Cartel Regulation

Contributing editor
A Neil Campbell

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GETTING THE DEAL THROUGH

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GETTING THE DEAL THROUGH

Cartel Regulation 2017

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Preface

Cartel Regulation 2017

Seventeenth edition

Getting the Deal Through is delighted to publish the seventeenth edition of Cartel Regulation, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Bulgaria, Greece, Russia, and a new article on Brexit.

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

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

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

GETTING THE DEAL THROUGH

London
November 2016

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Editor's foreword

A Neil Campbell
McMillan LLP

This 17th edition of *Cartel Regulation* provides the most current and comprehensive information available about anti-cartel laws and enforcement around the world as we head into 2017.

Cartel enforcement continues to expand and become more effective as competition laws and institutions are introduced or upgraded. The International Competition Network and its Cartel Working Group have provided a significant further impetus for active international cartel enforcement in recent years.

Anti-cartel laws are one of the core pillars of any competition regime. In 'product life cycle' terms, cartel regulation is still in a growth phase: there is significant domestic and cross-border activity in certain jurisdictions, but considerably more complexity to come as more agencies become more active and sophisticated in addressing the effects of cartels on their domestic markets.

Two key areas of consensus have fuelled the international expansion of cartel regulation:

- 'Cartels are bad' – there is now widespread acceptance that certain types of competitor coordination are unlikely to have procompetitive or efficiency-enhancing benefits and can therefore be prohibited without the need for a case-specific assessment of anticompetitive effects.
- 'Leniency programmes work' – by employing substantial 'carrot and stick' incentives and minimising uncertainty in the treatment of cooperating parties, the US Department of Justice (DOJ) has developed highly effective amnesty and leniency programmes. The basic principles are being adopted around the world because they have proven to be so effective.

While there is broad acceptance of these two guide posts, there are many important differences between regimes. The existence of double jeopardy (or, more accurately, 'multi-jeopardy') for corporations and individuals and the increasing criminalisation of cartel activity add further layers of complexity for cross-border cases.

Cartel Regulation 2017 provides a detailed account of the state of play in this evolving area including the key developments over the past year and the future changes that may be expected. In addition to the comprehensive coverage provided for 38 jurisdictions, this essential reference includes a global overview prepared by Sidley Austin, a review of the activities of the International Competition Network contributed by Allen & Overy and an article on Brexit by Slaughter and May and Hengeler Mueller.

The structure of the deskbook continues to be based on a template that ensures consistent presentation and ready access to the relevant information about each subject in each jurisdiction. The template has been modified slightly for greater clarity and completeness. As in past editions, the country profiles include the legislation and enforcement institutions, the jurisdictional and substantive coverage of the regime, and detailed explanations regarding the operation of immunity and leniency programmes as well as contested proceedings and penalties. In addition, the interface between public proceedings and private damage actions, including class actions, is addressed.

The chapters in *Cartel Regulation* are prepared by top experts in each jurisdiction. We are grateful for their efforts to provide thorough country reports including practical advice on how enforcement really works and tips for 'getting the fine down'. I also want to thank our publisher Dan White and his terrific Getting the Deal Through team at Law Business Research for all the work they do to produce this excellent annual volume.

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

A Neil Campbell
Co-chair, Competition and International Trade
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Global overview

Peter K Huston, Ken Daly and Lei Li
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Introduction

It has been 240 years since Scottish economist Adam Smith warned about cartels in *The Wealth of Nations* and over 125 years since the US and Canada outlawed them. Yet it is just within the past 25 years or so that we have seen a flood of anti-cartel enforcement sweep across much of the rest of the world. We are in the midst of a global trend toward broader and more vigorous cartel enforcement, heightened maximum penalties, leniency policies designed to disrupt and expose cartels and increased global cooperation among enforcers. Indeed, more and more jurisdictions are viewing cartels as not just illegal, but criminal. For example, this past year saw criminalisation of cartels take effect in South Africa and Chile's legislature is considering re-criminalisation. While only a few countries, to date, have actually jailed individuals convicted of cartel offences, this is likely to change as authorities seek to take advantage of the powerful deterrent effect that custodial sanctions provide.

While corporations cannot be incarcerated, the maximum corporate fines on the books in many jurisdictions are now staggeringly high. In addition, private class action litigation, which has long been a fixture in the US, is finally starting to take root in Europe. In this environment an issue of concern to global companies is the threat of multiple, overlapping sanctions. Price-fixed products can touch a number of different countries before finally coming to rest and defence counsel have lamented the possibility of double or triple counting. Japan's Ministry of Economy, Trade and Industry (METI) raised the concern in a report this year (which is understandable given how many enforcers around the world have focused on Japan's automotive industry). The issue of overlapping penalties is now firmly on regulators' radar and was discussed by officials from the US, Canada, Mexico and Brazil at an Antitrust Sentencing Symposium sponsored by the Antitrust Section of the American Bar Association in June 2016. In July of that year, Canada's Competition Bureau coordinated with the US Department of Justice Antitrust Division to avoid overlapping fines for Nishikawa Rubber Company, a Japanese automotive parts manufacturer. The parts at issue had been incorporated into automobiles assembled in Canada, most of which were ultimately sold in the US. After having cooperated closely on the case, it was agreed that the US would pursue a guilty plea and a US$130 million fine and Canada would step aside.

As increasing numbers of players crowd onto the cartel enforcement playing field and become more active, it is inevitable that they will continue to bump into one another, putting a premium on cooperation and coordination among enforcers and increasing the level of complexity for companies and counsel involved in international cartel investigations. Listed below are some of the highlights from the last year in cartel enforcement from selected jurisdictions around the world.

Europe

While the European Commission continues to refer to cartel enforcement as a priority in its public statements, its actual enforcement record over the past few years has been somewhat uneven. In 2014, 10 decisions were taken against 53 companies. This dropped to five decisions against 21 companies in 2015 and stood at only four decisions against 10 companies by the end of 2016's third quarter.

On the other hand, although the Commission's rate of work seems to have slowed in comparison to previous years, 2016 has seen the imposition of a fine that broke all EU cartel enforcement records.

On 19 July 2016, the Commission imposed fines amounting to €2,926,499,000, after finding that four truck manufacturers engaged in a cartel relating to truck pricing and the passing on of costs associated with compliance with new emissions' rules. A fifth truck maker received immunity from fines because it revealed the existence of the cartel. This was the highest total fine ever imposed by the EU for cartel activity. It also represented the highest and second-highest individual cartel fines ever imposed (€1,008,766,000 and €752,679,000 on two manufacturers). All companies acknowledged their involvement in the cartel and their liability for it and agreed to a settlement. This was the 21st settlement since the introduction of the procedure, which allows the Commission to apply a simplified and shortened procedure, and benefits the parties themselves due to faster decisions and a 10 per cent reduction in fines.

The other cases concluded by the Commission so far in 2016 related to canned mushrooms (a total fine of €5.2 million), car parts (total fine of €137.8 million) and steel abrasives (total fine of €6.2 million). The Commission also continues to work on other cases, including a series of investigations in the automotive parts' sector, including for occupant safety systems, thermal systems and exhaust systems.

Several factors seem to be influencing the overall rate of enforcement. The first is that the Commission does seem to be prioritising other types of antitrust cases (such as a number of major state aid and abuse-of-dominance investigations), and is using its resources more sparingly and focusing on fewer, though larger, cases. The second is that national enforcement is becoming increasingly prominent and to some extent this displaces Commission enforcement. The Commission actively encourages the national authorities of the EU member states to take the lead on cases that can be dealt with adequately on a national level. For example, in December 2015 France imposed fines of €672 million on parcel delivery companies and significant fines have been seen across a number of member states. The third is that the number of leniency applications submitted to the Commission appears to be falling, meaning that fewer cases are being commenced.

Anecdotal evidence suggests that the changing civil liability risks are having an important influence over the number of leniency applications filed and the number of cases commenced. For some years the Commission has pursued the goal of increasing the degree of civil enforcement following on from public enforcement decisions. It has issued a recommendation to all EU member states inviting them to create collective redress systems and the EU has also adopted the Antitrust Damages Directive, which member states are required to implement in their legal systems by 27 December 2016. This Directive is designed to make it easier for victims of antitrust infringements to sue for damages. It harmonises various rules regarding access to evidence, the availability of the passing on defence, limitation periods and the burden of proof in various scenarios. Even in advance of the full implementation of the Directive, antitrust damages actions are now far more common than they were only a few years ago, with most public authority decisions now being swiftly followed by civil actions. For example, follow-on damages actions have already been announced in Ireland and the UK following on from the above-mentioned truck cartel. In the UK, the 2015 Consumer Rights Act introduced the possibility of a US-style 'opt-out' class action for competition cases, which is already proving popular with plaintiffs.

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This trend towards greater civil enforcement appears to be altering the risk calculation for would-be leniency applicants, as applying for immunity or leniency does not prevent the applicant from having to pay compensation to victims. The EU's Directive does offer immunity applicants one benefit, which is that they will typically only be responsible for harm to their own direct or indirect purchasers, as opposed to being jointly and severally liable for all harm caused by the cartel. However, even this benefit can be claimed only if full compensation is actually available from other cartelists and so its application is uncertain. It is perhaps too soon to tell if this trend is the result of early nervousness regarding how damages will be awarded, but commentators now routinely query whether the right balance has been struck and whether the focus on damages will have the unintended effect of reducing the overall level of enforcement.

In parallel to the above developments, the European courts continue to have an important influence over how competition law is enforced at EU level.

In one case in March 2016 (Case C-248/14, C-267/14 and C-268/14) the European Court of Justice (ECJ) took the unusual step of criticising the Commission for excessively broad enforcement and quashing certain demands for information that had been issued to a number of cement manufacturers under investigation for suspected cartel activity. In March 2011, the Commission had adopted a decision requiring production of certain information. The request was more than 100 pages in length and requested highly detailed data covering an extended period of time, to be provided within 12 weeks. The companies appealed the production decision arguing that it was inadequately reasoned and justified and placed a disproportionate burden on them. The ECJ agreed and found that the Commission's justifications for the decision were 'excessively brief, vague and generic.' This is a relatively rare example of the Commission's investigative powers and methods being reined-in by the Court. However, it is noteworthy that it took the companies in question from 2011 until 2016 to achieve the annulment of the information demand, which perhaps illustrates why there are not more such cases.

In another important judgment on 20 January 2016 (Case C-428/14), the ECJ handed down a preliminary ruling concerning the relationship between the EU and member-state leniency programmes. The Court found that those systems 'coexist autonomously' and that being the first to apply for a fine reduction from the EU does not guarantee the applicant a marker in any subsequent national procedure. It therefore remains possible for an undertaking which was not the first to submit an application for immunity to the Commission to still be the first to submit an application for (full) immunity to the national competition authorities. This case illustrated once again that there can be no presumption of a 'one-stop-shop' system for leniency at the EU level and that consideration must often be given to multiple parallel applications.

The Americas

North America

Fines imposed in the US were down for fiscal year 2016 (ending on 30 September 2016) compared to recent years. Specifically, while total fines exceeded US$1 billion in each of fiscal year 2012, 2013 and 2014, and were over US$3.6 billion in fiscal year 2015 (an anomalous spike due to huge fines imposed in the financial services sector), the fines in 2016 were well below a billion dollars. It would be a mistake, however, to think that the Antitrust Division is letting its foot off the pedal when it comes to vigorous cartel enforcement. Total fines do not correlate with enforcement effort, charges levelled or number of successful outcomes. For one thing, fines are not imposed evenly across the multi-year arc of a cartel investigation. For example, in the massive auto parts investigations, corporate pleas and fines came in earlier years and now the Antitrust Division is devoting resources to prosecute individuals. And rightly or wrongly, the US Sentencing Commission's Sentencing Guidelines, which are used to calculate fines in the US, are in large measure driven by the volume of commerce affected by a cartel.

By most measures, the Antitrust Division has been busy. All parts of the Division's criminal programme – the two sections in Washington DC (Criminal I and II) and the field offices in New York, Chicago and San Francisco – have been productive recently. The number of individuals charged was slightly lower than the average over the past five years (but within a standard deviation). The Division has seen significant results in domestic matters such as bid rigging at real estate foreclosure auctions in Alabama, northern California, Georgia and North Carolina, bid rigging and price fixing in water chemicals, market allocation in heir-location services and price fixing in poster art through internet pricing algorithms. While the Division has been successful in these areas, the fines suggested by the Sentencing Guidelines in such cases are dramatically lower than those in international cartel cases or financial services cases.

On the international cartel front, the Antitrust Division continued its investigations into cartels involving electrolytic capacitors, roll-on roll-off cargo, financial services and automotive parts. The automotive parts investigation saw the somewhat rare indictment of corporations this year (last seen in the indictment of AU Optronics, which was convicted at trial for the price fixing of liquid crystal display panels, fined $500 million and required to retain a corporate antitrust monitor).

In the London Interbank Offered Rate matter, two former Rabobank derivatives traders were convicted in November 2015 after a four-week jury trial in the Southern District of New York. The case was jointly prosecuted by the Fraud Section of the Criminal Division and the Antitrust Division. The defendants later received sentences of one year and two years respectively. Additional indictments were handed down against two Deutsche Bank traders. The financial sector will likely remain under scrutiny from numerous directions in the US.

Following the September 2015 issuing of the Yates memo, which lays out the Department of Justice's more aggressive policy on individual accountability for corporate wrongdoing, Brent Snyder, the Antitrust Division's Deputy Assistant Attorney General for criminal enforcement, recommitted the Division to pursuing individuals and announced that the Division had instituted new policies to ensure that it followed the spirit of the memo. It is clear that the Antitrust Division will continue to seek maximum deterrence by attempting to hold culpable individuals directly accountable and impose jail time.

To the north, the head of Canada's Competition Bureau (CCB), Commissioner John Pecman, has also expressed a desire to see culpable individuals jailed. Canada's law now carries the world's stiffest potential jail sentences (up to 14 years), but so far no one has been jailed. The CCB refers criminal prosecutions to the separate Public Prosecution Service of Canada (PPSC) and the CCB is engaged in a process of improving its 'rocky' relationship with the PPSC.

As part of Mexico's effort to maintain close ties with US enforcers, the Federal Economic Competition Commission (COFECE) hosted an attorney from the US Antitrust Division's Criminal I section for two months at the end of 2015. Also of note, COFECE announced this year that for the first time it has revoked leniency benefits due to the petitioner's failure to continue its cooperation. The revocation came in the investigation of makers of air compressors for car air conditioning units. Several years ago, the Antitrust Division in the US revoked a company's leniency and charged the company for failure to withdraw from the conspiracy. The leniency revocation turned out poorly for the Antitrust Division because the District Court ultimately dismissed the indictment based on the Antitrust Division's violation of the non-prosecution agreement.

South America

South America remains a centre of vibrant cartel enforcement activity. Brazil's competition authority, the Administrative Council for Economic Defense (CADE) pursued alleged cartel conduct in anaesthesiology services and liquefied petroleum gas, among other industries. The sprawling scandal involving Petrobras continues to generate headlines. While many of those headlines are focused on political corruption, competition aspects are often at the heart. For example, in June 2016, the Brazilian Prosecutors Office (MPF) filed a complaint against several individuals with ties to two construction firms charging them with bid rigging and cartel activity. According to the prosecutors, construction contracts for a refinery and petrochemical complex were awarded to the companies based on rigged bids. Petrobras officials then took bribes in order not to take action against the cartel. The prosecutions stem from a leniency agreement CADE entered into with one of Brazil's largest construction companies.

CADE has used its leniency programme, which has been in place since 2000, to propel its increasingly vigorous enforcement regime. Efforts to strengthen the programme were made in 2016. To promote transparency, this year CADE issued comprehensive guidelines in a

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question and answer format. CADE also redesigned the leniency programme to provide more flexibility in the process for perfecting leniency markers and executing the leniency agreement. The amendments create a waiting-list system to allow those who are not first in the door to secure their status for purposes of settlement negotiations and for purposes of stepping into the lead position if the first in is unable to perfect its marker. CADE also clarified how discounts are calculated. The leniency programme will continue to mature as CADE works through thorny issues regarding influences that affect incentives and disincentives for companies considering cooperation, including private claims and disclosure of leniency documents.

In October 2015, Colombia's Competition Authority, the Superintendency of Industry and Commerce (SIC), issued record fines against Colombia's sugar companies for a conspiracy to block imports. Another milestone was marked in 2016 as the SIC decided the first three cases in which the leniency programme was applied. The cases involved cartels in the nappy, soft paper (napkins, tissue and toilet paper) and notebook industries.

Chile's Fiscalia Nacional Economica (FNE) has also been active, going after ocean shipping, poultry production and supermarket chains. And, as noted above, Chile's legislature is considering criminalisation of hard-core cartel conduct.

Peru's National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI) entered into a cooperation agreement with US antitrust agencies in 2016, agreeing to share information and conduct coordinated enforcement where possible. The agreement follows similar memoranda of understanding entered into with Brazil in 1999, Mexico in 2000 and Colombia in 2014.

Argentina's Comisión Nacional de Defensa de la Compentencia (CDNC) has proposed legislation to overhaul Argentina's competition law and procedures. The legislation would, among other things, allow for much stiffer monetary sanctions for anticompetitive conduct and establish a leniency programme.

Asia and Oceana

Japan

Cartel enforcement continues to evolve and mature in Asia. This year, the region's most seasoned antitrust enforcement agency, the Japan Fair Trade Commission (JFTC), strengthened its ties with other enforcers around the world, signing cooperation agreements with Australia, China and the EU. Meanwhile it carried on its aggressive anti-cartel enforcement programme, assessing surcharges in the capacitors and water purification industries, among others. In 2016, the JFTC convened a study group to review perceived shortcomings in Japan's administrative surcharge system. Among the issues identified are a rigidity that prevents the JFTC from imposing surcharges on culpable companies in the absence of domestic sales in Japan (for example in an international market allocation cartel where a company agreed not to sell in Japan), incompatibility with the JFTC's leniency programme and divergence from international norms.

China and Hong Kong

While Japan's Anti-monopoly Act (AMA) dates back to the post-Second World War era, China's Anti-monopoly law (AML) dates back only to 2008. Before China enacted the AML, cartels were regulated by other laws, primarily: the Anti-unfair Competition Law for all cartels and bid rigging; the Price Law for price-related cartels; and the Bidding Law for bid rigging. While those laws remain on the books, government authorities have relied on the AML for cartel enforcement since its passage.

Enforcement authority under the AML is divided. The National Development and Reform Commission (NDRC), with its local offices (Development and Reform Commissions, CDRCs and Price Bureaus), has enforcement authority over price-related cartels, while the State Administration for Industry and Commerce (SAIC), including its local offices (Administrations for Industry and Commerce (AIC)), has authority over 'non-price related' cartels.

After an active 2014, anti-cartel enforcement at the NDRC slowed somewhat in 2015, but came back in 2016 with a few cases. One notable enforcement was the investigation of five allopurinol tablet manufacturers in January 2016. The NDRC found that these manufacturers engaged in a series of cartel activities, that is, price collusion, market partitioning and bid rigging, and fined them approximately 4 million yuan. Also, in July, 2016, the NDRC found that three manufacturers of estazolam active pharmaceutical ingredient (API) and tablets violated anti-cartel provisions of the AML by agreeing not to supply estazolam API to other companies and agreeing on a price increase of estazolam tablets. The NDRC imposed a fine of about 2.6 million yuan. These two cases have shown the NDRC's focus on the pharmaceutical industry in its anti-cartel enforcement.

At the provincial level, Shanxi provincial DRC fined 31 car testing institutions for price collusion a total of approximately 5.77 million yuan in April 2016.

In February 2016, the NDRC under the authority of the Anti-monopoly Commission of the State Council (AMC), issued a draft of the Guidelines on Leniency in Horizontal Anti-monopoly Cases for public comment. The guidelines require that to be eligible for leniency, an applicant company should: (i) submit evidence materials on the horizontal collusion; (ii) admit to the illegal nature of the activities; (iii) cease illegal activities when or before reporting; and (iv) fully cooperate with the NDRC's subsequent investigation. If the NDRC finds that the applicant company has met these requirements, it may reduce the fines to be imposed, specifically: (i) 100 per cent reduction for the first leniency applicant before the initiation of the government investigation; (ii) 80 per cent or more reduction for the first leniency applicant after the initiation of the government investigation; (iii) 30 per cent to 50 per cent reduction for the second leniency applicant; and (iv) 30 per cent or less reduction for the third and subsequent leniency applicants. Also, the NDRC may reduce the disgorgement of illegal proceeds for leniency applicants as well, though the Guidelines do not specify the percentage of reduction.

In March, 2016, the NDRC, also in the name of the AMC, issued a draft of the Anti-monopoly Guidelines for the Automobile Industry for public comment. The draft Guidelines have focused on prohibition of vertical restraints and state that with regards to anticompetitive horizontal agreements, general principles of the AML shall apply.

SAIC has also been very active in anti-cartel enforcement. In 2014 and 2015, unlike the NDRC, SAIC targeted much smaller companies, with the resulting fines being smaller as well. However, in 2016, SAIC had several high-profile investigations.

In February 2016, the Jiangxi provincial AIC found that 17 insurance companies engaged in illegal market partitioning and imposed fines. In May 2016, the Shandong provincial AIC found that 23 accounting firms violated the AML by agreeing on market partitioning arrangements and imposed fines. In May 2016, the Hubei provincial AIC found that the Hubei Provincial Insurance Trade Association organised four insurance companies for concerted price increase, and imposed a fine of 200,000 yuan on the association. This is one of the rare cases in China where a trade association was fined for organising a cartel.

In September 2016, the Anhui provincial AIC found that two cipher code device manufacturers engaged in illegal market partitioning and imposed a fine in the total of 9.83 million yuan. This case has an interesting prelude. In September 2015, the Anhui provincial AIC started the investigation, but one of the investigated companies did not cooperate with the investigation and refused to produce documents. As a result, the AIC fined this company 200,000 yuan. This is the first case in China where the antitrust enforcement agency fined a company for non-cooperation.

A comparison between the enforcements of the NDRC and the SAIC shows that the NDRC has focused on price cartels, while the SAIC has focused on market partitioning.

In Hong Kong, the Competition Ordinance that was passed back in 2012 was finally implemented at the end of 2015. The Competition Ordinance's First Conduct Rule prohibits price fixing, market allocation and bid-rigging cartels, and the Hong Kong Competition Commission (HKCC) has indicated that such conduct will be an enforcement priority. Under the Competition Ordinance the HKCC and the Communications Authority have broad investigatory powers, including the right to conduct dawn raids. The HKCC published a leniency policy in November of 2015. Similar to leniency programmes in other countries, the first company to admit participation in a cartel and fully cooperate with the authorities (and its officers, employees and agents) will not face actions from the HKCC.

Korea

The Korea Fair Trade Commission (KFTC), which in September 2015 entered into a cooperation memorandum of understanding with the

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US enforcement agencies, remains an aggressive anti-cartel enforcement agency. It continued to impose large fines for bid rigging in the construction industry and corrugated cardboard market, among other industries. The KFTC has recently faced some headwinds, however. In cases involving ramen noodles and commercial freight vehicles, the courts in Korea have required the KFTC to show more than information exchanges among competitors in order to prove a violation of the Monopoly Regulation and Fair Trade Act (MRFTA).

Taiwan

In 2015 the Taiwan legislature amended the Fair Trade Act to allow the Taiwan Fair Trade Commission (TFTC) to establish a whistleblower reward fund to strengthen its ability to investigate and punish collusion. The fund, comprised of 30 per cent of fines from fair trade violations, is used to reward the reporting of cartel activities, promote international cooperation and establish and maintain a database to help strengthen cartel enforcement. In 2016, the TFTC put the programme in motion. A confidential whistleblower was awarded US$15,500 for blowing the whistle on a shipping and storage cartel. The resulting investigation led to significant fines against several companies.

Australia

After not collecting any fines in 2015, Australia's cartel enforcement came alive in 2016. The Australian Competition and Consumer Commission (ACCC) brought in tens of millions of dollars of fines in 2016. Moreover, in July of 2016, Australia brought its first criminal cartel case. Nippon Yusen Kabushiki Kaisha (NYK), a global shipping company based in Japan, pleaded guilty to criminal cartel conduct in the Federal Court. The case is not a fluke. The ACCC has said it has additional criminal investigations underway and it was aiming for a 'steady stream of one to two criminal cases per year.'

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Brexit

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Introduction

On 23 June 2016, the UK electorate voted (by a 52 per cent to 48 per cent majority) to leave the EU. The leave vote, or 'Brexit', as it is commonly known, has caused much political, economic and legal uncertainty. In particular, the process by which the UK will withdraw from the EU, as well as the future trading relationship it will form with the EU, remain highly unclear. The latest indications from the UK government arguably add to this uncertainty as they imply that it will seek a 'unique' trading model with the EU, rather than adopting an 'off-the-shelf' solution such as the 'Norwegian' or 'Swiss' models.

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

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

The Commission, specifically the Competition Directorate General (DG Comp) and the CMA are the principal competition enforcement agencies in the EU and UK, respectively.

Pursuant to Regulation 1/2003, national competition authorities (NCAs) throughout the EU are fully competent to apply EU competition law.

However, the Commission (rather than the CMA) is generally considered to be the most suitable authority to investigate a suspected cartel where:

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

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

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

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

Potential models post-Brexit

There is currently a great deal of uncertainty about the UK's withdrawal from the EU – and, in particular, the trading relationship it will enter into with the EU post-Brexit. While there is no way of knowing the precise form any 'unique' trading model between the UK and EU will take, there are a number of existing models that represent varying degrees of integration between the EU and non-EU countries. Two particular alternatives – the Norwegian model and WTO/FTA model – are illustrative of scenarios whereby the UK remains highly integrated with, or conversely, distinctly separate from, the EU.

Become a member of the European Economic Area (EEA) and of the European Free Trade Association (EFTA), the 'Norwegian model'

The EEA currently consists of the 28 EU member states, as well as Iceland, Liechtenstein and Norway (Switzerland is added to that list in the case of EFTA). Under the EEA agreement all EEA countries adopt all EU legislation in agreed policy areas, namely the free movement of goods, services, capital and people. Joining the EEA would mean that the UK would remain subject to the majority of EU legislation, including EU competition law.

World Trade Organisation or Free Trade Agreement model

The UK could choose to trade with the EU market pursuant to World Trade Organisation (WTO) rules, or negotiate a new (bespoke) free trade agreement (FTA). Either model would almost certainly see the UK ceasing to be subject to EU competition law. While it is too early at this stage to draw conclusions about the features of any post-Brexit relationship with the EU, an analysis of how cartel regulation operates under these alternative models provides an insight into the potential extent of the effects of Brexit.

Cartel regulation under the Norwegian, WTO and FTA models

Norwegian model

Under the Norwegian model, UK competition law and cartel regulation will largely remain as it is now. From a legislative perspective, section 60 of the Competition Act 1998 is likely to be amended to require the UK courts to interpret UK competition law in accordance with EEA (rather than EU) law. However, this is unlikely to have a significant impact on the way in which UK courts interpret UK competition law, given that the key competition provisions of the EEA Agreement – namely, articles 53 and 54 – mirror articles 101 and 102 of the TFEU.

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

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

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- The Commission assumes jurisdiction where trade between EU member states is appreciably affected (regardless of the effect on trade between EFTA states). As a result, the Commission typically deals with the majority of cases with an EEA-wide impact.
- ESA assumes jurisdiction where only trade between:
  - the EFTA states is affected (for example, only trade between Norway and Iceland); or
  - an EFTA state and an EU member state (but not between EU member states) is affected (eg, trade between Norway and Belgium) and the undertakings concerned derive 33 per cent or more of their EEA-wide turnover from the EFTA states.

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

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

WTO and FTA model

The EU competition rules are effects-based. Businesses would therefore continue to be bound by these competition rules to the extent that their conduct has effects in the EU. As such, businesses would still be potentially subject to enforcement by the Commission and other NCAs. However, as the UK would no longer be an EU or EEA member state, any effects in the UK would be outside the scope of the EU competition rules.

UK competition law would continue to apply to cartel conduct that has effects in the UK. At present, the UK competition rules largely mirror EU competition rules. In the short term at least, it seems unlikely that UK competition law would significantly shift from this position.

However, in the longer term, UK competition law could diverge from EU competition law. Under a WTO and FTA model, section 60 of the Competition Act 1998, which requires UK competition law to be interpreted in line with EU rules, would likely be repealed. Over time, UK competition law would develop independently of the EU rules, potentially resulting in a divergence between the two.

There would also be a significant shift in enforcement, as businesses would no longer be able to benefit from a 'one-stop shop' for cross-border cases involving the UK and other EU member states. Accordingly, businesses that are active in the EU and UK could face parallel investigations by the Commission and CMA; with the CMA having jurisdiction over a case insofar as the conduct has effects in the UK, and the Commission having jurisdiction insofar as the conduct affects trade between EU and EEA member states.

The risk of parallel investigations is particularly important for potential leniency applicants. Any potential leniency applicant that is subject to both the UK and EU regimes would need to consider lodging applications in both jurisdictions. Parallel investigations may also lead to the CMA and Commission arriving at different, and potentially, inconsistent, outcomes in relation to cartel cases arising from the same set of conduct. This could result in compliance becoming more complicated and difficult for multinational businesses.

From the regulators' perspectives, the WTO and FTA model may also make it significantly harder to gather information for the purposes

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of cartel investigations. As the CMA would no longer be subject to Regulation 1/2003, nor a member of the ECN, it may be unable to coordinate its cartel investigations, and share information relevant to such investigations, with the Commission (and vice versa). Further, there may be increased difficulties in obtaining information pursuant to compulsory information requests, where the specific business does not have premises located in the jurisdiction of the relevant authority (eg, the Commission may have difficulties in enforcing compliance with an information request in respect of a business where such a business resides in the UK only and has no premises in the EU).

The Commission would be unable to carry out dawn raids of premises located in the UK, nor would it be formally entitled to request that the CMA does so, irrespective of whether documents are available at those premises that are relevant to a Commission investigation.

Some of these potential difficulties faced by regulators could be mitigated if the EU and UK were to enter into a bilateral cooperation agreement, similar to arrangements that the EU currently has with other non-EU states, such as Canada, Japan and the US. That said, it is unlikely that these international cooperation agreements will facilitate the same kind of information sharing and cooperation as is currently the case between the CMA and Commission through the ECN.

Other potential issues

Following Brexit, there are specific jurisdictional issues that are likely to arise. In respect of investigations that are already under way, or which involve historic (pre-Brexit) conduct, there will be questions as to which authority is best placed to investigate and enforce competition law.

Uncertainty also arises with respect to the implementation of the EU Damages Directive in the UK, which seeks to harmonise rules across EU member states governing actions for damages under national law for competition law infringements. The Department of Business, Innovation and Skills (BIS) consulted on the implementation of the Damages Directive in March 2016 and was due to publish its response to the consultation in June 2016. However, to date, BIS has not published its response, further fuelling uncertainty as to whether (and how) the UK government will implement the Damages Directive by the deadline of 27 December 2017.

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

Conclusion

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

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ICN

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Driving global coordination and convergence in international cartel enforcement

Globalisation is the overarching theme of modern antitrust cartel enforcement. Once stubborn cultural attitudes regarding cartel activity are now gradually shifting. Many jurisdictions have moved to give their competition authorities broad jurisdictional reach and aggressive investigative tools, such as wiretap authority and compulsory process. There is also a burgeoning movement to criminalise cartel activity in places where it has previously been regarded as wholly or principally a civil matter. And the growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives for institutions to turn against their co-conspirators.

In this constantly evolving and increasingly crowded enforcement environment, there is a distinct need for cartel enforcers to closely coordinate. The International Competition Network (ICN) Working Group was formed in 2004 to address this need: to drive global cooperation and convergence among cartel enforcement authorities in the prevention, detection, investigation and punishment of cartel conduct.

A need for coordination and convergence

For over half a century, from the enactment of the Canadian Competition Act in 1889 and the Sherman Act in 1890 to the mid-1940s, Canada and the US were the only nations prohibiting cartels. In Europe, cartels were then still widely regarded as at least partly beneficial to the national economy. Several European nations even enacted legislation in response to the Great Depression, enabling the government to establish compulsory cartels or to force outsiders to join already existing ones. Especially during the Second World War, excessive concentration of economic power was used to create 'national champions,' which were easy to control and which could outperform their foreign rivals.

In the aftermath of the war, the US pressured Germany and Japan to break up their existing cartels and to put in place cartel enforcement regimes. At the same time, the UK adopted a new antitrust regime as part of its social policies to stimulate employment. Antitrust law was subsequently included in the 1957 Treaty of Rome as one of the key policy areas of the European Economic Community, laying the foundation for the European Commission's cartel enforcement practice. In the past few decades, cartel enforcement has spread from North America and Europe to virtually every major jurisdiction in the world. There are now antitrust authorities in more than 125 countries across all continents actively pursuing cartel activity and that list is growing.

Cartel enforcement by individual authorities over the years has also become more intensive and tougher than ever before. Both mature and new antitrust regimes have come to regard aggressive prosecution of cartel offenders as a primary policy objective. This is reflected in the ever-increasing penalties imposed on cartel offenders, the expansion of jurisdictions that are moving from mere civil or administrative enforcement towards a regime of criminal prosecution, as well as the growth in use of leniency programmes by regimes worldwide.

At the same time new and better-equipped enforcers are rapidly emerging on the world stage, extraterritorial cartel enforcement has become standard practice for major enforcement jurisdictions. Whereas the US was sharply criticised at first for the application of the Sherman Act to foreign conduct, the global antitrust environment has come to firmly embrace the principle of extraterritorial cartel enforcement.

The ICN Working Group

In recognition of the increasingly crowded cartel enforcement environment, in 2004, the ICN established the Working Group to drive global cooperation and convergence among cartel enforcement authorities. The Working Group is comprised of cartel enforcers from around the world. Seven agencies govern the Working Group, with three agencies acting together as co-chairs of the Working Group and two agencies co-chairing each of the Group's two subgroups – namely, the Legal Framework and the Enforcement Techniques subgroups. Leadership of the Working Group is rotated among agencies to create an inclusive environment that provides a varied perspective by bringing together newer and older agencies and those in various geographical locations. It also helps ensure continuity of the work and long-term initiatives.

Among the principal functions of the Working Group is the development of best practices resources for authorities. Equally important, is the role the Working Group plays as a platform for bringing authorities together to promote information sharing among jurisdictions.

Encouraging best practices

Fulfilling its mandate to address challenges in cartel enforcement and to bring together the ranging experience and resources of ICN members, the Working Group provides digital seminars and resources designed to promote best practices in cartel enforcement. The Working Group's digital offering includes a mix of call and webinar series.

A call series on leniency was initiated by the Working Group in 2012. This series provides a platform for the sharing of experience and expertise and provides members with information regarding specific enforcement efforts and policy initiatives in other jurisdictions. The calls have ranged in topics from leniency fundamentals to common pitfalls and problems to interactions with private enforcement and multi-jurisdictional investigations. Some specific topics within these calls included presentations on the impact of criminal sanctions and private rights of action on leniency programmes, the role of markets in leniency programmes and the threshold for granting conditional immunity from the European Commission perspective.

A shorter series of Asia-friendly calls were also initiated to address how to design and implement leniency programmes. The first call in the Asia series showcased perspectives from Singapore and Taiwan. Whereas the second call brought a different variety of experience by having the US Department of Justice as one presenter discuss how to design an effective programme. More than 40 member agencies participated in these calls and the content and slides of these calls are now available online for continued consultation and reference.

Between 2014 and 2015, two different substantive discussion calls were also held. The first was on the investigative powers to fight international cartels and the second was on sanctioning international cartels in the context of multi-jurisdictional investigations. This call series remains a focus and priority for the Working Group going forward.

In a move to further promote accessibility to information among jurisdictions, the Working Group made a commitment to release webinar series on areas of special concern and enforcement trends. The webinars have focused on topics including the impact of private enforcement on public anti-cartel enforcement and increasing cartel deterrence through compliance programmes.

Along with the more interactive platform the Working Group designed for information sharing in the digital context, the Working

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Group shares a wealth of knowledge in published reports. For example, volume one of the Building Blocks Report details the basic concepts of hard-core cartel conduct, the institutional and legal framework of agencies' anti-cartel units and the effectiveness of current penalties. The Working Group also provides the Anti-Cartel Enforcement Manual to serve as a tool for information sharing and best practices. The manual provides an overview of effective and successful anti-cartel enforcement techniques. The widespread reach of ICN members allows for a compilation of experiences and expertise that covers the nuances in jurisdictions. Instead of a static book relying on antiquated practices, the living document style of the online manual allows for up-to-date information on international experiences in the anti-cartel enforcement context. The wealth of knowledge present in the manual includes dialogue on topics ranging from investigation strategies and interview techniques to more cutting-edge topics of digital evidence gathering and the relationships between competition agencies and public procurement bodies. The recent inclusion of the chapter 'Cooperation with Procurement Agencies' offers a practical toolset for working with procurement bodies and ensuring that public bidding procedures promote free and fair competition. The manual also provides an overview of searches, raids and inspections and the inclusion of other topics such as cartel case initiation and investigation strategies. Such depth and diversity in global best practices serves as a valuable practical resource for practitioners and regulators alike.

Additionally, the Cartel Awareness and Outreach portal provides the world's largest collection of cartel awareness and outreach materials. The compilation provides a vast array of substantive information relating to the awareness of the prevention, reporting and prosecution of anti-cartel conduct. The collection continues to grow and additional agency submissions are regularly submitted. Included in the Cartel Awareness and Outreach portal, the Working Group provides a categorisation breakdown for materials relating to cartel awareness. Materials are divided into the following categories for ease of reference: materials that explain cartels and cartel enforcement policies; materials promoting leniency programmes; materials related to public procurement; materials aimed at businesses, SMEs and compliance programmes; and videos and other media. Outreach and awareness materials are provided by individual jurisdictions to form a discussion series of diverse presentations. A small sampling of presentations from this series includes, FAS Russia's Practice on Suppression of Bid Rigging, Brazil's Leniency Program Awareness Tools, and Cartel Criminalization as Cultural Change: A report from findings of a survey of the Australian public. Like many of the Working Group's initiatives, this is an evolving effort with input and submissions continuously added by member agencies.

Promoting convergence of standards and procedures

Information sharing among members is critical to the Working Group's efforts to promote convergence of standards and procedures. As investigations and cases continue to grow in international scope, spanning across multiple jurisdictions, communication is key for the effectiveness of global anti-cartel enforcement. In this regard, the Working Group is currently working to compile a catalogue on investigative powers for newer agencies and continues to promote the sharing of non-confidential information among jurisdictions.

The Working Group has also established a vast resource of cartel enforcement templates for various jurisdictions. The templates are provided and maintained by ICN members. The exhaustive list of available jurisdictions is accessible via the Anti-Cartel Templates page on the Working Group's website. Members have provided information on relevant legislation, the implementation of rules and regulations and information regarding relevant cases. Specific topics covered in these templates also include, the process for filing a complaint, decision-making, sanctioning cartel conduct, investigative tools, leniency, rights of defendants and confidentiality. Along with jurisdiction-specific information, the Working Group provides global templates for authorities to utilise in securing procedural and substantive waivers of confidentiality in cartel investigations. These templates are conveniently located on the Working Group's website and each is accompanied by an explanatory note that clarifies certain guidance on the proper understanding and use of the templates.

Facilitating relationship building through the ICN member network

Perhaps the most valuable role the Working Group plays, however, is the wide-ranging network of individuals and member agencies it brings together. The Working Groups hosts annual ICN Cartel Workshops that bring together authorities from countries around the world. These workshops provide a unique opportunity for the global sharing of best practices and experiences on leniency programmes, analytical tools for detecting cartels, and information sharing in cartel investigations. In addition to serving as a unique learning opportunity, these workshops enable individual jurisdictions to receive recognition by other enforcers for work or research done in a specific area of cartel enforcement over the course of a year. The most recent workshop was held in Madrid in October 2016.

The Working Group is also consistently looking for other ways to strengthen relationships and promote increased information sharing among global enforcers. In this regard, the Japan Fair Trade Commission (JFTC) recently made a proposal to enhance the Working Group's goal of facilitating greater sharing of non-confidential information through the establishment of an 'ICN Framework for Promotion of Sharing of Non-Confidential Information for Cartel Enforcement.' The proposal envisions seamless lines of communication to enhance cooperation in global cartel enforcement among member agencies. Specifically, the proposal invites ICN members to complete an information form and to register liaison officers to serve as initial contact points for international coordination. The member agencies are also asked to provide basic information on their respective regimes. Requests for information can then be exchanged among registered member agencies, acknowledging that an agency would only share information to the extent permitted under its own legislative mandate. This proposal envisions facilitating both formal and informal information requests between authorities.

As a starting point for the JFTC's more detailed proposal, the Working Group already makes available charts summarising information sharing mechanisms in each jurisdiction. The charts provide helpful information such as the relevant point of contact at an agency and the formal and informal mechanisms the agency has in place to alert other competition agencies to matters under investigation.

The road ahead

The efforts of the ICN Working Group have increased cooperation and coordination by enforcement authorities globally and, as a result, have dramatically heightened the detection of cartel offenders. Among its greatest impacts, the Working Group has contributed to what is now routine coordination among authorities at the outset of joint investigations. Indeed, as evidenced by nearly every recent global antitrust investigation, dawn raids are routinely taking place in close coordination between multiple enforcement agencies.

Going forward, the Working Group is committed to continuing to enhance the sharing of the most effective enforcement techniques and tools. Because global enforcement requires the inclusion of newer and smaller agencies, ensuring that these agencies have access to the experiential knowledge of more mature agencies is critical to effective global enforcement. The Working Group welcomes all agencies to become members and to learn from each other. Therefore, the Working Group is committed to continuing to expand its membership in the organisation and to increasing involvement from non-governmental agencies.

The Working Group's proposed annual plan for 2016 through 2017 consists of 10 proposed projects stemming from the two subgroups within the Working Group. The Legal Framework subgroup has proposed the following projects:

- checklist for efficient and effective leniency programmes;
- update on 'Setting of Fines for Cartels in ICN jurisdictions' (2008);
- webinars and call series on investigative tools and detection methods;
- webinars and call series on disclosure and discovery; and
- continuation of the Asia-Pacific friendly calls.

The Enforcement Techniques subgroup proposed the following projects:

- scoping study for new content for the 'Anti-Cartel Enforcement Manual';
- the 2016 ICN Cartel Workshop (Spain);

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- 'ICN framework for the promotion of the sharing of non-confidential information';
- completion of the 'Anti-Cartel Enforcement Template' updates; and
- update of the 'Compilation of Good Practices'.

These 10 projects provide the broad foundation to give guidance going forward and are among the more ambitious of those the Working Group has tackled to date.

Through these and future efforts, the Working Group will continue to play a critical role in addressing the challenges in global coordination that lay ahead. In particular, the Working Group will find itself at the epicenter of the growing demand for coordination among authorities at the level of charging decisions and punishment, where authorities will have to grapple with overlapping mandates and overcome their competing sovereign interests in punishing cartel offenders. This next level of coordination will present new and unique challenges for the Working Group.

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Australia

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Since 1 January 2011, the relevant law in Australia has been the Competition and Consumer Act 2010 (Cth) (formerly known as the Trade Practices Act 1974) (the Act).

2 Relevant institutions

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

The Australian Competition and Consumer Commission (ACCC) is the independent, national statutory authority responsible for the administration and enforcement of the Act. The federal director of public prosecutions (DPP) (acting on referrals from the ACCC) will prosecute criminal cases.

In enforcing the Act, the ACCC may bring proceedings in the Federal Court of Australia (the Court) seeking the imposition of monetary penalties, damages (in a representative capacity), injunctions and orders disqualifying a person from managing a corporation for a specified period. It is possible under the Act for an exemption to be obtained for a cartel arrangement by making an administrative application to the ACCC. The applicant must show there is sufficient 'public benefit' to justify the conduct in question.

The ACCC enforces the Act vigilantly. The largest single penalty imposed on a cartel member as a result of ACCC action exceeded A$35 million and the combined penalties for a number of airlines in the air cargo cases exceeded A$100 million (see question 16).

In cartel cases arising since July 2009, the DPP may commence criminal prosecution in either the Court or a State Supreme Court. Criminal charges were first filed in July 2016 when a Japanese shipping company pleaded guilty to criminal cartel conduct. The shipping company's guilty plea obviated the need for a court hearing on liability. It is anticipated that sentencing will occur late in 2016.

3 Changes

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

The Act has recently undergone a wide-ranging competition policy review by a panel of experts. The Australian government has supported many of the panel's recommendations and draft legislation reflecting most of the recommendations was provided for public consultation on 5 September 2016 (2016 bill). It is expected that a second round of legislation will address the remaining panel recommendations, including the simplification of the cartel provisions.

The 2016 bill is discussed in 'Update and trends' below.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Criminal and parallel civil sanctions apply for making or giving effect to a 'cartel provision' (see questions 15 and 16 for relevant penalties).

A cartel provision includes, broadly, any provision of a 'contract, arrangement or understanding' between persons, any two or more of whom are competitors, that has the purpose or likely effect of directly or indirectly fixing, controlling or maintaining, or providing for the fixing, controlling or maintaining, of the price, discount, allowance, rebate or credit in relation to goods or services supplied by any of the parties. In addition, a cartel provision includes, broadly, any provision of a 'contract, arrangement or understanding' between competitors that has the purpose of directly or indirectly:

- preventing, restricting or limiting the production of goods or the supply of goods or services by any of the parties;
- market sharing; or
- bid rigging.

The Act prohibits cartel provisions and cartel conduct per se, without reference to the effect of the contract, arrangement or understanding on competition. The Act also prohibits, per se, on a 'civil fine or penalty' basis, the following types of conduct and arrangements (both horizontal and vertical):

- making or giving effect to 'exclusionary provisions' – essentially arrangements between competitors with the purpose of boycotting dealings with another person or class of persons;
- imposing a minimum resale price for goods or services; and
- supplying goods or services on the condition that the purchaser must acquire other goods or services from a third party.

Liability for the criminal offence is strict, with no requirement to prove dishonesty or to show that the conduct was known to be illegal. To establish the criminal offence, it is sufficient to prove beyond reasonable doubt that the parties had 'knowledge or belief' that the conduct in question had the elements (including purpose) that make up the definition of the cartel offence, even if they did not appreciate that it was cartel conduct.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

Generally, there are no industry-specific offences and defences.

However, the Act currently prohibits certain communications and information exchanges that have the purpose of substantially reducing competition (known as the 'price signalling provisions'). The law applies to both private communications to competitors and public disclosures made for the purpose of substantially lessening or hindering competition in an Australian market. To date, this law applies only to the banking sector. The only prescribed corporations to which it applies are authorised deposit-taking corporations in Australia, which primarily include banks and other financial institutions. The prescribed services are accepting deposits and lending. There are various permitted exceptions, including a broad exception for disclosures made in the ordinary course of business. The 2016 bill proposes to repeal the price

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signalling provisions and replace them with a general prohibition on concerted practices (see below).

Part X of the Act provides limited exemptions for conference arrangements between international liner cargo carriers.

There are detailed provisions specific to the telecommunications industry in parts XIB and XIC of the Act.

As to antitrust exemptions and defences, there are a number of exceptions to the civil and criminal cartel provisions of the Act. These include:

- joint ventures – there is a joint venture defence to the civil and criminal cartel provisions where the joint venture is documented in a contract, the cartel provision is for the purposes of the joint venture, and the joint venture is for the production of goods or services. There is also a joint venture defence for exclusionary provisions that are for the purpose of a joint venture and do not have the purpose or effect of substantially lessening competition (civil only). The joint venture defence is subject to proposed amendments in the 2016 bill (see 'Update and trends' below);
- related bodies corporate – the prohibition on exclusionary provisions and the civil and criminal cartel provisions do not apply in relation to a contract, arrangement or understanding if the only parties to it are 'related bodies corporate';
- anti-overlap provisions – the prohibition on exclusionary provisions and the civil and criminal cartel provisions do not apply in relation to a contract, arrangement or understanding that fits within the provisions of the Act regulating vertical exclusive dealing arrangements (which are subject to a competition test, rather than per se prohibited). The 2016 bill proposes to simplify this area of the law, avoiding the need for the anti-overlap provisions, by amending the cartel provisions and removing the prohibitions on exclusionary provisions (this is discussed further below in 'Update and trends');
- resale price maintenance – the civil and criminal cartel provisions will not apply to a contract, arrangement or understanding that is more appropriately considered under the resale price maintenance provisions of the Act. Those provisions include an 'exception' for retail price recommendations that are genuine recommendations;
- mergers – contracts, arrangements or understandings to acquire shares or assets are subject to a competition test under the merger provisions of the Act;
- authorisation – contracts, arrangements or understandings that contain an exclusionary provision or a civil or criminal cartel provision can be authorised by the ACCC under an administrative process, where, after a public review, the public benefits of the conduct are found to outweigh the detriments;
- collective bargaining notifications – collective bargaining contracts that contain an exclusionary provision or a civil or criminal cartel provision can be notified to the ACCC to receive an exemption. Such notifications come into force within 14 days unless there is an objection from the ACCC, in which case the applicant must show that the public benefits of the conduct outweigh the detriments. Collective bargaining notifications can only be made where the value of the contracts in a 12-month period does not exceed A$3 million; and
- there are other defences for collective acquisitions and dual-listed company arrangements. There are also certain intellectual property and other exceptions.

6 Application of the law

Does the law apply to individuals or corporations or both?

Both. Although the Act, as a federal law, was originally limited to some extent by the division of federal and state powers under Australia's Constitution to apply only to trading and financial corporations, those limitations are now of little practical significance because universal application of the Act to all persons and government businesses is supported by mirror state legislation in all Australian states.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Yes, the Act applies to cartel conduct that takes place outside Australia where any of the following apply:

- the corporation is ordinarily resident or carries on business in Australia;
- a foreign corporation's agent (eg, an Australian subsidiary that is under the direction of its parent) carries on the business of the foreign corporation in Australia, such that the agent's conduct in implementing an offshore cartel arrangement on behalf of the foreign corporation can be 'attributed' to the foreign corporation as conduct that occurred 'within' the Australian jurisdiction; or
- a foreign corporation sends communications to Australia, by telephone or email, authorising an Australian subsidiary or giving it directions to implement an offshore cartel arrangement, such that the foreign corporation's conduct can be said to have occurred 'within' the Australian jurisdiction.

Hence, foreign companies that enter into offshore cartel arrangements affecting Australian markets will not escape being sued in Australia merely because they do not have a physical presence or carry on business within the Australian jurisdiction.

The review panel proposed that the Act be amended to remove the requirement:

- for private parties to seek Australian government ministerial consent before relying on extraterritorial conduct in private competition law action; and
- that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence (the panel has said that the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia).

Although the Australian government agreed with the first proposal and with respect to the second proposal explained it would 'consider how best to effectively capture conduct that harms competition in an Australian market, taking account of international law and policy considerations', the 2016 bill has not considered either matter.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The ACCC has extensive powers to investigate suspected breaches of the Act and may exercise these powers at any time, if it has reason to believe that a person has information relating to a breach or potential breach of the Act by any person. In a criminal matter, the ACCC will refer a brief for prosecution to the DPP.

There is no statutory time frame within which an investigation must take place or a criminal prosecution must commence. However, proceedings by the ACCC for recovery of pecuniary penalties for a civil breach of part IV of the Act must be instituted within six years of the contravention. There is no power to extend that period.

The Court has exclusive jurisdiction to determine civil penalty matters arising under the Act in proceedings before a judge. There are no time periods within which the hearing must be completed or judgment must be given. Generally, the Court gives a judgment determining the liability issues and if a contravention is established, holds a separate hearing to determine the appropriate penalty or other relief.

It is not unusual for several years to pass between the initiation of an ACCC investigation of cartel conduct and the final resolution of the penalty proceedings.

Criminal proceedings will involve:

- possible committal proceedings before a magistrate in a state or territory court. The magistrate will decide whether the charges are sufficiently strong for the person to face trial before a jury; and
- if the person is committed to stand trial, or waives a committal, a jury will hear the matter in either the Court or a state or territory supreme court.

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9 Investigative powers of the authorities

What investigative powers do the authorities have (eg, search and seizure/dawn raids, subpoenas or production orders, power to compel testimony, wiretapping)? Is court approval required to invoke these powers?

The ACCC has various powers to obtain information, documents and evidence by compulsory statutory notice (without reference to an issuing court) or pursuant to a search warrant (which is a court order). The choice between these tools depends on whether a criminal or civil investigation is being undertaken. The ACCC may enter the (commercial or domestic) premises of a person whom it has reason to believe has engaged in, or is engaging in, conduct that contravenes the Act for the purposes of inspecting, copying or taking extracts of documents (including emails, mobile phone records, computer records, tapes, DVDs, etc). The ACCC may also interview staff under the Act.

In a civil case, the ACCC may require any person in Australia whom it reasonably believes is capable of providing documents, information or evidence in relation to a suspected contravention of the Act to provide such documents, information or evidence under compulsion (a section 155 notice). It is an offence not to comply with a section 155 notice. This procedure may also be used for a limited period after civil proceedings have been commenced.

A person is not excused from answering a section 155 notice on the ground that the response may tend to incriminate the person (self-incrimination) but the response may not be used in a criminal prosecution. There is no right to remain silent. Testimony of an employee who has been compelled to produce information or documents by the ACCC using a section 155 notice can be used against that individual and his or her employer in civil proceedings for breach of the Act but not in criminal proceedings (other than proceedings concerning a failure to answer the notice).

The ACCC cannot use section 155 to require the production of legally privileged material.

In a criminal investigation, the ACCC may arrange for search warrants to be executed by the Australian Federal Police (pursuant to a court order), and telephone interception and surveillance device warrants can be sought for investigation of the cartel offence and accessorial liability in relation to that offence.

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation (eg, mutual legal assistance treaties, MOUs, cooperation agreements, informal contacts?)

The ACCC and the DPP have entered into a memorandum of understanding (MoU) in relation to the prosecution and investigation of criminal cartel offences. The MoU outlines the matters to be considered and the circumstances in which the ACCC will refer cases to the DPP for criminal prosecution, rather than the ACCC itself choosing to pursue civil penalties in the courts. According to the MoU, cases will be referred to the DPP where they involve 'conduct of the type that can cause large-scale or serious economic harm' or 'serious cartel conduct'. Some of the matters for consideration include whether:

- the conduct was long-standing or had, or could have, a significant impact on the market in which the conduct occurred; or whether the conduct caused, or could cause, significant detriment to the public, or a class thereof, or caused, or could cause, significant loss or damage to one or more customers of the alleged participants;
- one or more of the alleged participants has previously been found by a court to have participated in, or has admitted to participating in, cartel conduct (either criminal or civil); and
- the value of the affected commerce would exceed A$1 million within a 12-month period (that is, where the combined value for all cartel participants of the specific line of commerce affected by the cartel would exceed A$1 million within a 12-month period). In cases of bid rigging, the value of the bid or series of bids exceeded A$1 million within a 12-month period.

The ACCC and DPP also work together in relation to leniency applications (see questions 22 to 23) as the DPP has responsibility to grant immunity for conduct that may otherwise attract a criminal prosecution (as noted in the Policy).

There are no formal domestic cooperation agreements in place between the ACCC and customs agencies or state-based antitrust agencies. There is an agreement between the Australian Securities and Investments Commission and the ACCC in the financial services sector.

Internationally, the ACCC is an active member of the International Competition Network and has several bilateral cooperation agreements in relation to cartel and competition issues with various international antitrust enforcement agencies, including those in the United States, Europe, the United Kingdom, Canada, New Zealand, South Korea, Taiwan, Fiji, Papua New Guinea and Japan. The cooperation agreement signed between the ACCC and the Japan Fair Trade Commission (JFTC) was signed in April 2015, which formalised the partnership between the ACCC and the JFTC. Australia also has relevant free trade agreements with New Zealand, the United States, Singapore, Thailand, Chile, Malaysia and the 10 ASEAN countries, and is currently negotiating free trade agreements with China, the Gulf Cooperation Council, Japan, India, Indonesia, Korea and 15 Pacific countries. In 2012, New Zealand enacted the Commerce (International Cooperation and Fees) Amendment Act 2012 (the NZ Cooperation Act), which represented a concerted effort to facilitate increased collaboration between the New Zealand Competition Commission (NZCC) and the ACCC and to enable enhanced cooperation between the NZCC and other overseas regulators. The practical effect of the NZ Cooperation Act is to make it easier for the NZCC and ACCC to obtain and exchange information to address Trans-Tasman competition law issues, supporting the existing cooperation mechanisms described above. In May 2014, the ACCC entered into a Memorandum of Understanding on Anti-Monopoly Cooperation with China.

The Australian government also has in place an agreement of treaty status with the US on mutual antitrust enforcement assistance. Various requests or investigations have been made on both sides to date. The 2004 free trade agreement between Australia and the United States envisages that the ACCC and US authorities will work closely together to investigate and regulate cartel-style behaviour affecting either nation.

The ACCC may provide information and assistance to foreign regulators either under: the Mutual Assistance in Business Regulation Act 1992, which provides that a foreign regulator may request that the ACCC obtain information, documents or specific evidence (which the ACCC may provide if authorised to do so by the Commonwealth attorney general); or section 155AAA of the Act, which provides that the ACCC may provide a foreign government body with information that would enable or assist that body to perform or exercise its functions. Conditions may be imposed on the disclosure by the ACCC.

Under the Mutual Assistance in Criminal Matters Act 1987, a foreign country can request that the Commonwealth attorney general obtain evidence, information and documents, and provide other assistance in relation to criminal proceedings in that foreign country.

Australia also has entered into extradition treaties with many countries including the United Kingdom and United States.

The ACCC will also seek waivers from cooperating parties to enable the ACCC to share information with other agencies.

11 Interplay between jurisdictions

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

The ACCC works closely with agencies in other countries and has conducted numerous matters involving coordination of investigations and immunity applications with other regulators, in particular the United States, Canada, the European Union, New Zealand and Japan. The ACCC will usually seek waivers in immunity matters to share information, and in some cases (such as the *Marine Hose* case) has used documents, information or other assistance obtained from, or provided by, a foreign regulator in proceedings in Australia in the Court. Such material may be used if it relates to the Australian issues in the proceedings

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and is admissible in accordance with the Australian rules of evidence under the Evidence Act 1995. The ACCC can seize material in Australia and may pass it on to a foreign government body (see question 10).

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The ACCC itself has no adjudication powers and its role is that of investigator or applicant in proceedings before the Court. All enforcement proceedings in Australia require the ACCC or DPP to file an application or indictment. Neither agency has the capacity to impose fines or other remedies and must prosecute a case in an applicable court. Fines in civil proceedings must be imposed by the Court according to 'penalty factors' established by case law (see questions 16 and 17). Parties seeking to resolve or settle civil proceedings by admissions may make submissions to the Court seeking consent orders which address the principles applicable to the fixing of penalties (ie, the penalty factors) and apply those principles to the facts of the case. Recently, the High Court of Australia has confirmed, that parties are able to propose and agree a suggested penalty with the ACCC to present to the Court, for the purposes of the settlement, and the Court will determine the penalty based on its assessment applying the penalty factors (see Commonwealth of *Australia v Director, Fair Work Building Industry* [2015] HCA 46; see also question 28).

Committal proceedings for criminal cartel offences will be heard before a magistrate in a state or territory court. If the accused is committed to stand trial, the matter will be heard in either the Court or the supreme court of a state or territory. This will be at the DPP's election. A right to a jury trial for all indictable offences (which include cartel offences) is guaranteed by section 80 of Australia's Constitution. Section 163 of the Act confers federal indictable jurisdiction on the Court in relation to criminal proceedings instituted after 24 July 2009. The amendments to the Act also confer on the state and territory supreme courts federal jurisdiction with respect to certain declarations and orders if those courts are hearing appeals arising out of prosecutions of criminal cartel offences.

Civil penalty proceedings under the Act will be heard and determined by a single judge in the Court.

Penalty proceedings are adversarial in nature and can only be brought by the ACCC or DPP. Actions for damages in the Court are also adversarial and can be brought by any person, including a class of plaintiffs, who suffers loss or damage as the result of an alleged contravention, or by the ACCC in a representative capacity.

13 Burden of proof

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

In the case of civil penalty offences, the onus of proof lies with the plaintiff (the ACCC or any other party who has instituted proceedings) and a civil standard of proof applies, requiring proof 'on the balance of probabilities'. The burden of proof for criminal cartel offences lies with the prosecution, which must prove its case 'beyond reasonable doubt'. It is also necessary for the prosecution to prove that the relevant contract, arrangement or understanding was made, or given effect to, and that the accused knew, or was aware of, the facts that would make up the offence.

14 Appeal process

What is the appeal process?

Appeals from decisions of the Court are made to a court of three judges, sitting as a Full Court. Any further appeals are, by leave only, to the High Court of Australia.

Appeals from decisions of the Supreme Court of a State or Territory are made to the relevant court of appeal where they are generally heard by three judges. Any further appeals are, by leave only, to the High Court of Australia.

It is not unusual for appeals to take several years.

Sanctions

15 Criminal sanctions

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

Individuals will face a maximum of 10 years' imprisonment or fines of A$340,000, or both. Corporations face a maximum penalty of A$10 million or three times the amount of the benefit gained or, if the amount of the gain cannot be determined, 10 per cent of the corporate group's annual turnover in Australia, whichever of the three is greater.

As mentioned in question 2, criminal charges were first filed in July 2016 when a Japanese shipping company pleaded guilty to criminal cartel conduct. The shipping company's guilty plea obviated the need for a court hearing on liability. It is anticipated that sentencing will occur late in 2016.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity? (What are the maximum and minimum civil penalties? How frequently are fines levied? How do recent civil penalties compare with previous decisions?)

Civil penalties may be imposed by a court on corporations and individuals for breach of part IV of the Act. Currently, the maximum penalties (which apply in relation to contraventions occurring after 1 January 2007) are:

- A$10 million per contravention;
- if the Court can determine the value, three times the value of the benefit that the body corporate and any related body corporate have obtained directly or indirectly (that is reasonably attributable to the act or omission); or
- if the Court cannot determine that value, 10 per cent of the annual turnover of the body corporate in Australia and any related body corporate during the 12 months ending at the end of the month in which the act or omission occurred (only supplies connected with Australia will count towards total turnover).

The maximum civil penalty for an individual is A$500,000.

The ACCC may also apply to the Court for any or all of the following orders against individuals or corporations involved in contraventions of part IV of the Act, including:

- injunctions;
- disqualification from managing corporations;
- community service;
- probation (orders requiring a company to establish a compliance or training programme or revise its internal procedures); and
- adverse publicity (which may require the publishing of advertisements).

In the *Air Cargo* case, the Court imposed around A$100 million in agreed penalties on several airline defendants collectively, including an A$20 million penalty on Qantas Airways, Australia's national carrier. Statements from both the ACCC and the Court indicate that both institutions consider that the level of fines will increase. The largest penalty so far handed down in Australia was an A$36 million fine imposed on Visy (in 2007, before the current Act came into force) for its involvement in a domestic packaging cartel.

It is also a criminal offence for a corporation or an individual to refuse to answer a section 155 notice. This offence is punishable by:

- for a corporation, a maximum fine of A$17,000; or
- for an individual, a maximum fine of A$3,400 or imprisonment for 12 months.

The ACCC has indicated that it will work closely with the DPP to prosecute and seek custodial sentences for people who mislead the ACCC during investigations, or who obstruct those investigations by perverting the course of justice.

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17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

No formal ACCC sentencing or penalty guidelines exist. The Court has a broad discretion to order a person to pay pecuniary penalties in respect of each contravention of the Act. In determining the appropriate level of the penalty in civil proceedings for contraventions of the Act, Australian courts will consider the following non-exhaustive factors, exercising the courts' sentencing discretion:

- the size of the defendant and the degree of market power it is able to exert on a market (eg, by reference to ease of entry or other competitive dynamics);
- the circumstances in which the alleged conduct occurred and whether the conduct was, for example, deliberate or negligent;
- the nature, extent and duration of the contravention;
- the nature, extent and duration of the loss or damage caused;
- recidivism (or whether the infringing company or individual had previously engaged in similar conduct);
- the company's or individuals' culture of compliance;
- whether the illegal arrangements were made by senior officers or employees, or the conduct occurred at a lower level; and
- whether the company or individual cooperated with the ACCC.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

No.

19 Parallel proceedings

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

The MoU between the ACCC and the DPP (see question 10) acknowledges that some matters warrant both criminal and civil proceedings, but expressly states that the agencies will ensure that 'measures' are adopted to avoid civil proceedings adversely affecting a related criminal proceeding. As a matter of practice, the ACCC has stated it will not pursue civil proceedings concurrently with a criminal prosecution brought by the DPP. (See also question 36.) The Act provides that a judge presiding at a trial against a person for contravening the cartel criminal offences may, where appropriate, grant certain related civil orders. This ensures that a separate civil trial in such matters is not necessary.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Under the Act, private actions for single damages can be brought, including class actions. The Act also allows the ACCC to initiate 'representative' court proceedings to recover damages on behalf of persons who suffer loss or damage from cartel activity.

In a follow-on proceeding seeking damages for contravention of the Act, plaintiffs may rely as prima facie evidence on a finding of fact by the Court in a previous penalty action against the same defendant. However, this provision is rarely used and may only be available if the earlier court made a finding, at a trial, after hearing evidence in the earlier case. Most penalty cases are resolved as settlements based on facts agreed and endorsed by the Court for the limited purpose of the penalty case and such agreed facts are not usually capable of being relied on in follow-on suits.

The standard limitation period for civil damages matters in cartel cases is six years after the day on which the cause of action accrued, that is, the day when loss or damage was suffered as a result of the breach. A recent decision suggests (without finally deciding) that the limitation period begins to run when the loss or damage 'becomes manifest' to the plaintiffs (not before). Decisions in two other recent cartel cases have suggested (without finally deciding) that in some proceedings, there may be no time limit for follow-on actions, other than one imposed at the Court's discretion, for an action seeking both an injunction and compensation under the Act (section 87(1)).

There has been no judicial consideration of whether only direct, or also indirect, purchasers may claim for damages. The general position under the Act is that any person who has suffered loss as a result of a breach of the Act would have standing to file suit for single damages. There are examples of class actions where defendants compensated both direct and indirect purchasers in settlements before trial.

In many circumstances, plaintiffs may be able to recover a large proportion of their costs from defendants if successful before the courts.

The Competition Policy Review Panel has proposed that section 5 of the Act, which applies the competition law to certain conduct engaged in outside Australia, should be amended to remove the requirement for private parties to seek ministerial consent before relying on extraterritorial conduct in private competition law actions.

21 Class actions

Are class actions possible? If yes, 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?

Yes. Class actions are well established in Australia, as are litigation funding parties. Damages are assessed on the basis of the amount of loss or damage the person suffered as a result of conduct that contravened the Act. Punitive, exemplary or treble damages cannot be awarded.

The ACCC may bring representative proceedings for damages on behalf of any person who has suffered, or may suffer, loss or damage as a result of cartel activity.

There have been a number of class actions to date for cartel conduct alleging contraventions of part IV, although all have been settled before final judgment.

A price-fixing class action seeking damages and other relief on behalf of purchasers of air freight services for losses suffered as a result of the alleged *Air Cargo* cartel was settled in relation to the majority of parties in June 2014. The case began in February 2007. Group members were defined as all those persons resident in Australia as at 11 January 2007 who during the period 1 January 2000 to 11 January 2007 paid identified amounts totalling more than A$20,000 for the carriage of goods to or from Australia including in each instance a component by air. The applicants' case was underwritten by a litigation funding party.

Cooperating parties

22 Immunity

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

Yes. The Policy applies to domestic cartels and international cartels that affect Australia. The Policy is particularly directed at corporations that have engaged in serious cartel conduct affecting Australian markets.

The ACCC will manage requests for immunity from criminal and civil proceedings. Immunity from civil prosecution will be granted by the ACCC in accordance with the Policy.

The ACCC will make recommendations to the DPP about immunity from criminal proceedings. Immunity from criminal prosecutions will be determined by the DPP in accordance with the annexure to the prosecution policy of the Commonwealth, which incorporates the same principles that determine immunity under the Policy.

The DPP's decision will be communicated to the applicant at the same time as the ACCC's decision whether to grant conditional immunity in relation to civil proceedings. In the case of a corporation, immunity extends to all current and former directors, officers and employees (if they are expressly named in the immunity application), as long as the disclosures are 'a truly corporate act'. Their immunity is called derivative corporate immunity. This means that disclosure

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cannot be an isolated confession of an individual representative of the corporation.

In response to consultation with stakeholders, the ACCC and DPP have streamlined the process by which they each communicate a conditional immunity grant. Previously, although the ACCC typically would inform an applicant that its application had been made to the DPP, in some cases, the applicant would not hear back from the DPP about the outcome of the application for some time. At an early stage of an immunity process, this was often a source of considerable concern for parties. The Policy improves the administrative process surrounding the application for immunity, by providing that the DPP will write to applicants informing them of the terms and conditions of immunity by way of a 'comfort letter' likely to be simultaneous with the ACCC conditional immunity grant.

A corporation will be eligible for conditional immunity from ACCC-initiated civil proceedings where it applies for immunity and satisfies the following criteria:

- the corporation is or was party to a cartel;
- the corporation admits its conduct;
- the corporation is the first person to apply; and
- the corporation has not coerced others to participate.

The Policy was altered in September 2014 to remove a prohibition on a 'clear leader' of a cartel obtaining immunity – this was thought to be difficult to define and, in any event, the exclusion had never been applied in practice. Coercion in this context remains a disqualifying factor and is not limited to instances of physical coercion or threats of violence, but also includes instances of commercial threats or inducements to pressurise an unwilling participant to take part in a cartel. Several examples of commercial pressure are offered in the Policy to provide guidance.

- the corporation has either ceased its involvement or indicates to the ACCC that it will cease its involvement;
- the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives); and
- the corporation has provided full frank and truthful disclosure, and has cooperated fully and expeditiously while making application (the corporation must also undertake to continue to do so throughout the ACCC's investigation and any ensuing court proceedings). (See question 26.)

Immunity will be available until such time as the ACCC receives written legal advice that is has reasonable grounds to institute proceedings in relation to at least one contravention arising from the relevant conduct.

Importantly, the immunity offered by the ACCC does not limit the rights of injured third parties to take action under the Act to recover damages against any cartel participant (either classes of injured third parties or individual plaintiffs).

It is the responsibility of the Court to determine penalties for contraventions of the Act. However, under the Policy, the ACCC may reach an agreement with parties as to joint submissions about penalties to be placed before the Court for adjudication (see question 28), but any agreement is not binding on the Court.

23 Subsequent cooperating parties

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

Yes. The ACCC's policy for cooperating parties is set out in section H of the Policy (Cooperation Guidance). This may offer some form of limited immunity (ie, leniency) to subsequent applicants, but there are no fixed discounts to fines for the second or third applicants who apply.

The Cooperation Guidance covers all applications for leniency (for example, applications by a corporation that is not 'first in').

The following factors will be considered in assessing the value of the cooperation provided by a party who has engaged in the cartel conduct whether as primary contravener or in an ancillary capacity:

- Did the party approach the ACCC in a timely manner?
- Has the party provided significant evidence (ie, providing valuable and important evidence of a contravention of which the ACCC is either otherwise unaware or has insufficient evidence to initiate proceedings)?
- Has the party provided full, frank and truthful disclosure and cooperated fully and expeditiously on a continuing basis throughout the ACCC's investigation and any ensuing court proceeding?
- Has the party ceased its involvement in the cartel or indicated to the ACCC that it will cease its involvement?
- Did the party coerce any other person/corporation to participate? (See question 22.)
- Had the party acted in good faith?
- For individuals, has the party agreed not to use the same legal representation as the corporation by which it is or was employed?
- Has the corporation a prior record of breaches of the Act or related offences?
- Was the company a ringleader of the cartel?

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

In Australia, if a person is second to cooperate with the ACCC in respect of a cartel investigation, the Cooperation Guidance applies (see question 23). A party who cooperates with the ACCC in relation to one cartel may discover a second cartel that is independent and unrelated to the first. In those circumstances, the party may apply for conditional immunity for the second cartel and also seek amnesty plus for the original cartel conduct.

Amnesty plus is a recommendation by the ACCC to the court for a further reduction in the civil penalty in relation to the first cartel. If the first cartel is dealt with as a criminal matter, the DPP will advise the court of the full extent of the party's cooperation so that it will be taken into account for sentencing purposes.

A party will be eligible for amnesty plus if it cooperates with the ACCC in relation to the first cartel, and receives conditional immunity for the second cartel. The criteria for conditional immunity and cooperation will apply to a party seeking amnesty plus. A party seeking amnesty plus should seek a marker for the second cartel as soon as possible under the usual conditions for marker applications described below.

Previously it was not clear what additional leniency might be available for a second or later applicant on the first cartel matter notified. Now the Policy makes clear that amnesty plus involves a recommendation by the ACCC to the Court for a further reduction in the civil penalty in relation to the first cartel.

25 Approaching the authorities

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 Policy applies up until the ACCC receives written legal advice that it has sufficient evidence to institute proceedings in respect of at least one contravention of the Act arising from the cartel conduct. Accordingly, the best time to approach the ACCC is well before it has completed (or, if possible, commenced) its investigation, and certainly before it has instituted proceedings in respect of any of the cartel participants.

The ACCC offers a 'marker' system to persons intending to make an application for conditional immunity but do not have enough information to satisfy the grant of immunity when placing the marker. A marker may be requested of the ACCC for a limited time to preserve the applicant's place in the queue for immunity (usually 28 days, but this can be extended by agreement in complex matters, such as where document translation is required).

Persons wishing to make an immunity or leniency application, but who are uncertain as to the possible application of the various leniency policies, may approach the ACCC for clarification, including on a hypothetical basis. Any information provided to the ACCC in this

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context will not be used by the ACCC for any purpose other than to provide the clarification.

The ACCC requires that applications for immunity be made to the executive general manager of the Enforcement and Compliance Division. These applications may be made in writing to a dedicated fax line or orally by telephone. They cannot be made by email. The applicant must then provide the ACCC with detailed evidence and information about the suspected cartel conduct.

An immunity or leniency application can be made in writing or orally. Applying orally may avoid the creation of documents that could be discoverable in Australian and offshore civil litigation.

26 Cooperation

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?

The Policy provides that a corporation will be eligible for conditional immunity from ACCC-initiated civil proceedings where the corporation undertakes to provide full disclosure and cooperation to the ACCC. The grant of final immunity is contingent on the corporation providing ongoing full disclosure and cooperation to the ACCC. A grant of leniency to subsequent applicants, subject to the Cooperation Guidance, is contingent on the same principles.

A party's cooperation will be considered by the ACCC in determining whether to reach an agreement on civil penalties and any other relief. In particular, the ACCC will take account of the extent and value of a party's cooperation with the ACCC. Notably, the ACCC will consider the following:

- for corporate parties, whether the contravention arose from conduct of senior management or at a lower level;
- for corporations, whether the corporation has a corporate culture conducive to compliance;
- the nature and extent of the party's contravening conduct;
- whether the conduct has ceased;
- the amount of loss or damage caused;
- the circumstances in which the conduct took place;
- for corporations, the size and power of the corporation;
- whether the contravention was deliberate; and
- the period over which the conduct extended.

The ACCC will identify by way of submissions to the court any cooperation provided by a party. However, the size of the civil penalty and/or sanctions imposed is ultimately determined by the court in its absolute discretion.

Corporate applicants should use best efforts to secure and promote the ongoing, full and truthful cooperation of all current and former directors, officers and employees for the duration of the investigation and any subsequent court proceedings.

The cooperation required by the ACCC may be extensive and can include steps such as foreign witness interviews, provision of extensive documentation and materials to explain the conduct and form the basis of court proceedings, engaging IT experts to analyse and make available electronic records, reviewing phone records, delivering mobile phones and diaries to the ACCC and bringing foreign-based executives to Australia to be interviewed. Witnesses may be required to give evidence against other cartel participants in proceedings initiated by the ACCC and to cooperate over a substantial period of time. Documents and information they provide are also not immune from production to other persons alleged to have participated in the conduct in court proceedings in certain circumstances (including at an early stage well before trial).

The ACCC's Cooperation Guidance provides that a subsequent applicant for reduction in fine, which provides the ACCC with full and frank disclosure of the activity and all relevant documentary and other evidence available to it, and cooperates fully with the ACCC's investigation and any ensuing litigation, may be granted a reduction in fine or penalty.

27 Confidentiality

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

The ACCC provides confidentiality to all parties during the course of its investigations, subject to the ACCC's practice of fully publicising the cartel from the time the ACCC commences proceedings. Once the matter is before the Court, the pleadings become publicly available (subject to orders for confidentiality which occur in rare circumstances). Affidavits and evidence may be read and given in open court, at which time the public has full access. The Court may also require the ACCC to produce leniency information to other cartel defendants or their legal representatives once a matter is before the Court.

While the ACCC's investigations into the cartel are under way, the ACCC expects an immunity applicant not to disclose that it has applied for immunity without first informing the ACCC (so as to not jeopardise ACCC investigations). This includes immunity applicants' proposed statements to stock exchanges under disclosure obligations.

These principles are subject to the rules on international cooperation described in questions 10 and 11.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

As also considered above in question 12, the Court's decision in the CFMEU case has changed the way in which Australian regulators and parties settle negotiate settlements of actions for civil penalties. Although the decision was based on the Building and Construction Industry Improvement Act 2005 (Cth) and not the Act, the decision will affect various Commonwealth regulators, including the ACCC. The result of the CFMEU case is that regulators and businesses cannot submit a suggested range of pecuniary penalties to the court, or an agreed figure. Parties and the ACCC can, however, make submissions on the relative seriousness of the misconduct, the relevant sentencing principles, and on any comparable decisions and/or penalties. Previously, the ACCC could reach an agreement with parties as to joint submissions about the penalties to be placed before the Court for adjudication. While such an agreement was not binding on the Court (see questions 12, 16 and 17), and the Court and State Supreme Courts retained significant oversight of the settlement process and final sentencing discretion, those submissions as to penalty were usually accepted. We consider that this change in practice is likely to result in significant uncertainty as to negotiating the settlement and predicting penalties ultimately imposed by the Court in cartel settlements.

The ACCC has stated that a defendant in criminal proceedings cannot 'plea bargain' to pay a higher civil pecuniary penalty in exchange for no imprisonment or criminal fine.

In criminal cases, a proposal by the defence that a plea be accepted to a lesser number of charges or a lesser charge or charges may include a request that the prosecution not oppose a defence submission to the Court at sentence that the penalty fall within a nominated range. Alternatively, the defence may indicate that the defendant will plead guilty to an existing charge or charges if the prosecution will not oppose such a submission. The prosecution must consider whether to agree to such a request and whether the penalty or range of sentence nominated is considered to be within acceptable limits for a proper exercise of the sentencing discretion in all the circumstances.

While the criminal courts retain significant oversight as above, they would tend to confirm settlements within permissible ranges given the nature of all the circumstances.

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29 Corporate defendant and employees

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

Under the Policy, if a corporation qualifies for conditional immunity, only those named current and former directors, officers and employees of the corporation who admit their involvement in the cartel will receive immunity in the same form as the corporation (as long as the individual provides the ACCC with full and frank disclosure on similar terms to that required of the corporation). No other employees or directors will receive immunity unless included expressly in the application.

Under the Cooperation Guidance, the ACCC may decide, on a case-by-case basis, not to bring proceedings against employees of a corporation. (See questions 22 and 23.)

30 Dealing with the enforcement agency

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

An immunity applicant must, to the best of its ability, provide the ACCC with detailed information and evidence relating to the potential cartel and identify by name all officers and employees covered by the application. After this evidence and information is provided, the ACCC may decide to grant conditional immunity to the applicant and set out the next steps the applicant must reasonably take. The ACCC will grant conditional immunity if it forms the view that the conduct admitted by the applicant constitutes a contravention of the Act. The ACCC may also decide that the application is not accepted if, for example, it does not comply with the Policy. (See questions 22 and 23.)

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

The Policy was recently revised in September 2014. These changes are reflected in the above sections (see in particular questions 22 and 23).

Defending a case

32 Disclosure

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

The ACCC will seek to maintain confidentiality and the Act permits the ACCC to withhold such material but subject to the courts ability to order that the ACCC provide all relevant material to the defendant. The defendant can also request the ACCC provide copies of all information held by the ACCC relevant to the ACCC's case.

Once court proceedings are commenced the ACCC (or the DPP, in the case of criminal proceedings) is required to provide to the defendant and the Court with evidence and other materials relevant to the case.

33 Representing employees

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

As a general principle in Australia, counsel may represent both employees and a corporation only if there is no conflict of interest between them. In practice, it is usual for each employee in cartel investigations to obtain independent legal advice because of the possibility of a conflict of interest. A present or past employee is generally advised to seek independent legal advice at the time proceedings are commenced or threatened. However, under the Policy, a condition of derivative immunity for individuals requires that an individual must retain separate counsel to the corporation that employs, or employed, them.

Update and trends

The 2016 bill is the result of the most expansive antitrust review Australia has seen in many years.

While the expert review recommended a complete simplification of Australia's cartel laws, the 2016 bill does not yet achieve this – that simplification is expected in the next round of legislative changes.

The 2016 bill does, however, propose to make a number of key changes to Australia's cartel laws, which, as discussed in part in question 5, includes:

- confining the application of the provisions to cartel conduct that affects competition in Australian markets, that is, conduct occurring in trade or commerce within Australia or between Australia and places outside Australia;
- removing the overlap between the new provisions and the old legislation by removing references to the exclusionary provisions and modifying the cartel provisions to cover collective boycotts, being restrictions on acquisition as well as supply;
- broadening the current exception for joint ventures to provide exemptions for joint venture activity, thereby removing the current limitation to contracts or to supply joint ventures. Consequently, the exception will apply to any restriction in a contract, arrangement or understanding that is for the purposes of, or is reasonable necessary for undertaking, a joint venture for the production, supply or acquisition of goods or services;
- providing for a broad exception for restrictions in vertical arrangements for the supply or acquisition of goods or services. This exception is particularly relevant for dual distribution models, where a supplier provides services both directly to the public and through intermediaries (for example airline companies that sell flights direct and also through agents). Under the 2016 bill these arrangements would be assessed under the substantial lessening of competition test, which seems to be a more sensible basis for the ACCC to pursue those cases.

34 Multiple corporate defendants

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

In general, no, because of the conflict-of-interest rules referred to in question 33. Counsel usually represents multiple corporate defendants in proceedings for breach of part IV of the Act only where those corporate defendants are related or are all part of the same corporate group.

35 Payment of penalties and legal costs

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

For contraventions occurring after 1 January 2007, corporations are prohibited under the Act from paying the pecuniary penalties or legal costs of officers who have breached part IV of the Act. The term 'officers' is defined in the Corporations Act 2001 and will generally include only senior managers and directors of a company.

The Act does not prohibit corporations indemnifying and paying the legal costs of employees and agents who are not officers but there are other general law considerations that must also be considered in such cases.

36 Taxes

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

Fines or other penalties for breaches of the relevant provisions of the Act, either civil or criminal in nature, are not tax deductible in Australia. In Australia, deductions are generally allowable for all losses or outgoings to the extent that they are incurred in gaining or producing assessable income or are necessarily incurred in carrying on business for the purpose of producing such income. In past cases, where damages were payable out of a breach caused by carrying on business outside of the constraints of the law (eg, in contravention of a Commonwealth statute, such as the Act), damages have been held not to be deductible. In

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order to claim a deduction for damages paid, the amount paid would generally need to have a sufficient nexus with the taxpayer's income-producing activities.

37 International double jeopardy

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 no double jeopardy principle enshrined in the Australian law that protects corporations from the prospect of double penalties. However, we are aware that in the Air Cargo case the penalty submitted to the Court reflected the fact that certain defendants (with less than 2 per cent share of the Australian market) had paid, or would be likely to pay, very substantial penalties in other jurisdictions.

Note that, domestically, in cases where parallel civil and criminal proceedings are initiated, any civil proceedings will be postponed until after the criminal proceedings are determined. If convicted in the criminal proceedings, the civil proceedings will be permanently stayed, negating the risk of double jeopardy in those circumstances. (See question 19.)

No private actions, which may have given rise to overlapping liability in several jurisdictions, have yet been determined before the Court. It is therefore unclear whether overlapping liability for damages in other jurisdictions would be taken into account as a determinative factor for the calculation of a damages award.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The best method is to approach the ACCC early once the corporation knows the facts, and to provide significant and valuable evidence that will assist the ACCC to bring a case against the cartel members. If the corporation is not first in to cooperate, the extent of leniency afforded will depend upon:

- the seriousness of the conduct;
- any prior contraventions on the part of the defendants;
- the level and degree of cooperation;
- the time at which cooperation was offered;
- the size and scale of the defendant's operations;
- comparisons drawn with other Australian decisions establishing levels of penalty; and
- the degree of commerce affected by the activity.

The existence of a compliance programme may, in many circumstances, result in a relatively small reduction in penalty.

See also questions 17, 26 and 28.

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Austria

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

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

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

2 Relevant institutions

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

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

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

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

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

3 Changes

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

The recent amendment to the Cartel Act 2005, as well as to the Competition Act, entered into force on 1 March 2013. The core changes include a revised de minimis rule, which, similarly to the situation under the European Commission's de minimis notice, does not benefit hardcore restrictions. However, it makes no distinction between restrictions by object and such by effect. Further, the notion of collective dominance and presumptions thereof were explicitly incorporated in the Cartel Act 2005. The amendment also led to a further alignment of the rules on the determination of fines to the European Commission's fining guidelines. Moreover, a separate section in the Cartel Act 2005 now deals with private enforcement issues, namely compensation for damages as a result of infringements of cartel law and, inter alia, stipulates that civil law courts are bound by final decisions by the Cartel Court or by the European Commission. However, not only private enforcement but also public enforcement has been strengthened as more powers are attributed to the FCA and, in particular, with regard to dawn raids, further align them with the competences of the European Commission. In merger proceedings, the notifying parties may now ask for an extension of the decision deadlines in both Phase I and Phase II. The EU Damages Directive will have to be implemented by 27 December 2016. A public consultation has been launched regarding a legislative proposal which mainly covers the implementation of the EU Damages Directive. However, in some aspects the Austrian law already corresponds with the Directive (see question 16, binding effect of decisions by competition authorities). Nevertheless, changes are necessary in particular with regard to the provisions on disclosure of evidence, the statute of limitation and suspension. Moreover, a rebuttable presumption that cartel violations cause harm must be implemented in the Cartel Act. The legislative proposal also covers certain other topics which are not related to the implementation of the EU Damages Directive such as changes to the statute of limitation for fining decisions as well as a clarification regarding the application of the de minimis rule.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

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

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

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

Section 2(2) contains the revised de minimis exemption and exempts certain practices from the prohibition in section 1. To come within the de minimis exemption, the undertakings concerned,

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provided that they are competitors, must not have a combined market share of more than 10 per cent of the relevant market or, in the case of non-competitors, their market shares must remain at or below 15 per cent. In addition, it is stipulated that agreements do not profit from the exemption if hard-core restrictions, such as price fixing or market allocation, are involved. Further specific exemptions relate to certain agreements in the book and press sector, restrictions of competition between members of a cooperative insofar as they are justified by the aim of the cooperative and certain restrictions of competition within the agricultural sector.

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

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

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

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

6 Application of the law

Does the law apply to individuals or corporations or both?

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

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

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

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

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Typically, the FCA takes the first steps in an investigation. The outcome may be shared with the undertakings concerned (section 13 of the Competition Act). If they consider competition law to be infringed, the FCA or the FAP (or both) may file a motion for cease and desist, finding or fines with the Cartel Court. Often, the FCA enters into settlement talks with the undertakings concerned prior to bringing an application before the Cartel Court. Typically, the undertakings are to acknowledge certain facts and their legal qualification for a reduced fine. As the Cartel Court cannot go beyond the fine applied for by the official parties, an undertaking prepared to settle in such way has some certainty what its fine will be and the proceedings are by far less elaborate (as taking of evidence, etc hardly takes place).

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

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

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

9 Investigative powers of the authorities

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

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

In particular, the FCA may request information from (associations of) undertakings; inspect and make copies of business documents, irrespective of their format (including electronic information); and request the answering of questions (section 11a(1) of the Competition Act).

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

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

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

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

International cooperation

10 Inter-agency cooperation

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

As mentioned above, the FCA collaborates with the European Commission in its investigations. Moreover, the FCA is integrated into the network of European competition authorities. In particular, the FCA exchanges information and documents with the Commission and competition authorities of other EU member states (section 10(1) of the Competition Act). Information obtained from the network in connection with a leniency application must, however, not be used for an application for fines – such application may be based on information obtained from other sources (section 11(7) of the Competition Act). The FCA is also very active in bilateral contracts with other national competition authorities and has signed memoranda of understanding with other competition authorities (see www.bwb.gv.at). Further, there

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is also an inter-agency cooperation on a national level that has experienced a strengthening by the recent amendment. It is now explicitly laid down in the Competition Act that the criminal police, the federal prosecutor's office and the courts can submit to the FCA personal data that they gained in criminal proceedings so that it can fulfil its tasks, in particular for the enforcement of the antitrust prohibition (section 14(3) of the Competition Act). Moreover, during dawn raids, the public security organs (ie, the police) may assist the FCA in securing documents (section 14(2) of the Competition Act). To the best of our knowledge, the FCA does have informal contact with other competition authorities, in particular with the German Federal Cartel Office.

11 Interplay between jurisdictions

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

See, in particular, questions 9 and 10.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

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

Private enforcement motions may be brought before the Cartel Court if seeking cease-and-desist orders or decisions for finding; other private actions need to be brought before the ordinary civil or commercial courts (see also question 16).

13 Burden of proof

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

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

As mentioned above, the Cartel Court is not restricted to the evidence offered. Austrian law does not restrict the forms of permissible evidence. Expert evidence is accepted, although in practice, the courts often only rely on expert witnesses that they have appointed rather than on the opinions of expert witnesses instructed by one of the parties.

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

Moreover, the court must be convinced by the relevant evidence. Regarding damages under the Unfair Competition Act (see question 16), the Supreme Court has lowered the standard of proof by holding that the plaintiff only has to establish with a high probability that (some) harm has occurred (see OGH 15-9-2005, 4 Ob 74/05v).

Under certain circumstances (in particular, where the plaintiff has, for objective reasons, considerable difficulties in proving something), courts are also willing to accept some prima facie evidence. For example, in predatory pricing cases, it has been held sufficient that the applicant establish that sales were below cost by analysing data of comparable undertakings (see OGH 9-10-2000, 16 Ok 6/00 and 16-12-2002, 16 Ok 11/02).

Where a damage claim is based on the infringement of a protective rule (the prohibition of cartels is considered to be such a rule), the defendant must prove that it bears no fault. Moreover, according to court practice, the plaintiff only has to prove the infringement and that harm has occurred; it does not have to prove causality (see, eg, OGH 16-9-1999, 6 Ob 147/99g).

14 Appeal process

What is the appeal process?

In general, an appeal against a decision by the Cartel Court must be filed within four weeks of service of the decision. Since the amendment, the Cartel Act 2005 stipulates a shorter appeal period of two weeks for, inter alia, interim injunctions, as well as for decisions concerning the content of the publication of the decision (since the recent amendment, all Cartel Court decisions are published, but the parties may specify business secrets). The Cartel Court of Appeals serves as second and last instance; however, only in very exceptional cases can facts be challenged in the appeal.

In private enforcement before the civil courts, there are typically three instances. Decisions must be appealed within four weeks. A respective appeal can be based on erroneous findings of facts as well as on an incorrect legal assessment. The Supreme Court as last instance only decides on questions of significant legal importance and provided that a specific jurisdictional value is at stake (over €30,000). For amounts between €5,000 and €30,000, the Court of Appeals must declare whether a subsequent appeal is admissible.

Sanctions

15 Criminal sanctions

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

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

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

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

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

A cartel law infringement may lead to administrative fines of up to 10 per cent of the group's turnover in the year prior to the verdict (section 29 of the Cartel Act 2005). Section 30 of the Cartel Act provides guidance as to the calculation of administrative fines (see question 17). In a primarily vertical case that also had horizontal elements (hub and spoke), Spar (a large food retailer) was fined with €30,000,000 for coordinating final selling prices in 2015 – the highest fine ever imposed on one single undertaking in Austria. According to the website of the FCA, in 2015, for example, the Cartel Court and the Cartel Court of Appeals (in the *Spar* case) imposed fines following applications by the Official Parties in the amount of about €34,436,735.

Apart from private actions before the ordinary civil courts or motions before the Cartel Court (see, in particular, question 12), private enforcement in Austria may also be based on section 1 of the Unfair

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Competition Act. Under the unfair competition law rules, the commercial courts may issue cease-and-desist orders, have judgments published and award damages if the cartel law infringement cannot be justified by a reasonable construction of the law (Supreme Court case 4 Ob 60/09s *Anwaltssoftware*).

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

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

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

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

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

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

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

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

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

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

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

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

19 Parallel proceedings

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

The same conduct may well lead to criminal, civil and administrative sanctions in Austria.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Private damage claims may be brought under general Austrian civil law before the ordinary courts. Most commentators and the Supreme Court agree that the prohibition of cartels (as well as the abuse of market dominance provisions) are protective rules within the meaning of section 1311 of the Austrian General Civil Code also protecting customers (and not only competitors). As a consequence, aggrieved competitors as well as harmed customers may bring a tort claim. Private plaintiffs may also invoke contractual claims and concepts such as illicit gains. Further, as mentioned above, private actions may be based on the Unfair Competition Act. In Austria, only single damages will be awarded (see question 16). As to the reimbursement of legal costs, see question 35. A party bringing an action must have active standing. Those indirectly harmed (eg, the customer of someone who purchased from a cartelist) generally only have a valid claim under very limited circumstances.

The recent amendment (see question 2) has led to a strengthening of private enforcement, inter alia, in the context of applications for finding before the Cartel Court. In this respect, a legal interest for the finding is always required as a condition for a corresponding decision to be rendered that shall establish anticompetitive behaviour. The Cartel Act now contains an explicit provision stating that the required legal interest is also given if a decision for finding is applied for to seek compensation for damages later on (section 28(1a) of the Cartel Act 2005). Prior to the amendment, this was not considered to be sufficient to establish the required interest. Moreover, a separate section in the Cartel Act 2005 clarifies that anyone infringing competition law is liable for any damages caused thereby, including interest as of the damaging event (section 37a of the Cartel Act 2005).

Pursuant to the new provision, a private damage claim by the direct purchaser is not excluded by the fact that the goods or services have been sold on, which constitutes – to some extent – a limitation of the passing-on defence. It also now expressly refers to section 273 of

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the Austrian Code of Civil Procedure, which, under certain circumstances, allows the civil courts to estimate (rather than strictly ascertain) the compensation to be awarded to plaintiffs; the amendment made it clear that when estimating the compensation, the civil courts can take into account any gains from the cartel behaviour. Further, civil courts can interrupt private enforcement proceedings for such time as a case concerning the cartel in question is pending before the European Commission or any competition authority of a member state. Moreover, the limitation period for damage claims is suspended for the time of the duration of respective cartel proceedings and six subsequent months after the final decision in or other termination of such proceedings. See also question 16.

21 Class actions

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

Regarding class actions, a draft amendment to the Code of Civil Procedure, which would have introduced group trials and what could be referred to as 'specimen proceedings', was heavily criticised and has not become law. Thus, there is only limited scope for collective claims. Under certain conditions, however, individual proceedings can be brought together or subsequently be joined by the competent court. In that regard, it can also be possible to sue several defendants in Austria even if only one of them is seated in Austria. Moreover, (potential) plaintiffs may assign their claims to one entity that then brings the assigned claims together in its own name. Hence, the persons concerned have to take action in assigning their claims. Therefore, such a 'group action' is based on an 'opt-in' basis. It should be noted that such assignment does not necessarily mean that the values of the various claims are to be added together. Hence, the district (generally competent for claims of up to €15,000) rather than the regional court may remain competent for such a 'group action'.

Cooperating parties

22 Immunity

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

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

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

- the respective undertaking has ended its involvement in an infringement of section 1 of the Cartel Act or of article 101(1) TFEU;
- it has informed the FCA of this infringement prior to the FCA having knowledge about the infringement, the leniency applicant provides enough information to enable a dawn raid or even a direct fine application to the Cartel Court;
- the undertaking cooperates fully, promptly and truthfully with the FCA and must submit all evidence concerning the infringement in its possession or available to it in order to clarify the circumstances of the case completely; and
- it did not coerce other undertakings or associations of undertakings to participate in the infringement.

23 Subsequent cooperating parties

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

Principally, only the 'first in' may obtain full leniency (see question 22 above). However, if the 'second in' provided so much information to directly allow for an application for fines to the Cartel Court while the 'first in' had only provided enough to enable a dawn raid or less, there may still be amnesty.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Subsequent undertakings can qualify for reductions of fines. According to the leniency handbook, the following reductions will typically be granted if all the criteria of section 11(3) of the Competition Act are met and information of significant additional value is provided to the FCA:

- a second undertaking, reduction of 30 per cent to 50 per cent;
- a third undertaking, reduction of 20 per cent to 30 per cent; and
- all later undertakings, reductions of up to 20 per cent.

25 Approaching the authorities

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

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

26 Cooperation

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?

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

27 Confidentiality

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

In general, all leniency information is kept confidential. In this regard, section 39, paragraph 2 of the Cartel Act provides that, in principle, third persons may only access the cartel court file with the consent of the parties to the proceedings concerned. This provision was recently tested in a request for preliminary ruling before the ECJ (C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie*), where the court indeed found this provision to be incompatible with EU law. Rather, the national court must determine whether access is allowed by balancing the legitimate interest of confidentiality and the protection of the leniency programme against the individual's interest in the enforcement of its rights. Further, the Austrian Supreme Court (28-11-2014, 16 Ok 10/14b and 16 Ok 9/14f) has held that access to file must also not be generally denied in cases not containing a 'foreign element'. The Austrian Supreme Court further stated, that the criteria for being granted access to file must not impose an excessive burden on the ones who seek damages.

Besides, the Supreme Court has made it clear that the Cartel Court's file is to be given to the criminal prosecutor upon request (OGH 22-6-2010, 16Ok 3/10). The implementation of the EU Directive on Antitrust Damages Actions will bring further clarity and, inter alia, an explicit protection of leniency statements.

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Update and trends

The EU Damages Directive will have to be implemented by 27 December 2016. A public consultation has been launched regarding a legislative proposal which mainly covers the implementation of the EU Damages Directive but also covers certain other aspects which are not related to the implementation of this Directive (see question 3). Generally, private enforcement plays an increasingly important role.

Generally, proceedings before the Cartel Court are public; everyone can follow the proceedings. However, upon application by a party the general public can be (partially or fully) excluded from oral hearings if regarded necessary for protecting business secrets. In addition, the Cartel Court is obliged to publish final decisions on (i) the cessation of violations, (ii) the finding of infringements, (iii) the imposition of fines and (iv) certain requests in concentration proceedings. The names of the undertakings concerned as well as the essential content of the decision, including imposed sanctions, have to be published. Nevertheless, the Cartel Court has to take into account the legitimate interests of undertakings in the protection of their business secrets. Further, the Cartel Court must provide the parties with the opportunity to identify the parts of the decision, which they want to have excluded. The currently proposed new legislation which primarily covers the implementation of the EU Damages Directive will also contain minor changes as regards the publication of Cartel Court decisions. In future, decisions dismissing an application will also have to be published.

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

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

While there is no formal plea bargain regime, an undertaking and the FCA may attempt to settle a case up-front. In a case concerning the Austrian telecom incumbent, such settlement was reached; upon waiver by all parties of their rights to appeal, the Cartel Court's decisions was limited to imposing the fines applied for by the FCA and accepted by the undertaking concerned (case 29 Kt 4/09). A settlement also took place in the brewery cartel case as well as in the *Rewe* case and the recent *Spar* case (case 29 Kt 10/16m). There are no formal rules applicable to such settlements, and settlement talks may vary from case to case. Generally speaking, parties do not require permission to discontinue proceedings and instead try to reach a settlement. Typically, the parties negotiate the settlements with the FCA, and thereby can even avoid a procedure before the Cartel Court.

29 Corporate defendant and employees

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

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

30 Dealing with the enforcement agency

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

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

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

The FCA has recently published a leniency handbook on its website (see www.bwb.gv.at/SiteCollectionDocuments/Leniency%20Handbuch%202014.pdf) setting out details on the law and practice of leniency and immunity applications in Austria.

Defending a case

32 Disclosure

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

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

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

33 Representing employees

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

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

34 Multiple corporate defendants

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

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

35 Payment of penalties and legal costs

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

In general, a corporation may pay the legal costs of and penalties imposed on its employees. In the *Austrian Banks* case (see ECJ decision in joint cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P), which triggered criminal proceedings in Austria, the banks reimbursed their managers, who had been made to pay some compensation payments.

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36 Taxes

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

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

Private damage awards, on the other hand, can be tax-deductible if the relevant wrongdoing is attributable to the business sphere (as opposed to private actions) (Supreme Administrative Court 2008/15/0259). With cartel activities, this will usually be the case.

37 International double jeopardy

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

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

As regards private damages claims, principally everyone (allegedly) harmed by a cartel may approach the ordinary Austrian courts; most relevant is that they have jurisdiction as long as at least one defendant has its seat in Austria. Liability for damages in other jurisdictions is principally not taken into account.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

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

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

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Brazil

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The current Brazilian Antitrust Act is Law No. 12,529/2011, which became effective on 29 May 2012 (replacing Law No. 8,884/94). Law No. 12,529/11 is applicable to companies and individuals alike. However, it is important to clarify that only individuals may be criminally prosecuted in Brazil for cartel offences, according to Law No. 8,137/90.

2 Relevant institutions

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

The Administrative Council for Economic Defence (CADE) is the Brazilian antitrust agency responsible for prosecuting and adjudicating cartel cases in the administrative sphere. Two of CADE's departments are relevant for cartel cases: the General Superintendence and the Administrative Tribunal. 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, cartels are prosecuted by the public criminal prosecutor (that is completely independent from CADE). Criminal cases will be adjudicated by a criminal court.

3 Changes

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

There have been no recent changes or proposals to the regime.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

A cartel is the conduct that produces, or may produce, the effects defined in article 36 of the Brazilian Antitrust Act and its paragraph 3 exemplifies the types of conducts that results (or may result) in such effects.

Article 36 defines in general terms that if a conduct (notwithstanding its form) may result in: (i) limiting, restraining or in any way injuring free competition or free initiative; (ii) controlling the relevant market of goods or services; (iii) arbitrarily increasing profits; or (iv) exercising a dominant position abusively; may be characterised as 'violations to the economic order' (antitrust violations), regardless of fault, even if effects are not achieved (even if anticompetitive effects are potential).

Article 36, paragraph 3, contains examples of types of conducts that, if resulting (or may result) in any of the above definitions, may be deemed as antitrust violations. Specifically, regarding a cartel, the following items of said paragraph 3 are applicable:

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

In practice, CADE classifies a cartel from article 36, paragraph 3 as:

- to regulate markets of goods or services by establishing agreements to limit or control the research and technological development, the production of goods or services, or to impair investments for the production of goods or services or their distribution;
- to limit or prevent the access of new companies to the market; and
- to create difficulties for the establishment, operation or development of a competitor company or supplier, acquirer or financier of goods or services, among others.

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

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

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

However, it is relevant to mention that there is a discussion in the courts regarding CADE's (lack of) jurisdiction over financial institutions. The matter is not settled yet, but it could be established that only the Central Bank has powers to investigate financial institutions, even regarding antitrust violations.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Brazilian Antitrust Act is applicable to both corporations and individuals. On the other hand, the criminal law is applicable to individuals, only.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Brazilian Antitrust Act is applicable to antitrust violations (even if potential) that occurred on Brazilian territory and to those that took

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place outside Brazilian borders, but may have had direct or indirect effects in Brazil (even if potential).

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

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The investigation is initiated by CADE's General Superintendence ex officio or upon a complaint being filed by any interested party.

Following the initiation of the administrative process, all defendants shall be served. The defendants shall provide their defences within 30 days. The 30-day deadline starts from the date that the last defendant is served. This deadline will be doubled (60 days) if there is more than one defendant represented by different attorneys. The defence deadline may also be extended for 10 days at the defendant's request at CADE's discretion. After the filing of the preliminary defences and within 30 working days (this deadline is to be considered as a reference), the General Superintendent will determine the evidence to be submitted, which may include the hearing of witnesses, requesting of additional information from the defendants, companies, associations or other entities, economic studies, etc.

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

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

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

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

9 Investigative powers of the authorities

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

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

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

The General Superintendence can also request oral explanations from any individual or legal entity, whether private or public.

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

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

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

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

CADE's General Superintendence does not have the power to perform or request wiretapping or email monitoring. This is only possible in criminal investigations through specific court authorisation.

International cooperation

10 Inter-agency cooperation

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

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

11 Interplay between jurisdictions

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 more interplay with US and EU authorities, which resulted in a series of cartel investigations in Brazil following investigations started by US and European authorities.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

A cartel proceeding is adjudicated by the CADE's Tribunal. As explained above (see question 8), the General Superintendence is responsible for the prosecution and investigation of antitrust violations and CADE's Tribunal is responsible for adjudicating the cases initiated by the General Superintendence, casting the final decision.

In CADE's Tribunal the antitrust violations cases like cartels will be adjudicated in a public adjudication session by CADE's Tribunal full court. The defendant has 15 minutes to orally provide the defence arguments before the Reporting Commissioner reads the vote. The decisions are taken by a majority of votes (CADE's Tribunal is composed of one president and six commissioners).

13 Burden of proof

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

CADE's General Superintendence that has the burden of proof to sustain the charge against the defendants. Such proofs can be collected by CADE ex officio and also through a leniency agreement or settlement agreements executed between the authority and individuals or companies involved in the antitrust violation.

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14 Appeal process

What is the appeal process?

CADE's Tribunal decision can be challenged only before the federal courts. The scope of the appeal is broad and may regard the due process, the merit of the case, as well as the balance of the penalties. It is important to clarify that lawsuits in Brazil are not expeditious, usually lasting between five to 10 years or more. It is also important to mention that to challenge CADE's adverse decision it is necessary to deposit in a court's bank account the full amount of the fine imposed by the Tribunal.

Sanctions

15 Criminal sanctions

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

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

The administrative prosecution of cartels (performed by CADE) has been more effective than criminal prosecutions (performed by criminal public prosecutors) in the past years. However, the criminal prosecution of cartels has been increasing lately. In light of this, CADE has recently signed a memorandum of understanding with the specialist Cartel Fighting Division of the Federal Public Prosecutor Bureau in São Paulo in order to increase the cooperation between the administrative and criminal prosecution of cartels.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

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

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

In addition to the penalties mentioned above, pursuant to article 38 of the Antitrust Act, other penalties may also be cumulatively imposed (together with the fines) by CADE, such as: (i) the requirement to publish the adverse decision in a newspaper of wide circulation; (ii) a prohibition on contracting with public financial institutions and of participating in biddings held by public bodies for no less than five years; (iii) a split-up of the company or a divestiture of certain assets; (iv) the recommendation to the relevant public bodies to grant compulsory licence of intellectual property rights when the offence is related to the use of these rights; (v) the recommendation to the relevant public bodies not to grant the payment of federal taxes in instalments or to cancel, in whole or in part, tax incentives or public subsidies; (vi) the prohibition on performing commercial activities on their own behalf or as a corporate representative for a period of five years (for individuals), (vii) the inclusion of the perpetrator in the National Consumers Roll; and (viii) to determine any other act or measure in order to eliminate the harmful effects to the economic order.

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

The complainant seeking damages compensation must prove: (i) the violation of the Antitrust Act; (ii) the damage; and (iii) the causal link between the violation and the damage.

Nonetheless, damages recovery lawsuits motivated by antitrust violations are still uncommon in Brazil. One of the most important difficulties in carrying out civil damages recovery lawsuits is the time frame before a final decision is reached. This may take several years, with more than a decade being not uncommon.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

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

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

There is no specific guideline regarding the interpretation of these criteria and they are assessed on a case-by-case evaluation by the CADE's Tribunal.

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

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

As mentioned above (see question 16), there are other penalties that may also be cumulatively imposed with fines. One of them is the prohibition on contracting with public financial institutions on participating in bids held by public bodies. If this specific ancillary penalty is imposed, it will be valid for no less than five years. Ancillary penalties are applied at CADE Tribunal's discretion. There are some CADE precedents concerning bid rigging in which this was applied.

19 Parallel proceedings

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

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

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

The Brazilian Antitrust Act does not distinguish between 'direct or indirect purchasers'. The Act foresees in general the possibility for a damage recovery lawsuit to be brought by any party affected by the violation.

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Civil damages recovery is calculated by the extension of the damages. There is no possibility of multiplying factor application. Defendants in a damage recovery lawsuit are jointly and severally liable.

21 Class actions

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

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

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

As mentioned previously, the Brazilian Antitrust Act expressly recognises the independence of administrative and civil liability, meaning that a civil damages recovery lawsuit does not depend on a previous adverse CADE decision. The complaint seeking damages compensation before the civil court must prove: (i) the illegal act; (ii) the damage; and (iii) the causal link between the illegal act and the damage.

Cooperating parties

22 Immunity

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

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

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

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

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

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

The effects of the leniency agreement may be extended to other entities of the same economic group and to employees. However, the extension is not automatic and it is mandatory that these other entities and employees also execute the leniency agreement together with the applicant company.

If the leniency agreement is executed only by an individual, its effects will not be extended to the company.

23 Subsequent cooperating parties

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

Full immunity in the leniency programme is granted only to the first applicant. However, the subsequent companies and individuals that did not come first may execute settlement agreements (TCCs) with the authority, qualifying for an administrative fine reduction.

According to the settlement agreement programme, the companies and individuals that are defendants in an administrative proceeding may settle an antitrust investigation if they: (i) confess their misconduct; (ii) fully cooperate with the investigation; and (iii) pay a pecuniary contribution (in case of cartel investigation).

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Regarding the settlement agreement programme, the main advantages for a defendant to execute a TCC are: (i) reduction in the expected fine; (ii) the administrative process will be suspended in relation to the applicant; and (iii) it does not have to support the defence costs. In contrast to the leniency agreement, the TCC does not grant criminal immunity for individuals.

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

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

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

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

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

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

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

25 Approaching the authorities

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

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

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Update and trends

According to publicly available information, within the last four years CADE's Tribunal adjudicated 170 administrative processes with 110 resulting in judgments (64.7 per cent). The total amount in fines imposed was approximately 4.2 billion reais.

Furthermore, regarding the settlement programme, CADE executed 152 TCCs between 2012 and 2015. In the first six months of 2016, CADE received 13 TCC applications: 12 were accepted by the CADE's Tribunal and only one was rejected.

General Superintendence discretion that will have a less incentive after the initiation of the administrative process.

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

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

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

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

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

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

Recently, the amendment of CADE's Internal Rules, dated 31 May 2016, foresees that if a marker for a leniency agreement is not available, the applicants on the waiting list for the leniency agreement's proposal will be given the opportunity to negotiate for a TCC, if they want to, in the same chronological order they arrived for the leniency agreement's proposal.

26 Cooperation

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?

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

In a TCC, the cooperation will influence the amount of discount in the pecuniary contribution. In this sense, the more evidence provided, the greater the discount.

27 Confidentiality

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?

Usually, the leniency agreement will be kept confidential from third parties. To comply with the due process of law and guarantee full rights of defence, all defendants of the administrative process will have access to the agreement and to information and documents related to it.

The level of confidentiality is different in connection with TCCs as the full content of the TCC is published on CADE's website after its ruling. Only its annexes and documents will be kept confidential (including the history of conduct with the detailed description of the conduct) and will be accessed only by the defendants and to the authorities. However, recently, a Superior Court's decision determined the publicity of a TCC and its documents in order to support a damage recovery lawsuit. The appeal of such decision is still pending and the matter remains unsettled.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Only those previously listed.

29 Corporate defendant and employees

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

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

In the TCC this extension will depend on the existence of specific clauses allowing the employees and former employees to adhere to the TCC negotiated by the company.

30 Dealing with the enforcement agency

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

The leniency agreement application can be divided in four phases: (i) secure a marker; (ii) negotiate and submit the content of the history of conduct (with a detailed description of the conduct) and the evidentiary documents to be provided; (iii) execute the leniency agreement; and (iv) the final declaration of compliance of the leniency agreement by CADE's Tribunal with the consequent confirmation of the immunity.

A TCC application can be divided in four phases: (i) secure a marker; (ii) negotiate and submit the content of the history of conduct (with a detailed description of the conduct) and the documents of evidence to be provided; (iii) execution of the TCC and consequent suspension of the investigations regarding the defendants covered by it; and (iv) the final declaration of compliance of the TCC by CADE's Tribunal upon the casting of the final decision.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or anticipated assessments or reviews of the leniency programme or of the settlement programme.

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Defending a case

32 Disclosure

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

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

33 Representing employees

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

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

34 Multiple corporate defendants

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

Although there is no limit or restriction determined by law, we understand that it is not recommended that counsel represent multiple corporations due to possible conflicts of interest.

35 Payment of penalties and legal costs

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

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

36 Taxes

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

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

37 International double jeopardy

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

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

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

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Bulgaria

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation on cartel regulation in Bulgaria is the Law on Protection of Competition (LPC) promulgated in the State Gazette 102/28 November 2008. The cartel regulation is modelled closely to EU competition law. The cartel prohibition contained in the LCP mirrors article 101 of the Treaty on the Functioning of the EU (TFEU), excluding the effect on interstate trade criterion. An English-language version of the LCP is available on the website of the Bulgarian Competition Authority.

2 Relevant institutions

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 Bulgarian Competition Authority – the Commission for the Protection of Competition (CPC). The CPC is responsible for cartel investigations and enforcement of cartel prohibition. The CPC also applies article 101 TFEU in relation to agreements and concerted practices affecting competition in Bulgaria.

The CPC is an independent administrative body and has jurisdiction for the entire territory of Bulgaria. The seven-strong CPC membership is elected by the Bulgarian National Assembly. The CPC administration consists of five departments; three of which handle competition law enforcement (Antitrust and Concentrations, Competition Law and Polices, 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 Supreme Administrative Court.

3 Changes

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

Although in 2015 there have been amendments to the LPC to introduce a new chapter to the LPC on Prohibition of Abuse of a Superior Bargaining Position, there are no recent changes or proposals for amendments to the legal regime applicable to cartels.

For implementation of Directive 2014/104/EU on antitrust damages actions (Private Damages Directive), a bill for amendment to the LPC has been recently submitted to the National Assembly. It is expected to be voted by December 2016 and to provide substantive and procedural rules for claims for damages arising from infringements of competition law, including cartels, which are currently not present in the legislative framework.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 15 of the LPC mirrors article 101 of the TFEU. The LPC prohibits agreements (horizontal or vertical) as well as concerted practices between undertakings, decisions of associations of undertakings, aimed at or with an intended result of preventing, restricting or distorting the competition on the relevant market. The law provides a non-exhaustive list of prohibited agreements, such as: (i) direct or indirect fixing of prices or other trading conditions; (ii) sharing of markets or sources of supply; (iii) limiting or controlling the production, trade, technical development or investment; (iv) applying dissimilar conditions for same type of contracts to certain partners, whereas they are placed in competitive disadvantage; (v) 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.

LPC further defines cartels as agreements or concerted practices between undertakings – competitors on the relevant market, aimed at restricting competition by way of price fixing or other pricing conditions regarding the purchase or sale, allocation of production or sales quotas or markets, including bid rigging.

The LPC provides an exemption for restrictive agreements, decisions and concerted practices that have an insignificant effect on competition (de minimis – article 16 of the LPC). A de minimis effect on competition is determined based on the market shares of the parties to the agreement. However, the de minimis exemption does not apply to the cartels as defined by LPC.

Although rarely possible, the parties may demonstrate significant positive effects under article 17 of the LPC, similarly to article 101(3). If successful, the cartels in question would not fall within the prohibited agreements under article 15. Any prohibited agreements or concerted practices, including cartels, are null and void.

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

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

The framework on cartels under the LPC does not provide for exceptions or industry-specific infringements and applies across all economic sectors. There is no exception for government-sanctioned activity or regulated conduct.

At present, there are several block exemptions under article 18 of the LPC, including sector–specific, introduced by way of CPC Decision No. 55 of 20 January 2011 concerning:

- vertical agreements within the meaning of the Regulation (EC) No. 330/2010;

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- vertical agreements within the meaning of the Regulation No. 1400/2002 and the Regulation No. 461/2010 in the sphere of motor vehicles;
- agreements within the meaning of the Regulation (EC) No. 1218/2010 for the specialisation agreements;
- agreements within the meaning of the Regulation (EC) No. 1217/2010 for the research and development (R&D) agreements;
- agreements within the meaning of the Regulation (EC) No. 1267/2010 for some agreements in the insurance sphere; and
- agreements within the meaning of the Regulation (EC) No. 772/2004 (replaced by Commission Regulation (EU) No. 316/2014) for some agreements for transfer of technologies.

6 Application of the law

Does the law apply to individuals or corporations or both?

The LCP applies to all undertakings performing economic activity irrespective of their legal and organisational form. These could be corporations, partnerships, associations and professional organisations, individuals performing economic activity as sole traders, and so on. The LPC also applies to individuals who have assisted in a breach under the LCP, including cartels.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

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

According to article 3(1) of Regulation 1/2003, the CPC has the authority to apply (and usually does so) article 101 TFEU in parallel with national anti-cartel provisions if the agreement or concerted practice may affect the trade between EU member states.

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

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

A cartel investigation procedure is opened by the 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 a EU member state; or
- a request by the European Commission (EC).

Most often the CPC takes the decision to open a cartel investigation based on results of sector inquiries conducted by the Commission or on the written request by affected persons. We also see contracting authorities conducting tender procedures to notify the CPC about suspected bid rigging. Although the CPC adopted and announced the leniency programme, currently no leniency applications have been submitted.

The investigation procedure is opened by a ruling of the Chairperson of the CPC, whereby a working group (case handlers) and a supervising member from the CPC members are appointed.

The working group compiles information and sends questionnaires for information such as market and financial data relevant for the investigation of the undertaking in question. Addressees are given approximately one month to provide the requested information. The CPC does not disclose the exact behaviour it is investigating, but has to inform on the legal grounds for 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, which is publicly available on the CPC website (without the confidential information).

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 site-inspections (dawn raids). In certain complex cases, the CPC may appoint external experts to cover technical, financial or sector-specific questions. The cartel investigation is not limited in time. In practice, it may take between six months and two years.

Once the working group has collected sufficient evidence, a detailed report is presented by the supervising member to the CPC in a closed session. Based on the report, the CPC shall issue:

- a decision of lack of violation and shall close the case;
- a ruling to return the case to the working group for additional investigation with mandatory instructions; and
- a ruling for serving a statement of objection to the defendant, where CPC arguments for the committed infringement are presented.

Each party to the case (defendant, claimant, affected third parties) will then have at least 30 days to make a written submission on the CPC's findings in the statement of objections and to present evidence. Parties are not given access to the report of the working group; however, at this stage, they will have access to the non-confidential file of the working group.

Since the cartels as defined by LPC are considered a material infringement of the competition, the CPC is not allowed to approve commitments by the alleged infringers in case of other types of prohibited restrictive agreements.

After the 30-day period, an open session of the CPC is scheduled, which cannot be earlier than 14 days. At the open session the parties present their positions and questions to clarify certain facts and circumstances that could be asked by the CPC members. The CPC may accept statements from other persons as well.

After the open session hearing, in a closed session, the CPC shall, after consideration of all statements, arguments and objections, issue:

- a final decision establishing (i) violation under LPC and imposing sanctions, or (ii) that no infringement has been committed by defendant/s, or (iii) that there are no grounds for taking actions against defendant/s for infringing article 101 of the TFEU;
- a ruling for serving a new statement of objections to the defendant/s; or
- a ruling for returning the case to the working group for additional investigation.

A non-confidential version of the CPC decision is published on the CPC website.

9 Investigative powers of the authorities

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

The Bulgarian Competition Authority has a wide range of investigative powers. During an investigation the CPC case handlers are authorised to request information and evidence from the defendant(s), any third party, state authority or other competition authorities of the EU and member states that might have information relevant to the investigation. Requested parties should cooperate and provide all data in their possession, even if the information contains trade secrets. The CPC is obliged to protect any confidential information and not disclose it to other parties. The CPC may fine any person who, without reasonable grounds, fails to comply with a formal information request.

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

For carrying out a dawn raid at the premises of the investigated undertakings, the CPC shall obtain an explicit authorisation from the

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Administrative Court in Sofia, based on which, it may enter all business premises used by the investigated undertakings irrespective of their location and means (offices, motor vehicles, etc). However, under Bulgarian law, private homes cannot be inspected by the CPC.

The CPC case handlers and other specified persons (such as IT experts) are authorised to:

- enter and search premises. During the unannounced inspections, the CPC case handlers are usually assisted by the police for entering the premises;
- take possession of relevant documents (in copy or original documents), or take necessary steps to preserve or prevent interference with such documents;
- require any person to provide an explanation to documents or information, to the best of his or her knowledge and belief, where it may be found; and
- require any relevant information that is stored electronically and is accessible from the premises to be produced in a form that is legible and in which it can be taken away; and
- access servers accessible by computers and other means, located in the premises and take forensic images of any digitally stored information.

Bulgarian law recognises the attorney-client privilege in communications by undertakings with their external legal advisors. However, in-house legal counsel's advice does not enjoy legal privilege and could 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 any other document or evidence that raises a well-founded suspicion of other antitrust infringement under Bulgarian or EU laws.

International cooperation

10 Inter-agency cooperation

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

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

The Bulgarian Competition Authority is also involved in bilateral cooperation with competition authorities, outside of the European Competition Network, such as the Federal Antimonopoly Services of Russia, competition agencies of Albania, Azerbaijan, Bosnia and Herzegovina, Croatia, Macedonia, Serbia, Turkey and Ukraine.

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

The CPC cooperates with the EC and other EU member states' national competition authorities, by receiving and rendering assistance and exchanging information under the procedure set forth in Regulation (EC) No. 1/2003. Based on this, the CPC may forward information obtained during the course of its cartel investigations to the EC and EU member states' competition authorities. This is an exception to the general rule that states confidential information collected by the CPC during the investigations shall not be disclosed and should only be used for the purposes of the LPC. The law requires that the recipient competition authority of confidential data should guarantee the same level of confidentiality for the obtained information as the one ensured by the national competition authority of the member state that has forwarded this information.

The CPC is also a party to inter-institutions' cooperation agreements, for example, with the Ministry of Interior, the Bulgarian National Audit Office, the National Revenue Agency, the Public Procurement Agency, etc, based on how the competition authority uses information and recourses for its enforcement activity. For example, the police assists the Commission during dawn raids, the Public Procurement Agency notifies for potential bid rigging in public procurements, the National Revenue Agency provides market and financial data needed during the course of cartel investigation, etc.

11 Interplay between jurisdictions

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 Bulgarian Competition Authority'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 European Commission of any formal investigative measures under article 101 of the TFEU. Before a decision is adopted, including on a cartel case, the CPC is required to provide the EC with a summary of the case and a draft decision.

The CPC also informs national competition authorities of the member states on any of its cases with a cross-border effect and reviews information about the cases initiated by national competition authorities of member states to check whether they may affect competition on the Bulgarian market, so that cases may be reallocated within ECN members. So far, no cases have been reallocated from or to other national competition authorities.

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

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The CPC is the only authority that investigates and adjudicates cartel matters in Bulgaria. As mentioned above, the CPC opens the proceedings for investigation of cartel on the legal grounds provided for in the LPC, including on own initiative of the CPC (see question 7).

Pursuant to the LPC, cartel investigation is carried out by case handlers – experts (lawyers and economists) nominated by the Chairperson of the Commission, supervised by the member of the CPC. Members of the CPC, based on the results of the conducted investigation, make decisions on the case.

13 Burden of proof

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

As a main rule, the burden of proof lies with the competition authority. However, if an undertaking refers to an individual exemption under articles 17 of the LPC or article 101(3) TFEU, the undertaking must prove that the requirements laid down in those provisions are fulfilled.

14 Appeal process

What is the appeal process?

The CPC decisions are subject to appeal before the Supreme Administrative Court (SAC) according to the provisions of the Administrative Procedure Code.

Parties under cartel investigation are entitled to submit appeals against the CPC decision within 14 days as of receipt of notification for the CPC decision. Any interested third party is also entitled to appeal the decision within 14 days from its publication on the CPC website.

The appeal should be submitted through the CPC. The entire CPC file is provided to the SAC. The evidence and information marked as confidential are kept in separate files to which only the judges have access. The appellant(s), the CPC and all interested parties may submit written statements on the appeal and are summoned to take part in oral hearing(s) before the Court. The Court may appoint external experts on specific technical or financial issues. Usually, the appeal procedure can take between three months and two years.

The SAC judgment is subject to cassation before the SAC sitting in a panel of five judges. The SAC's five-panel judgment is final and binding. The cassation usually takes about six months.

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Sanctions

15 Criminal sanctions

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

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

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Civil sanctions

According to article 15 para 2 of the 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.

Administrative sanctions

Under the LPC, for cartel activity the 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 on setting fines (see question 17).

Recent CPC decisions on cartel cases show that the CPC is inclined to impose sanctions towards the maximum amount provided in the law. For example, in 2012 the CPC imposed the highest fine for a 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 supply of air tickets. One of participant was sanctioned with the highest fine ever imposed by the CPC on a particular undertaking for horizontal cooperation – 2,818,800 leva. However, in 2016 the Supreme Administrative Court repealed this decision.

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 which 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 per cent to 1 per cent) on undertakings for non-cooperation (non-provision of requested information) during the investigations. The Supreme Administrative 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 in order 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 commitment of cartel could be fined by the CPC with a fine in amount between 500 leva to 50,000 leva. Individuals who failed to cooperate and assist the CPC during the investigation are fined between 500 leva to 25,000 leva.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

In 2009, the CPC adopted a methodology for calculating fines under the LPC. Since then, the methodology has been updated several times; most recently in 2015.

With regard to sanctions for cartel activity, fines are set by using a two-step approach – the basic amount of the sanction, which thereafter, is adjusted based on aggravating or mitigating circumstances. The basic amount is based on the value of sales of products affected by the cartel, depending on the gravity and duration of the infringement. According to the methodology, cartels are considered a serious infringement and therefore the basic amount is up 10 per cent of the value of sales of the affected products. The basic amount may then be increased or reduced by 10 per cent for each aggravating or mitigating 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.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Under the Bulgarian Public Procurement Act, in force as of 15 April 2016, infringement of cartel prohibitions (whether under Bulgarian, other national competition law or article 101 TFEU) may lead to the exclusion of an undertaking from public procurement procedure for a period of three years following the decision establishing the infringement. However, such a decision does not automatically lead to exclusion from procurement. It is necessary that the contracting authority has included such selection criteria in the tender. In case the undertaking provides with sufficient evidence that all damages arising from the unlawful behaviour have been compensated, the contracting authority may allow such undertaking to participate in the tender process.

19 Parallel proceedings

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

Pursuant to Bulgarian law, cartel activity does not qualify as a crime and only the administrative sanctions could be pursued in addition to the invalidity of the agreement stemming from the provision in the law.

Private rights of action

20 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private damages claims are available to all natural persons and legal entities who have suffered damages even where the infringement has not been directed against them. However, due to insufficient regulation, there have only been a limited number of private claims cases; none of them related to cartel infringements. However, at the date of this report, a bill for amendments to the LPC implementing the Private Damages Directive in the national law has been submitted to parliament. It is expected the bill will be adopted by the end of 2016 or early 2017.

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21 Class actions

Are class actions possible? If yes, 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 been rarely 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

22 Immunity

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

The LPC sets out the legal basis for granting full or partial immunity to an undertaking which 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 CPC in 2011.

There are two alternative options for granting a full leniency to a participant in a secret cartel. The undertaking may benefit from full immunity if before any other participant the undertaking submit evidence which is a sufficient ground for the CPC to ask for court authorisation 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 proceed with such a request.

If the conditions for the above first option are not present, the cartel participant may still apply for full leniency provided that it presents ahead of any other participant in the cartel sufficient evidence that allows the CPC to prove the cartel infringement. In this case, the CPC should not have granted conditional immunity to another undertaking at the time of the immunity application and should not have had at its disposal sufficient evidence for adoption of a decision for cartel infringement.

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 conduct 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.

23 Subsequent cooperating parties

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

The CPC may grant partial leniency (fine reduction) where it has already started a cartel investigation. The undertaking is eligible for such reduction if (i) at its own initiative and voluntarily, prior to the completion of the proceeding (statement of objections) it provides evidence that is of material importance for proving the infringement and (ii) complies with the conditions for granting of full leniency set out in the Rules for Application of the Leniency Programme (see question 26).

24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

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 30 per cent and 50 per cent of the penalty, which would be otherwise 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 the third cooperating party, the fine reduction is between 20 per cent and 30 per cent. For any subsequent applicant – between 10 per cent 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. 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'). In case the undertaking provides information for disclosing the existence of more cartels, the CPC may reduce the fine imposed for the participation in the first cartel by up to 10 per cent for any subsequent cartel, but by no more than 30 per cent universally.

25 Approaching the authorities

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, since only the first cooperating party is eligible to 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.

It should be noted that in the case of a cartel that may affect trade between EU member states, the undertaking should also consider making simultaneous leniency applications to the EC and the relevant competition authorities of the member states. The leniency application to the EC will not be considered as an application to the CPC or any national competition authority and vice versa.

The leniency programme under the LPC sets out rules for markers applicable to both full and partial leniency applicants. At a 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 possesses enough data and evidence to present with the application. The grace period could be extended at the CPC's discretion. In the marker application, the undertaking should provide as a 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).

26 Cooperation

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?

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 up to the adoption of the decision by the CPC. The leniency applicant shall provide at its own initiative or at the CPC request all information and evidence which are at his disposal. In particular, the applicants should provide the authority with all non-legally privileged information, documents and evidence available regarding the existence and activity of the reported cartel and, where appropriate, making its current employees and managers and members of the management board of the undertaking (and as far as possible its former employees and managers) available for hearing or witness statements. The applicant should not destroy, conceal or fabricate any information. It shall not disclose in any way either the fact of the intention to participate in the leniency programme, nor its content prior to, or after the application, except to other authorities. The applicant should comply with 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.

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27 Confidentiality

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?

Up to the present time there have been no immunity applications and many of the particularities of the implementation of the leniency have not been developed in detail within the leniency programme.

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

The applicant should also keep confidential its intention to participate in the leniency programme, as well as the content of its application after its submission to the CPC. The leniency programme and the rules for application do not provide explicit terms until the confidentiality is kept.

Access to the CPC file containing non-confidential information is given to the parties after the CPC has served a statement of objections to the alleged infringing parties or after the issuance of a decision for lack of infringement. Therefore, any documents marked as confidential are not accessible to the other parties.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Besides the leniency, which is settled at an earlier stage of a cartel investigation, there are no other options regarding settlement procedures prior to the adoption of the CPC decision for relief or reduction of the penalty.

29 Corporate defendant and employees

When immunity or 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. Individuals are not eligible to apply for immunity or reduction of fine under the leniency programme. Irrespective of the fact that an undertaking has been granted a full or partial leniency, the individuals who have assisted cartel activities remain subject to penalties (fines).

30 Dealing with the enforcement agency

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

Undertakings wishing to take advantage of the leniency programme should contact the CPC and apply for leniency. The application has to be signed by a person who represents the applicant and should be submitted in the format adopted by the CPC. The application should contain information regarding the participants and detailed information about the cartel activity affected products and/or services, affected territories, nature of the infringement (price fixing, client and market allocation), duration of the cartel and a description of the way it functions (including telephone calls and emails). The undertaking shall supplement its application with relevant evidence. Leniency applications could be submitted orally too (through the CPC contact persons).

It should be noted that leniency applications submitted to other competition authorities or the EC are not recognised by the Bulgarian Competition Authority as leniency applications submitted to the CPC. If the EC is the best placed authority to investigate a particular cartel activity, immunity applicants may submit applications to the Bulgarian CPC in short-form.

It is possible prior to the submission of a leniency application, the undertaking (usually through its lawyers) may try to obtain on a no-name basis an informal guidance by the CPC regarding the application, the content of the leniency programme and information about its eligibility to benefit from the Programme.

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

Update and trends

New members of the CPC were appointed in July 2016. The new CPC declared its intention to focus, and be more effective against, suspected cartels in the fuel sector, retail food chain and pharmaceuticals. It could be expected that the CPC will tend to carry out more on-site and unannounced inspections (dawn raids) and to open more cases for cartel investigation.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

The present leniency programme was adopted in 2011. It replaced the former leniency programme from 2009. To the best of our knowledge there are no ongoing or anticipated assessments or reviews of the current leniency programme. At this moment in time, none of the leniency programmes adopted by the CPC have been applied in practice.

Defending a case

32 Disclosure

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

During the investigation, the defendant is only provided with general information about the legal grounds for the investigation and the investigated undertakings. Where the investigation is opened on the grounds of a claim from another undertaking, the defendant is only aware of the claim, the claimant and names of the investigated undertakings.

No specifics on the alleged infringement or documents are given to the defendant until the CPC serves the statement of objections (SO) or issues a decision for lack of competition infringement. In both cases, the defendant would not be provided with access to information that is presented as confidential, nor to the internal documents of the CPC, including correspondence with the EC or with the national competition authorities of other EU member states. Whenever the CPC considers that certain information is not confidential, it shall issue a ruling that certain information could not qualify as confidential as per the criteria of the CPC and such information would be accessible by the parties to the CPC investigation.

In case of SO, the defendants would be given access to the CPC file (without access to the documents identified as confidential) only after the SO has been served. Defendants would not be provided with access to documents presented as confidential, even during the appeal proceedings before the Supreme Administrative Court. In its case law, the Court takes the view that parties' interests are not affected from the limited access to documents collected by the CPC since the Court has unlimited access to the entire file.

33 Representing employees

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

The LPC does not regulate this issue. Under the Bulgarian Bar Act, members of the Bar may not represent interests of two or more parties if the interests of those parties conflict. Therefore, the counsel may represent both the corporation and the employee if their interests are not conflicting. However, if conflict of interests arises, the counsel should withdraw as counsel for one of the parties.

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34 Multiple corporate defendants

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

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

35 Payment of penalties and legal costs

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 execute payments of fines imposed on its employees and legal costs.

36 Taxes

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

37 International double jeopardy

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 Bulgarian CPC would not take into account penalties imposed in other jurisdictions.

So far, there are no precedents in Bulgaria for private damages cases resulting from cartels.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

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

Under Bulgarian law, the optimal way to get the fine down for cartel activity is by the submission of a leniency application and termination of an infringement. It should be noted that under the CPC methodology for the calculation of fines, termination of infringement immediately after the beginning of the investigation is not considered as a mitigating circumstance in case of cartel activity. The mitigating circumstances in cartel cases affecting the level of fine are:

- the overall passive behaviour of the undertaking in a cartel activity;
- limited role in the infringement or adopting the strategy of 'follow the leader';
- full cooperation with the competition authority during the investigation;
- undertaking due measures for remedying the unfavourable consequences of the infringement; and
- others, depending on the specific case.

Since the 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.

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Canada

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Canada has one statute governing all aspects of competition law: the federal Competition Act (the Act). This statute is applicable throughout the country; there is no provincial or territorial competition legislation in Canada.

2 Relevant institutions

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

The Act is administered and enforced by the Commissioner of Competition (the commissioner) who serves as the head of the Competition Bureau (the Bureau), a unit of Industry Canada. The commissioner is responsible for investigating alleged breaches of the criminal provisions of the Act. The Cartels Directorate in the Bureau, consisting of the senior deputy commissioner, a deputy commissioner, two assistant deputy commissioners and approximately 40 officers, investigates all matters relating to cartels, conspiracies and bid rigging.

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

In practical terms, cartel prosecutions are initiated only upon the commissioner's recommendation to the DPP. Similarly, negotiated resolutions under the Bureau's immunity and leniency programmes (see question 25) are initially handled by the Bureau but ultimately concluded by the PPSC, with the Bureau's input.

3 Changes

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

In March 2010 the former 'partial rule of reason' approach to criminal conspiracies in section 45 was replaced with a per se criminal offence to address hard-core cartel conduct. A civil 'reviewable practice' was added in section 90.1 to address other anticompetitive agreements between competitors. The amendments also raised the maximum penalties for cartels to a fine of C$25 million per count charged and/or up to 14 years in prison for the new conspiracy offence. The bid-rigging provision under section 47, which was also amended to include agreements to withdraw a previously submitted bid, carries the same imprisonment penalty and/or a fine at the discretion of the court.

In December 2009, the Bureau issued guidelines setting out its policy on competitor-collaboration agreements. These guidelines are discussed further below at question 31. It also issued revisions to its immunity and leniency policies, which are discussed further below at questions 21 to 25. In September 2013, the Bureau amended the 'FAQ' bulletins under its immunity and leniency programmes.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Section 45 of the Act forms the core of Canadian cartel law. It provides that any person who, with a competitor in respect of a particular product, conspires, agrees or arranges any of the following is guilty of an indictable offence:

- fixing, maintaining, increasing or controlling the price for the supply of the product;
- allocating sales, territories, customers or markets for the production or supply of the product; or
- fixing, maintaining, controlling, preventing, lessening or eliminating the production or supply of the product.

As a result, price fixing, market allocation and output restriction conspiracies are now illegal per se in Canada. Previously, the Act prohibited only conspiracies that had serious or 'undue' competitive effects, as determined under a 'partial rule of reason' analysis. Notably, there is no statute of limitations for the conspiracy or bid-rigging offences. Thus the former provision remains applicable to conduct occurring prior to March 2010.

As with most criminal offences, a conviction under the Act requires the prosecution to prove beyond a reasonable doubt both the actus reus and the mens rea of the offence. The actus reus is established by demonstrating that the accused was a party to a conspiracy, agreement or arrangement with a competitor to fix prices, allocate markets or customers, or lessen supply of a product in the manner described above. To establish the mens rea of the offence, the prosecution must demonstrate that the accused intended to enter into the agreement and had knowledge of its terms.

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

While section 45 investigations have traditionally focused on price fixing and market allocation, the section is broadly worded. The new law specifically addresses agreements involving competitors in the supply of goods and services that have elements related to pricing, customer or market allocations, or output restrictions. Despite some older reform proposals to the contrary, it does not address group boycotts. Potentially, it could catch other forms of cooperation among competitors, including behaviour such as joint ventures and strategic alliances. However, the Bureau has indicated in its guidelines on competitor collaborations that the conspiracy offence will be reserved for the most egregious 'naked restraints'. Commercial activities such as joint ventures and strategic alliances will, instead, be assessed under the new reviewable practice provision in section 90.1. However, these guidelines are not determinative regarding the avoilability of private damages actions (see question 20).

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Application of the law and jurisdictional reach

5 Industry-specific provisions

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

The Act creates two industry-specific offences, one for professional sports and the other for financial institutions. With respect to professional sports, the Act prohibits conspiracies to unreasonably limit the opportunities for any person to participate in a professional sport or to negotiate with the team or club of his or her choice in a professional league. Conspiracies among federal financial institutions are also per se illegal – no lessening of competition needs to be proven. Any agreement among such institutions with respect to interest rates, service charges, or the amount and conditions of loans is an offence. However, there are exceptions for the sharing of credit information and other matters.

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

The Act now recognises the common law 'regulated conduct' defence under subsection 45(7). The new subsection provides that the rules and principles of the common law that render a requirement or authorisation by or under another act of parliament or provincial legislature a defence to prosecution under subsection 45(1) continue to apply.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Act applies to both individuals and corporations. Charges are often laid against both a corporation and individuals such as its senior managers, officers or directors. On conviction, a person is subject to a fine of up to C$25 million or up to 14 years' imprisonment per count, or both. Senior Bureau officials have noted in speeches that the Bureau will look for appropriate cases in which to prosecute individuals and recommend that the PPSC seek jail terms. The Bureau and PPSC have charged numerous individuals (39 as of September 2013) in an inquiry into retail gasoline prices in Quebec. Similarly, in an inquiry into chocolate confectionery, three senior officers were charged in parallel with charges against several companies, although the proceedings have subsequently been stayed against all parties. In the past 10 years more than 100 individuals have been prosecuted.

The Superior Court of Quebec decision in the matter of *R v Pétroles Global Inc* is the first ruling in Canada regarding an organisation's criminal liability pursuant to section 22.2 of the Criminal Code; the appeal before the Quebec Court of Appeal has been abandoned. 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.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside 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.*

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. Some uncertainty remains regarding the jurisdiction of Canadian courts over such conduct.

The commissioner has demonstrated a willingness to adopt an expansive interpretation of *Libman*. The Bureau's position is that a foreign cartel which affects Canadian customers triggers substantive jurisdiction. Bureau guidelines and document production orders in various cases confirm the Bureau's interest in claiming jurisdiction over indirect (as well as direct) sales into Canada. Foreign producers of fax paper, sorbates, bulk vitamins, automotive parts and numerous other products have pleaded guilty to violations under the former section 45 for price-fixing and market-allocation agreements that occurred wholly outside Canada but affected Canadian markets, prices and customers.

Personal jurisdiction

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

The case of foreign corporations with no Canadian presence or assets in Canada is more complex. Where the accused is a corporation, notice (in the form of a summons to appear on indictment) must be served on the corporation pursuant to the Criminal Code by delivering it to 'the manager, secretary or other executive officer of the corporation or of a branch thereof' within the territory of Canada. Service upon the Canadian 'affiliate' of a foreign corporation is unlikely to be sufficient, given that an affiliate is a separate legal person and service outside of Canada on a foreign corporation is not specifically authorised. However, a corporation that does not have a branch in Canada may still be properly served if one of its executive officers is present in Canada to carry on the business of the corporation. If there is a Canadian affiliate of a foreign corporate conspirator, a prosecution may also be instituted against the local subsidiary under section 46 of the Act in respect of local implementation of the conspiracy, regardless of whether charges under section 45 are pursued against the foreign parent.

Extradition

Persons located in the US can be extradited to Canada pursuant to the Canada–US Extradition Treaty, which permits each state to request from the other extradition of individuals who are charged with, or have been convicted of, offences within the jurisdiction of the requesting state. 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 in Canada. Extradition to Canada from the UK, or any other country that criminalises cartel activity and with which Canada has an extradition treaty, is also possible.

The procedure for extradition requires the Canadian government to make a formal request for extradition under the applicable treaty. The request documentation would have to include an arrest warrant. This procedure has been used for offences under the Act at least twice. In *Thomas Liquidation* – a misleading advertising case – the US authorities accepted a Canadian government request for extradition and issued a warrant for the arrest of an officer of the accused corporation who was individually charged under the Act. In a more recent case three Canadians who operated a deceptive telemarketing scheme based in Toronto, which purported to offer credit cards to Americans for a fee but never delivered the cards, were extradited to the US and were sentenced by the US Federal Court in the Southern District of Illinois. This was the first time a Competition Bureau investigation resulted in extradition.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The Bureau routinely commences informal investigations in response to complaints by marketplace participants, its own strategic analysis of

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public information, or the evidence of informants. If such an investigation leads the commissioner to believe, on reasonable grounds, that a criminal offence has been committed, the commissioner will launch a formal inquiry under section 10 of the Act. In addition, the commissioner is required to commence an inquiry in response to a directive from the Minister of Innovation, Science and Economic Development (the minister) or by an application under oath by six residents of Canada. Commencement of an inquiry empowers the commissioner to exercise formal powers, such as obtaining judicial orders to compel the production of evidence, search warrants and wiretap orders (see question 9).

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

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

As described further at question 2, where a matter is referred to the DPP, it will make an independent decision whether to lay charges and pursue a prosecution. In May 2010 the Bureau and the DPP issued a memorandum of understanding clarifying their respective roles in this process.

9 Investigative powers of the authorities

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 court order under section 15 of the Act. Under that section, the commissioner must establish that there are reasonable grounds to believe that a criminal offence has been committed and that relevant evidence is located on the premises to be searched. Preventing access to premises or otherwise obstructing the execution of a search warrant is a criminal offence and the commissioner may enlist the support of the police if access is denied.

The Act expressly provides for access to and the search and seizure of computer records, including applications to the court to set the terms and conditions of the operation of a computer system. Bureau investigators have downloaded data stored outside Canada in the course of searches of computer systems located in Canada, although there continues to be some controversy as to the precise limits of the authority granted by a warrant authorising a search of computer systems in a cross-border context.

Documents that are subject to solicitor–client privilege cannot be immediately seized by officers under a search warrant. The Act contains a special procedure for sealing such documents and for determining the validity of privilege claims within a limited time. The Act also contains a provision requiring the commissioner to report to the court to retain seized documents. Because the affected company or individual can ultimately request a retention or privilege hearing, and because evidence procured through an illegal search can be excluded at trial, the courts have ruled that search warrant orders cannot be appealed. However, such an order can be set aside in special circumstances such as a material non-disclosure or misrepresentation in the affidavit (known as an 'information to obtain') supporting the commissioner's ex parte application, or where the inquiry giving rise to the order has ended without the laying of criminal charges.

Wiretaps

The commissioner has the power to intercept private communications without consent through electronic means – in other words, to use a wiretap. This power is restricted to conspiracy, bid rigging and serious deceptive marketing investigations, and requires prior judicial authorisation. The first use of wiretaps as an investigative tool led to the laying of criminal charges under the deceptive tele-marketing provisions of the Act, an area that has been the subject of vigorous enforcement activity on the part of the Bureau. Subsequently, extensive wiretap evidence has been used in the investigation and prosecution of retail gasoline price-fixing conspiracies in Quebec and Ontario, in which the Bureau recorded 'thousands' of telephone conversations using its wiretap powers.

Subpoenas

As an alternative (or in addition) to executing a search warrant, the commissioner may apply to a court pursuant to section 11 of the Act to require the production of documents and other records and/or compel a corporation to prepare written returns of information under oath, within a certain period of time. On a section 11 application, the commissioner need only satisfy the court that an inquiry has been initiated and that a person is likely to have relevant documents in his possession or control. Such subpoenas may be issued against targets of an investigation as well as other third parties who may have relevant information.

Under subsection 11(2), a Canadian corporation that is an affiliate of a foreign corporation may be ordered to produce records held by its foreign affiliate. The precise scope of this 'long-arm' authority has not been judicially determined, but it continues to be invoked in document production orders sought by the Bureau. The section 11(2) power was the subject of constitutional challenge by Toshiba in the *CRT* investigation and by Royal Bank of Scotland in the *Libor* investigation. In both cases, the litigation was settled before any final determinations on the provision's validity were made by a court.

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

International cooperation

10 Inter-agency cooperation

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

In international cartel cases, the Bureau will often cooperate closely with other competition agencies, either through formal procedures or informally.

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

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exchange confidential information and meet regularly to discuss case-specific matters.

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

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

11 Interplay between jurisdictions

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

In light of the MLAT and other inter-agency cooperation discussed in question 10, a company defending a cartel investigation that has multi-jurisdictional implications, and particularly one involving the US or the EU, should be highly sensitive to the potential involvement of the Bureau. A coordinated defence strategy is increasingly critical, and the timing of approaches or responses to the authorities in each jurisdiction should be considered carefully. The exposure of key individuals to prosecution in Canada is a factor of particular concern in developing a comprehensive strategy.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel matters are prosecuted as indictable criminal offences. The charges are set out in an indictment and the accused must respond by entering a plea. In practice, many cases are resolved by negotiated plea agreements which are subject to court approval, as discussed further in questions 17 and 28.

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

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

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

13 Burden of proof

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 generally apply, although the Act expressly provides for the admissibility of statistical evidence that might not be admitted in some other criminal cases. The Act also provides that a court may infer the existence of a cartel agreement from circumstantial evidence.

14 Appeal process

What is the appeal process?

There is an automatic right of appeal on any ground of appeal that involves a question of law alone, from any conviction under the Act to the provincial court of appeal or the Federal Court of Appeal, as the case may be. Leave of the Court is needed for any ground of appeal 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.

Sanctions

15 Criminal sanctions

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

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

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

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

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Cartel cases are normally prosecuted under the criminal provisions of the Act and are primarily subject to the criminal sanctions of fines and imprisonment discussed in question 14. It is also common for the DPP to seek a prohibition order to prevent future repetition of the offence.

For competitor collaboration cases that do not fall into the traditional hard-core cartel pattern, the section 90.1 reviewable practice provisions permit the Bureau to pursue a prohibition order against the conduct in question. (Fines are not available.) Alternatively, it might be possible for the commissioner to bring an application under the joint abuse of dominance provisions in the non-criminal part of the Act. Such applications would be heard before the Competition Tribunal, an administrative body that considers the evidence on a civil standard of a balance of probabilities. Since 2009, the Competition Tribunal can impose administrative monetary penalties under the abuse of

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dominance provision of the Act of up to C$10 million for a first order and of up to C$15 million for subsequent orders.

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

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

While the federal Criminal Code enumerates a range of binding sentencing principles, they provide considerable latitude and the determination of sentence is ultimately a matter for the discretion of the court. In addition to sentencing principles, the Criminal Code provides the following list of aggravating and mitigating factors to be considered when sentencing organisations (ie, corporations):

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

The Bureau's leniency policy establishes a framework for determining the recommendation that it will make to the DPP regarding the fine to be sought in a particular case. The policy uses an initial starting point of 20 per cent of the volume of commerce affected by the cartel in Canada. Cooperation discounts (up to 50 per cent for the first leniency applicant, up to 30 per cent for subsequent leniency applicants) and any aggravating or mitigating factors are then applied to the 20 per cent base fine. While these criteria and the Bureau recommendations are given significant consideration in the negotiation of guilty plea arrangements, they are not binding on the DPP or on the court when a guilty plea is presented to the court for acceptance. Nor would they bind the DPP when making submissions on an appropriate sentence after obtaining a conviction at trial.

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

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

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

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

Exceptions to the policy may apply in circumstances in which it is necessary to the public interest to enter into business with a supplier that has been convicted. Possible circumstances necessary to the public interest could include:

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

Individual provincial (or indeed municipal) authorities may establish additional 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 in the previous five years from entering into contracts with public bodies or municipalities.

19 Parallel proceedings

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

Once proceedings have been initiated under the criminal provisions in part VI of the Act, proceedings under the various civil reviewable practices provisions cannot be brought on the basis of substantially the same facts. The choice of which track to pursue is a matter of enforcement discretion for the Bureau and the DPP. As noted in question 4, the Bureau has issued guidelines indicating that hard-core cartel conduct will normally be prosecuted criminally and that other types of competitor collaboration will be dealt with under the civil provisions.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Section 36 of the Act grants private parties the right to recover in the ordinary civil courts any losses or damages suffered as a result of a breach of the criminal provisions of the Act, as well as their costs of investigation and litigation. Only single damages are available. The Act expressly provides that a prior conviction for an offence is, in the absence of any evidence to the contrary, proof of liability. However, there are no conditions precedent to a private action under the Act, and the absence of a conviction, or even the refusal of the commissioner to commence an inquiry, does not bar or provide a valid defence to such an action.

Both direct and indirect purchasers may bring private claims in Canada. The passing-on defence is not permitted. The Supreme Court of Canada has held 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.

There is no private right of action in relation to the civil provisions of the Act. However, in some situations private parties may be able to use section 36 to bring a private action in respect of an alleged breach of the conspiracy or bid-rigging provisions even if it involves conduct that the Bureau, as a matter of enforcement discretion, would treat under the civil rather than criminal track.

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21 Class actions

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

Class actions are available, and are now a virtual certainty in multiple provinces in Canada after (and often before) a conviction under the Act in matters where cartel activity may have occurred. A vigorous and effective plaintiffs' bar has evolved in Canada, often acting in conjunction with US plaintiffs' counsel in cross-border cases. Claims are normally brought in provincial courts – most typically in British Columbia, Ontario, and Quebec – rather than the Federal Court. These provincial regimes follow an 'opt-out' model that is generally similar to that seen in the US. However, there is no formal procedure for consolidating parallel actions brought in multiple provinces.

Cooperating parties

22 Immunity

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

The Bureau has created an immunity programme where a company or individual implicated in illegal cartel activities may offer to cooperate with the Bureau and request immunity. The term 'immunity' refers to a grant of full immunity from prosecution by the DPP on recommendation by the Bureau. The first party to come forward where the Bureau is unaware of an offence, or before there is sufficient evidence for a referral to the DPP, is eligible for immunity. The applicant must have terminated its participation in the illegal activities and must not have coerced others to participate in the illegal activities.

The 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 an immunity agreement 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 will also receive immunity provided they offer complete and timely cooperation. Former directors, officers and employees of the company will often also be given immunity in exchange for cooperation, provided they are not currently employed by another member of the cartel that is being investigated.

23 Subsequent cooperating parties

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

The Bureau has created a leniency programme that complements its immunity programme for candidates that are not eligible for a grant of immunity. The Bureau will recommend to the DPP that qualifying applicants be granted recognition for timely and meaningful assistance to the Bureau's investigation. An agreement to plead guilty and cooperate can earn the first leniency applicant (after the immunity applicant) a reduction of 50 per cent of the fine that would otherwise have been recommended by the Bureau to the DPP, as well as a recommendation that the directors, officers or employees of a corporate applicant not be charged.

The second leniency applicant is eligible for a 30 per cent reduction of the fine. Subsequent applicants are also eligible for a reduction of the recommended fine by up to 30 per cent. However, they normally will not benefit from a greater discount than earlier applicants.

All leniency applicants must meet the requirements of the programme, which are similar to those of the immunity programme, including full, frank, timely and truthful cooperation.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

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

Under the Bureau's leniency programme, the second party usually will be able to negotiate a penalty reduction of up to 50 per cent of the fine that would otherwise be recommended, and protection of its employees from prosecution. Other conspirators who seek to resolve their exposure later in the investigation will have progressively less ability to negotiate favourable terms, with regard to both fine levels (where the discount decreases to a maximum of 30 per cent) and the exposure of individuals to potential prosecution.

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

25 Approaching the authorities

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 authorities. However, the available benefits decline for subsequent cooperating parties as noted in question 24. To increase its likelihood of obtaining immunity or leniency, a party should approach the authorities as soon as legal counsel has information indicating that an offence may have been committed.

As noted in question 30, a 'marker' can be obtained that will allow counsel time to complete a full investigation. Once a marker is granted, the applicant has 30 calendar days to provide the Bureau a detailed proffer describing the illegal activity, its effects in Canada and the supporting evidence. If an applicant fails to provide its proffer within 30 days, or within any extended period of time agreed by the Bureau, the marker will automatically lapse. The marker can also lapse if the proffer is incomplete. In situations involving multiple jurisdictions, a party whose business activities have a substantial connection to Canada should consider contacting the Bureau either prior to, or immediately after, approaching foreign competition law authorities.

26 Cooperation

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?

A participant in the Bureau's immunity or leniency programmes must provide 'full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, that in any manner relate to the anticompetitive conduct for which immunity is sought'. Participants must also take all lawful measures to secure the cooperation of current and former directors, officers and employees for the duration of the Bureau's investigation and any ensuing prosecutions, including appearing for interviews and potentially providing testimony in judicial proceedings. All such cooperation efforts are at the cooperating party's own expense.

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27 Confidentiality

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

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

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

In addition, the Bureau will not inform other competition agencies with which it may be cooperating of the identity of an immunity applicant. No other party will receive a commitment of non-disclosure to foreign competition agencies.

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

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Canada has a bifurcated approach to criminal cartel enforcement: the Bureau investigates anticompetitive conduct, and when the Bureau has developed sufficient evidence of a cartel offence it will refer the matter to the DPP with recommendations for prosecution. While the Bureau may make recommendations to the DPP with respect to the severity of any penalty or obligation to be imposed on parties that cooperate in cartel investigations (and those that do not), the DPP retains the ultimate discretion concerning decisions to prosecute, negotiation of plea bargains and sentencing submissions presented in court.

As discussed in question 17, 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. The common law encourages courts to accept 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.

29 Corporate defendant and employees

When immunity or 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 involvement 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 offer to cooperate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis and immunity is not automatic for agents or past employees. Even if a corporation does not qualify for immunity – for example, if it coerced others to participate – past or present directors, officers and employees who come forward with the corporation to cooperate may nonetheless be considered for immunity as if they had approached the Bureau individually.

The Bureau will generally recommend that no charges be brought against current employees of the second cooperating party (the first leniency programme applicant). Former employees are likely to be protected as well, assuming no other contrary factors (eg, subsequently working for another party to the cartel) exist. 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 will only apply to the non-cooperating party. A company's immunity or leniency can be revoked while its cooperating directors, officers, employees and agents retain their protection. Likewise, an individual's immunity can be revoked while the individual's employer retains its immunity or leniency (provided it has discharged its obligation to take all lawful measures to attempt to secure the individual's cooperation).

30 Dealing with the enforcement agency

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 his designate. Very basic information about the industry or product will need to be provided, usually through a hypothetical oral disclosure, to determine whether the Bureau is already investigating the matter. The party may be granted a 'marker' to secure its place in the queue, 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.

Proffer

If the party decides to proceed with the immunity or leniency application, it will need to provide a detailed description of the illegal activity and to disclose sufficient information for the Bureau to determine whether it might qualify for immunity or leniency. This is normally done by way of a privileged proffer by legal counsel that describes the conduct and potential evidence. At this stage the Bureau may request an interview with one or more witnesses, or an opportunity to view certain documents, prior to recommending that the DPP grant immunity or leniency. Recently, the Bureau has also been placing an emphasis on receiving 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 grant the party immunity from prosecution or leniency, as the case may be.

Immunity or leniency agreement

If the DPP accepts the Bureau's recommendation, the DPP will execute an immunity or plea agreement that will include all of the party's continuing obligations.

Full disclosure and cooperation

After the party enters into an immunity or plea agreement with the DPP, it will be required to provide full disclosure and cooperation with the investigation and any ensuing prosecution (see question 26 above).

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31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

After the 2009 legislative amendments, the Bureau issued its competitor-collaboration guidelines in December 2009, an updated immunity bulletin in June 2010, a revised and updated leniency bulletin in September 2010, and revised immunity and leniency FAQ documents in September 2013. A review and updating of the regimes is anticipated in the coming year.

Defending a case

32 Disclosure

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

The DPP is required to produce to the defence all relevant information, whether or not the DPP intends to introduce it into evidence and whether it is inculpatory or exculpatory. The DPP does have discretion to withhold information as to the timing of the disclosure where necessary to protect the identity of an informer or a continuing investigation. The discretion must also be exercised with respect to the relevance of information. This disclosure obligation begins at the outset of the prosecution at the first appearance and will remain until the end of the proceedings. A violation of this constitutional right can lead to an abuse of process action, in which the court can stay the criminal proceedings and acquit the defendant.

33 Representing employees

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

As individual employees and the company can both be charged with an offence under the Act, there is a potential conflict of interest if counsel acts for both the company and any employees that are also targets of an investigation or prosecution. For example, an employee may wish to obtain immunity in exchange for testimony which includes evidence contrary to the interests of the corporation, or the corporation may wish to claim that the employee's actions were not authorised by management. This is less of a concern when employees are not being targeted personally in the investigation and are providing cooperation pursuant to the company's participation in the immunity or leniency programme.

Counsel for a corporation must caution employees that he or she acts for the company alone and, if they believe that their interests may conflict with the company's, they should obtain independent legal advice. Counsel for the company will be free to act for both the corporation and the employee, if they both consent to a waiver of the potential conflict of interest and confidentiality arrangements as between them. However, the Bureau investigators or DPP prosecutor may resist joint representation if there is a risk of divergent interests.

34 Multiple corporate defendants

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 (who are not affiliates) during Bureau investigations and prosecutions, as well as in civil litigation where there are potential cross-claims between co-defendants. However, on occasion, law firms have acted for multiple defendants where the defendants have consented and appropriate confidentiality and conflicts management arrangements have been established between lawyers at the firm engaged in the matters. These arrangements have usually occurred where the parties concerned have been involved in related conspiracies, but the defendants were not in a situation of actual conflict.

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

35 Payment of penalties and legal costs

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

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

36 Taxes

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

Fines and penalties can be categorised as follows:

- judicial – these are imposed by a court of law for a breach of any public law; and
- statutory – these are imposed as a result of the application of statutes (for example, the Competition Act).

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

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

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

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

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

37 International double jeopardy

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 Hoffmann-La Roche that were also prosecuted in the US.

Similarly, the Bureau will take into account sales from foreign cartel participants to Canadian customers. It has on past occasions expressed the view that it can take into account indirect sales into Canada made by a cartel participant when asserting jurisdiction or imposing penalties. A possibility therefore exists for such 'double jeopardy' in international cartel cases. In its leniency programme FAQs, the Bureau indicates that:

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

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Section 718.21 of the Criminal Code requires a court sentencing a corporation to take into consideration whether the organisation was – or any of its representatives who were involved in the commission of the offence were – convicted of a similar offence or sanctioned by a regulatory body for similar conduct. There is no Canadian jurisprudence indicating 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 dicta 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 sentence in Canada.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

In Canada, plea negotiations in criminal matters are a well-recognised and accepted practice. The single most effective consideration in negotiating a plea agreement and sentencing recommendation is the stage in the investigation at which the party decides to come forward. Even where there are serious aggravating elements – instigation, multiple charges, obstruction or previous convictions – if the party comes forward before the investigation is complete and at an early enough stage to provide valuable assistance to the investigators for the prosecution of other parties, a reduced fine or leniency for exposed individuals (or both) may be negotiated. Other substantive factors are also important: the capacity to pay a fine, the existence or lack of an effective corporate compliance programme, the degree of management awareness of the actions of individual participants and passive or reluctant participation as opposed to instigation of the offence, are among the important elements in a negotiated settlement of the company's exposure to prosecution.

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China

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

In China, a number of different laws, including the Price Law of 1998, the Bidding Law of 2000 and the Anti-Unfair Competition Law of 1993, currently contain different provisions governing cartel arrangements. For instance, the Price Law of 1998 prohibits business operators from colluding with others in manipulating market prices and harming the lawful rights and interests of other business operators or consumers.

Among all the laws containing cartel provisions, the Anti-Monopoly Law (AML) (which was adopted at the 29th session of the 10th National People's Congress on 30 August 2007 and became effective as of 1 August 2008) is currently regarded as the main legislation that governs cartel arrangements in the PRC, and our responses will only deal with the AML (consequently, all provisions mentioned refer to provisions in the AML unless otherwise stated).

The cartel investigation authorities: the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) have issued the following substantive and procedural rules in relation to cartel agreements. These rules are:

- Rules on Anti-Price Monopoly (issued by the NDRC on 29 December 2010, effective as of 1 February 2011);
- Rules on Administrative Enforcement Procedure regarding Anti-price Monopoly (issued by the NDRC on 29 December 2010, effective as of 1 February 2011);
- Rules of the Industry and Commerce Administration Authorities on the Prohibition of Monopoly Agreement Behaviours (issued by the SAIC on 31 December 2010, effective as of 1 February 2011);
- Provisions and Procedures on Investigation and Handling Cases of Monopoly Agreements and Abuse of Dominant Market Position by Administration for Industry and Commerce (issued by the SAIC, effective as of 1 July 2009);
- Provisions on Procedures of Price-Related Administrative Penalties (issued by NDRC, effective as of 1 July 2013);
- Provisions on Evidence for Administrative Penalty for Price-Related Violations (issued by the NDRC, effective as of 1 July 2013);
- Rules for Trial and Review of Cases Involving Price-related Administrative Penalties (issued by the NDRC, effective as of 1 January 2014); and
- Provisions on Regulating the Price-Related Administrative Penalty Power (issued by the NDRC, effective as of 1 July 2014).
- Provisions on Prohibition of Abuse of Intellectual Property Rights to Exclude and Restrict Competition (issued by the SAIC, effective as of 1 August 2015)

2 Relevant institutions

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

There are two authorities that investigate cartel matters in China: the NDRC and the SAIC. The NDRC has authority to enforce prohibitions against pricing-related monopoly agreements and the SAIC has enforcement authority with respect to all other monopoly agreements. Both the NDRC and SAIC can authorise their provincial branches to investigate and handle cartel cases with an effect within the province. NDRC and SAIC and the relevant authorised provincial branches determine cartel matters on their own.

3 Changes

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

The Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolistic Conduct (Anti-Monopoly Judicial Interpretation), as adopted at the 1539th session of the Judicial Committee of the Supreme People's Court on 30 January 2012, were issued on 3 May 2012 and came into force on 1 June 2012. This judicial interpretation reflects important experience accumulated in the judicial practice of monopoly civil disputes and will play an important role in the future enforcement.

According to the Anti-Monopoly Judicial Interpretation, there are two ways of filing an antitrust lawsuit: a plaintiff may file a lawsuit directly with the court; or may file a lawsuit after the antitrust enforcement agencies have issued a determination of monopolistic conduct and this decision has come into effect.

The Anti-Monopoly Judicial Interpretation clarifies the principle of centralised jurisdiction. At first instance, an antitrust lawsuit should normally be heard by intermediate courts of:

- the capital cities of the provinces and autonomous regions;
- municipalities directly under central government; and
- cities under separate state planning.

In addition, with the approval of the Supreme People's Court, other intermediate courts and some basic people's courts may have jurisdiction over antitrust cases as the court of first instance.

In addition to the above-mentioned Anti-Monopoly Judicial Interpretation, the SAIC issued the Provisions on Prohibiting Eliminating or Restricting Competition by IPR Abuse on 7 April 2015, which came into effect on 1 August 2015. It addresses the matter of IP-related monopoly agreements and abuse of dominance. The Provisions specifically provide that the following IPR actions may constitute IP-related monopoly agreements or an abuse of a dominant position: patent pools, patent claims in standard setting and implementation, and copyright collective management organisations.

As of September 2016, the NDRC has released six antitrust guidelines, including guidelines for the auto sector, intellectual property rights, the leniency programme, the calculation of fines, the suspension of investigations and exemptions. These guidelines provide specific factors that shall be considered when identifying cartels in different sectors, as well as providing specific procedures of leniency application, commitment, exemption and determination of fines, which would be very helpful to the enforcement of the AML.

Besides, the SAIC also issued its draft guidelines in IP sector on 4 February 2016.

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4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The AML prohibits specific types of horizontal monopoly agreements (namely, cartels). Article 13 states that the following types of monopoly agreement between competing business operators are prohibited:

- fixing or altering the prices of commodities;
- restricting the production quantity or sale quantity of commodities;
- dividing sales markets or procurement markets of raw materials;
- restricting the procurement of new technologies and new equipment or restricting the development of new technologies and new products;
- jointly boycotting transactions; and
- any other monopoly agreements as defined by the antimonopoly enforcement agency of the State Council.

In addition, it is noteworthy that the AML also prohibits certain types of agreement between vertically related entities (although we note that the traditional notion of a 'cartel arrangement' is between horizontal and not vertical entities). These prohibited agreements between entities that are vertically related are also known as 'monopoly agreements' pursuant to the AML.

Article 14 states that the following types of monopoly agreements between business operators and trading counterparts are prohibited:

- fixing the price of commodities for resale to third parties;
- fixing the lowest price for resale of commodities to third parties; and
- any other monopoly agreements as defined by the anti-monopoly enforcement agency of the State Council.

The debate about whether a cartel is per se illegal or subject to the rule of reason may not be exactly relevant in the AML context. If we look at the AML provisions, it is fair to say that no agreements are per se illegal in the sense that the exemption clause of article 15 applies to all types of monopoly agreements. So far, however, there are no publicly available cases which demonstrate the successful application of exemption.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There is an exemption of agricultural activities from the application of the AML. Specifically, article 56 states that the AML shall not apply to cooperative or collaborative acts between agricultural producers and rural economic organisations in business activities such as manufacturing, processing, sale, transportation, storage of agricultural products.

Article 15 provides a general exemption mechanism for cartel activities. Where a business operator is able to prove that conduct falls under any of the following categories, articles 13 and 14 of the AML will not apply:

(i) where the objective is technological improvement or research and development of new products;
(ii) where the objective is to raise product quality, lower costs, improve efficiency, standardise product specifications and standards or implement specialisation;
(iii) where the objective is to raise business efficiency of small and medium-sized business operators and to strengthen the competitiveness of small and medium-sized business operators;
(iv) where the objective is to fulfil public interests such as energy conservation, environmental protection and disaster relief, and etc;
(v) where the objective is to alleviate a serious drop in sale quantity or obvious overproduction in times of recession;
(vi) where the objective is to protect legitimate interests in foreign trade and economic cooperation; or
(vii) any other circumstances stipulated by the law and the State Council.

A business operator relying on the exceptions from (i) to (v) must also prove that the agreement it has entered into would not severely restrict competition in the relevant markets and that the agreement would bring about benefits for consumers.

The antitrust guidelines in the automobile industry (Draft Automobile Guidelines) released by the NDRC on 23 March 2016 stipulate that the geographic or customer restrictions created by business operators without significant market power may benefit from an exemption measured by market shares. Such market share threshold for a non-significant market player in relation to a vertical arrangement, according to the Draft Automobile Guidelines, could be less than 25 per cent to 30 per cent in the relevant market. If it exceeds such threshold, a business operator may have to prove that its behaviour could be justified by article 15 of the AML on an individual basis (individual assessment).

Apart from the above, there are no general antitrust laws or regulations that provide a defence or exemption for government-sanctioned activities. Article 8 of the AML also prohibits abuse of administrative powers. It states that administrative departments or organisations authorised by laws or regulations to perform the function of administering public affairs may not abuse their administrative powers to eliminate or restrict competition.

6 Application of the law

Does the law apply to individuals or corporations or both?

In general, the AML applies to both individuals and corporations. Pursuant to article 12 of the AML, all prohibitions in the AML apply to natural persons, legal persons and any other entities that engage in the production and sale of commodities or provision of services. Not all individuals will be subject to the AML. Only an individual who engages in the manufacture or trading of goods, the provision of services or other business activities (ie, can be regarded as a business operator) will be subject to the AML.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

China's AML adopts an 'effect' approach when determining a jurisdiction. Article 2 of the AML states that the AML applies to a monopoly agreement occurred outside China as long as the effect of such agreement that eliminates or restricts market competition could take place in China.

As of September 2016, the NDRC has established jurisdiction in relation to the following three cartels, which were committed outside China but had effects on the Chinese market.

LCD panel manufacturers' cartel (2013)

On 4 January 2013, the NDRC announced that it had imposed fines totalling 353 million yuan on six LCD panel manufacturers in accordance with the Price Law. This was China's first enforcement action against international cartels. During the investigation, the NDRC used leniency to encourage the companies to voluntarily report the cartel. This strategy was proved to be effective. AU Optronics was the first to confess the illegal conduct to the NDRC, and other manufacturers followed suit. As the first successful leniency applicant, AU Optronics was exempted from the fines, but it was nonetheless required to pay other penalties.

Apart from the monetary sanctions, the six LCD manufacturers also promised to take corrective measures, which include providing Chinese TV makers with premium products on a non-discriminatory basis, and extending the warranty period of the panels to 36 months.

It is worth mentioning that the decision was made pursuant to the Price Law because the illegal conduct had ceased before the AML became effective and the AML does not have retrospective effect.

Auto parts and bearing cartel (2014)

In August 2014, the NDRC announced that it had imposed fines totalling 1.235 billion yuan on eight Japanese auto parts suppliers and four Japanese bearing suppliers for price monopoly. In this case, most of the 12 companies were granted exemptions under leniency policy. Hitachi received full exemption as it was the first auto parts company to report its monopoly agreements and offer important evidence to the NDRC. NFC, as the first bearings company to confess the illegal conduct to the NDRC, also received full exemption.

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Other companies which also applied for leniency were partly exempted from punishment. The fines imposed on the other 10 companies varied from 29.76 million to 290 million yuan. In addition to the monetary sanction, the 12 companies also submitted measures to correct their misconduct, including:

- discontinuing the monopolistic conduct immediately according to the PRC law, especially the sales strategy and the sales conduct;
- employing comprehensive AML compliance training to fully comply with the PRC law; and
- taking concrete measures to eliminate the consequence of the unlawful deeds, protect the fair competition order, and benefit consumers.

International shipping companies cartel (2015)

On 31 December 2015, the NDRC announced that it had imposed fines totalling 407 million yuan on eight international shipping companies for price monopoly (bid rigging). In this case, the NDRC applied leniency policy to three companies, NYK, Kawasaki and MOL, among which NYK received full exemption as it was the first shipping company to report its monopoly agreements and offered important evidence to the NDRC. Kawasaki and MOL were partly exempted from punishment and received a fine of 23.9809 million yuan and 38.1211 million yuan respectively. The fines imposed on the other 10 companies varied from 1.1984 million to 284 million yaun.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

According to the AML and the rules and provisions issued by the NDRC and the SAIC, the following are the typical steps in an antimonopoly investigation:

(i) Accepting the reporting materials and verifying the content of the reporting materials.

(ii) Initiating an investigation:
- An investigation is usually initiated by reporting on cartel arrangements.
- The SAIC or the NDRC may themselves initiate an investigation into an alleged cartel if they believe that a business operator has violated article 13 or 14 of the AML.

(iii) Investigation.

(iv) Commitments may be accepted:
- According to article 45 of the AML, where a business operator under investigation undertakes or commits to eliminate the allegedly infringing conduct within a period approved by the NDRC or the SAIC, these authorities may suspend investigations.
- Resumption of investigations: the NDRC or the SAIC may resume investigations pursuant to the following circumstances:
  - should the business operator fail to perform the promised undertaking;
  - should there be significant changes to the facts on which the decision to suspend the investigation is based; or
  - if the decision to suspend the investigation was based on incomplete or untrue information provided by the business operator.

(v) Leniency consideration.

(vi) Determining the specific amount of the fine: according to article 10(3) of the Rules for Prohibition of Monopoly Agreements by Administration for Industry and Commerce, the SAIC must take the following factors into account when determining the specific amount of the fine:
- the nature of the illegal acts;
- the details of the illegal acts;
- the degree of illegality; and
- the duration of the illegal acts.

(vii) Determinations: article 44 of the AML provides that, at the end of an investigation, should the NDRC or the SAIC conclude that the conduct amounts to a monopoly agreement, they will make a determination pursuant to the AML and make a public announcement.

There is no regulation or guidance about the timeline of a cartel investigation. In practice, the time frame for cartel investigation varies depending on the complexity of the case, the efforts of the authority, the attitude of the operator or operators being investigated, etc.

9 Investigative powers of the authorities

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

The authorities have a range of investigative powers under the AML, which include:

- entering the business premises or any other relevant premises of the business operator under investigation in order to carry out an inspection;
- questioning the business operator under investigation, other interested parties or any other related organisations or individuals and requiring them to provide relevant explanations;
- inspecting or making copies of relevant documents and materials such as certificates, agreements, accounts books, business correspondence, electronic data of the business operator under investigation, other interested parties or any other related organisations or individuals;
- sealing up or confiscating relevant evidence; or
- enquiring into the bank accounts of the business operator.

Where the measures stipulated in the preceding paragraph are adopted, a written report shall be submitted to the key person in charge of the antimonopoly enforcement agency for approval.

Investigative powers include:

- ordering the production of specific documents or information;
- carrying out compulsory interviews with individuals;
- carrying out an unannounced search of business premises;
- carrying out an unannounced search of residential premises;
- a right to 'image' computer hard drives using forensic IT tools;
- a right to retain original documents;
- a right to require an explanation of documents or information supplied;
- a right to secure premises overnight; and
- a right to enquire into the bank accounts of the business operator without seizing or freezing the bank accounts.

Court approval is not required to invoke the above investigative powers.

International cooperation

10 Inter-agency cooperation

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

The SAIC and NDRC signed two memoranda of understanding (MoUs) on competition law with the UK Office of Fair Trading in November 2010 and January 2011.

On 27 July 2011, the NDRC, the Ministry of Commerce (MOFCOM) and the SAIC signed an antitrust MoU with their US counterparts, the US Federal Trade Commission and Department of Justice. The MoU provides for high-level consultations among all five agencies as well as separate communications between individual agencies. The MoU also lists several specific areas for cooperation, including:

- keeping each other informed of significant competition policy and enforcement developments in their respective jurisdictions;
- enhancing each agency's capabilities with appropriate activities related to competition policy and law such as training programmes, workshops, study missions and internships;
- exchanging experiences on competition law enforcement, when appropriate;
- seeking information or advice from one another regarding matters of competition law enforcement and policy;
- providing comments on proposed changes to competition laws, regulations, rules and guidelines;
- exchanging views with respect to multilateral competition law and policy; and
- exchanging experiences in raising companies', other government agencies' and the public's awareness of competition policy and law.

On 29 September 2012, the European Commission signed a MoU with the NDRC and the SAIC. The MoU seeks to increase the authorities'

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cooperation on antitrust enforcement, including cartels and abuse of dominance cases. The agencies will also discuss competition legislation and share non-confidential information regarding global antitrust investigations.

The PRC has not joined the International Competition Network. However, it has already started visiting and communicating with its members.

On 30 May 2012, the NDRC signed a MoU with the Korea Fair Trade Commission (KFTC) to establish a strategic partnership with the KFTC. Korea is one of the earliest countries in East Asia to establish antitrust enforcement measures. Both parties agree to establish cooperation within specific areas, including:

- enhancing regular communications with regard to most recent competition policies of both parties;
- sharing experience in competition law enforcements;
- holding regular conferences on antitrust enforcement experience.

On 27 April 2010, the SAIC signed a MoU with the World Intellectual Property Organization to establish a strategic relationship of antitrust enforcement in the area of intellectual property rights. This MoU will encourage the SAIC to further develop cooperative relationships around the world.

11 Interplay between jurisdictions

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 there are certain communications between the Chinese anti-monopoly enforcement agencies and their counterparts in other jurisdictions, the interplay between them is not clear. Despite the MoUs mentioned above and the NDRC's investigation of international cartel activities, there is no precedent that shows that interplay between jurisdictions affects the investigation.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Where the NDRC or the SAIC has verified the investigation of an alleged monopoly act and concludes that the act constitutes a monopoly agreement, it shall make a decision pursuant to the AML and make a public announcement.

According to the Provisions on Procedures on Price-Related Administrative Penalties issued by the NDRC, effective as of 1 July 2013, the NDRC is required to issue a notice prior to issuing all formal administrative determinations. The Administrative Penalty Law only required the administrative agents to inform investigated parties of their right to a hearing before severe decisions are to be issued. Business operators involved in the pre-determination notice and applicants are entitled to submit a defense or to apply for a hearing, provided that certain conditions are met. Before the NDRC issues an administrative decision, it must inform the investigated party of its rights to a defence, which can be in writing or oral, and a hearing. Upon the investigated party's application for the defence or hearing, the NDRC shall review the facts, reasons and legal basis provided by the applicant in the statement or at the hearing. If the defence is accepted by the NDRC, no penalty would be imposed. Thus, this pre-determination procedure serves as a critical remedy for business operators subject to a price-related investigation by the NDRC, given the complex and prolonged administrative appeal procedure. Upon reviewing the defence of the investigated parties or a conclusion of a hearing, the NDRC can decide whether to issue an administrative decision.

As regards the SAIC, upon a conclusion of investigation, SAIC can make a formal administrative decision. According to the Administrative Penalty Law, administrative agents are required to inform investigated parties of their right to a hearing before severe decisions are to be issued. As for critical cases, the SAIC shall report to the Anti-Monopoly Commission of the State Council before issuing a decision.

After such decisions are made, the investigated parties can resort to administrative litigation or administrative review as remedies. The administrative review process is not a prerequisite for administrative litigation. If the investigated party resorts to administrative review and is discontent with the result, it may resort to further administrative litigation or the State Council. The State Council's decision shall be final.

13 Burden of proof

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

In administrative litigation proceedings against investigative authorities, generally speaking, the defendants shall bear the burden of proof. Under the PRC's Administrative Litigation Law, the burden of proof falls on the government authorities for the specific administrative act they have undertaken, and they shall provide the evidence and regulatory documents in accordance with which the act has been undertaken.

In a monopoly civil litigation against cartels, it shall follow the general rules for burden of proof in civil litigations, which provides that 'the party who makes claims shall bear the burden to prove its claims'.

According to the Civil Procedure Law and the Anti-Monopoly Judicial Interpretation, in monopoly civil disputes, the plaintiff has the burden to prove:

- the defendant entered a horizontal or vertical monopoly agreement;
- the horizontal monopoly agreement under the catch-all provision of article 13 of the AML has the effect to eliminate or restrict the competition;
- the plaintiff has suffered loss (if the plaintiff claims the damages); and
- causation between entering into the monopoly agreement and losses suffered by the plaintiff.

The defendant has the burden to prove:

- the horizontal monopoly agreement of fixing price, limiting output or sales, segmenting sales markets or input purchasing markets, restricting R&D and jointly boycott transactions do not have the effect of eliminating or restricting competition; and
- the exemptions under article 15 of the AML are applicable to the monopoly agreement.

The Anti-Monopoly Judicial Interpretation does not clarify who should bear the burden to prove the effect of eliminating or restricting competition of a vertical agreement. It seems that the plaintiff should bear the burden to prove the vertical agreement has the effect to eliminate or restrict competition.

In civil litigation, the level of proof should be balance of probabilities. In administrative litigation, the court can revoke an administrative decision if 'the key evidence is insufficient'.

14 Appeal process

What is the appeal process?

Pursuant to article 53 of the AML, persons who disagree with the decision of the SAIC or the NDRC may apply for an administrative review. These reviews will be undertaken by the SAIC or NDRC themselves. If the determination was made by the Price Bureau or the Administration of Industrial and Commerce at the provincial level, those dissatisfied with a specific administrative act may, at the choice of the applicant, apply for an administrative review to the government of the province, autonomous region or municipality, or to the competent department one level higher (ie, the NDRC or the SAIC).

Appeals may also be brought via an administrative lawsuit to the courts. According to article 17 of the Administrative Litigation Law:

- The people's courts at the domicile of the administrative agency that initially rendered the administrative decision shall have jurisdiction over the case, provided that the plaintiff has not applied for administrative review of the decision.
- Where the administrative decision has been reviewed:
  - If the administrative review does not make adjustments to the decision, the people's courts at the domicile of the administrative agency shall have jurisdiction over the case.
  - If the administrative review makes adjustments to the decision, the people's courts at the domicile of the administrative agency and of the review agency both have jurisdiction over the case.

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Citizens, legal persons or other types of organisations can apply for administrative review where they believe administrative acts by an administrative organisation infringe their lawful rights and interests. The administrative review body for decisions made by the NDRC or the SAIC is the decision-making authority itself. The administrative review body for decisions made by provincial branches as authorised by the NDRC or the SAIC is the people's government of that province, or the NDRC or the SAIC themselves.

In the administrative review, the following aspects of the appealed decision will be reviewed: the identification of facts, the level of proof, the use of the law, the due procedure, and the appropriateness of the contents. Administrative review should be filed within 60 days after the administrative decision is made. The administrative review body must make the decision within 60 days of accepting the review application (if laws provide otherwise, such laws will prevail).

Citizens, legal persons or other types of organisations can apply for administrative litigation where they believe the substantive administrative decisions by an administrative organisation infringe their lawful rights and interests. The existing law has not established any rules for the level of jurisdiction for antimonopoly administrative litigation. According to the administrative tribunal in the Supreme People's Court, given that antimonopoly administrative litigation requires specialised legal and economic knowledge, the court to conduct first instance trials for antimonopoly litigation should be: the intermediate people's courts nominated by the high people's courts at the domicile of the defendant; or the high people's courts at the domicile of the defendant.

If the administrative decision did not go through administrative review or is not adjusted by administrative review, the people's courts at the domicile of the administrative agency shall have jurisdiction over the case. Otherwise, the people's courts at the domicile of the administrative agency and of the review agency both have jurisdictions over the case.

In the administrative litigation, the following aspects of the appealed decision will be reviewed: whether the proof for the appealed decision is solid, whether the law used in the appealed decision is correct, whether the appealed decision is made in due process, and whether the decision making agency has appropriate authority. The court must make the judgment of first instance within three months of accepting the case.

This period can be extended upon the approval from the relevant high court (if the court of first instance is the High Court, the approving body should be the Highest Court). The parties can appeal the first instance judgment within 10 to 15 days (depending on the nature of the judgment) after the receipt of the judgment of first instance. The court must make the appeal judgment within two months upon the filing of the appeal. This period can also be extended by the same mechanism discussed above.

Sanctions

15 Criminal sanctions

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

There are no criminal sanctions for cartel activities under the AML. In general, individuals will not face imprisonment for cartel conducts.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

According to article 1 of the Anti-Monopoly Judicial Interpretation, natural persons, legal persons and other organisations can file civil lawsuits with the people's courts for disputes over losses caused by monopolistic conduct or violations of the AML by contractual provisions, by-laws of industry associations, and etc.

In general, the litigation fee charged by the court for hearing cases is undertaken by the party losing the case. Article 14 of the Anti-Monopoly Judicial Interpretation provides, upon the claimant's request, that the people's court may include the plaintiff's reasonable expenses, the charges on investigation and prevention of the monopolistic conduct, into the scope of compensation for losses.

Where a business operator has violated the provisions of the AML, both the SAIC and the NDRC possess the powers to order the following sanctions:

- order the business operator to stop the illegal act;
- confiscate any illegal income from the illegal act; and
- issue fines ranging from 1 per cent to 10 per cent of the business operators' revenue in the year preceding the illegal act.

Where a monopoly agreement has been entered into but has not yet been implemented, a fine of no more than 500,000 yuan may be imposed.

If an industry association violated the provisions of the AML by facilitating monopoly agreements reached among business operators (eg, by playing an organising or coordinating role), AMEAs may impose a fine of no more than 500,000 yuan on such industry associations. If the matter is considered 'serious', industry associations may be deregistered.

We notice that the NDRC and SAIC's enforcement activities against cartels become increasingly intensive and the level of civil penalties for cartel-related infringements have also been increased in recent years.

A plaintiff can seek compensation for losses caused by the relevant monopolistic conduct. Meanwhile, the court may request the defendant to compensate for the plaintiff's reasonable expenses on investigation and prevention of the monopolistic conduct. No punitive damages are available to the plaintiffs.

Recent administrative sanctions

Up to September 2015, the largest penalty imposed by the NDRC on cartel activity is 1.235 billion yuan on eight Japanese auto parts suppliers and four Japanese bearing suppliers for price monopoly. Among the 12 auto parts and bearing suppliers which were fined, Sumitomo Electric Industries Ltd received the highest fine of 290.4 million yuan.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

The Provisions on Regulating the Price-Related Administrative Penalty Power provide some general principles on fining. The Provisions only apply to administrative penalties issued by the NDRC and its local counterparts. Thus, they do not apply to adjudicators in private litigations.

The NDRC issued on 17 June 2016 the draft Guidelines on the Identification of Illegal Proceeds Derived by Operators from Monopolistic Practices and the Determination of Fines (the Draft Fines Guidelines), which clarify the calculation and factors to be considered when confiscating illegal proceeds and imposing fines.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

If the operators conduct bid rigging, and the offence is severe, they will be debarred from bidding in other projects for between one and two years. According to the Chinese law, if the bid rigging is found as a severe violation, the operators would be subject to a one to two-year debarment from compulsory bidding procedures and their business licences may even be revoked by the SAIC.

19 Parallel proceedings

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

The cartel activities can be sanctioned by both administrative penalty and civil liability, because the purpose of administrative penalty and that of civil liability are different. Although the AML does not explicitly establish the above principle, the regulations and rules for trial and investigation of other types of cases have confirmed this principle. For example, according to article 7 of the Administrative Penalty Law, natural persons, legal persons or other organisations shall be subject to

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administrative penalties for their illegal conducts; where their illegal conducts have caused losses to others, they shall bear civil liabilities.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

A plaintiff can seek compensation for losses caused by the relevant monopolistic conduct (pursuant to article 50). At the same time, the court may request the defendant to compensate for the plaintiff's reasonable expenses on investigation and prevention of the monopolistic conduct. No punitive damages are available to the plaintiffs. Both direct and indirect purchasers are allowed to file an antitrust action under the AML, provided that they suffer losses due to the alleged cartel conduct, and have direct interest in the dispute.

There are no specific rules on the passing-on defence and double recovery in China.

The first civil damage claim for cartel conducts was brought by a consumer in Zhejiang Intermediary Court in early 2015. The lawsuit was brought against the insurer, Chinese insurance giant Ping An Property and Casualty Insurance, after it was fined last year by the NDRC for price collusion. The parties settled the case in the court.

21 Class actions

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

China does have a representative action regime, which is different from the concept of class action. Representative litigation refers to representatives from the members of one party to a lawsuit acting on behalf of that party. This may be done where the number of persons comprising one party in a lawsuit is large, and the ruling of the court is binding on the representatives and also the other members being represented. After obtaining special authorisation from the members, the representatives may attend open-court trials, change or waiver claims, recognise claims of the opposing party, settle with the opposing party or enter into settlement agreements with the opposing party, and lodge counterclaims or appeals.

According to article 59 of the Provisions on Evidence in Civil Proceedings, 'large in number' means no fewer than 10 persons.

According to the Chinese civil law, members can elect a representative to conduct the representative action. When the number of the members is not certain at the time of initiating a lawsuit, the court can make a public announcement for interested members to register. The registered members can elect a representative or the court and members can agree on one representative. The court judgments are binding on all registered members. If unregistered members file a lawsuit within the statute of limitation, such judgment is also binding on these members.

Cooperating parties

22 Immunity

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

There is one leniency programme constructed for enforcement by both the NDRC and the SAIC. The programme for the NDRC enforcement is based on article 46 of the AML, Rules on Administrative Enforcement Procedure regarding Anti-price Monopoly and the Provisions on Regulating the Price-Related Administrative Penalty Power. The programme for the SAIC enforcement is based on article 46 of the AML and Rules of the Industry and Commerce Administration Authorities on the Prohibition of Monopoly Agreement Behaviours. The constituent elements and the importance of 'first in' to cooperate are slightly different between the NDRC and the SAIC's enforcement, which are explained in detail below:

NDRC	SAIC
Elements: voluntarily reporting the cartel and providing critical evidence, which serve as key facts for finding a price-related cartel by the NDRC. First in: may not be fined. Second in: may receive a reduction of the fine of no less than 50 per cent. Subsequent applicants: may receive a reduction of the fine of no more than 50 per cent. Cartel organiser: voluntarily providing critical evidence may qualify for leniency.	Elements: voluntarily reporting the cartel and providing critical evidence, which serve as key facts for the SAIC to initiate or find a cartel. The evidence includes business operators involved in a cartel, the scope of products affected, the content of the cartel, the form in which a cartel is concluded and the implementation of the cartel, etc. First in: voluntarily reporting, providing critical evidence, and fully cooperating with the investigation should not be fined. Others: voluntarily reporting and providing critical evidence should receive a reduction of the fine, the amount of which varies on a case-by-case basis. A reduction of the fine does not include any unlawful profits. Business operators: voluntarily ceasing a cartel, the SAIC may reduce or annul the fines on a case-by-case basis. Cartel organiser: does not qualify for leniency.

Besides, the draft Guidelines for the Application of Leniency Program to Cases Involving Horizontal Monopoly Agreements (Draft Leniency Guidelines) issued by NDRC on 2 February 2016 provide a basic framework for China's 'marker' system. According to article 6 of the Draft Leniency Guidelines, a business operator applying for leniency shall submit a report containing information about the monopoly agreement as well as key evidences they have acquired. As for the application form, article 8 of Draft Leniency Guidelines specifies that business operators may submit leniency application reports or preliminary reports orally or in writing. For oral reports, the enforcement agency shall make written records, which shall be signed by the authorised representatives of the business operators.

23 Subsequent cooperating parties

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

The NDRC's leniency programme provides 'second in' and subsequent cooperating parties to a cartel investigation a reduction in the fine payable to the NDRC in exchange for admissions in connection with their participation in the cartel and cooperation with the NDRC's prosecution of other cartel participants. Under the leniency programme the percentage reduction in the fine payable to the NDRC for 'third in' and subsequent cooperating parties is capped at 50 per cent.

The NDRC has recently issued new guidance on fees reduction for cooperating parties in its Provisions on Regulating the Price-Related Administrative Penalty Power. This new guidance, effective as of 1 July 2014, provides that if any cooperating parties have made critical contribution to a separate cartel investigation being undertaken by the NDRC, those cooperating parties will also benefit from a reduction in the fine. The new guidance does not specify what would amount to a 'critical contribution'. It also remains to be tested whether the 50 per cent fine reduction cap under the NDRC's leniency programme will be removed for any 'third in' or subsequent cooperating parties of a cartel who make a critical contribution to a separate cartel investigation being undertaken by the NDRC under the new guidance.

The SAIC's leniency programme provides that 'second in' and subsequent cooperating parties to a cartel investigation voluntarily reporting and providing critical evidence should receive a reduction of the fine, the amount of which varies on a case-by-case basis.

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24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

According to article 14(2) of the Rules on Administrative Enforcement Procedure regarding Anti-Price Monopoly, the NDRC may reduce no less than 50 per cent of the penalties for the business operator who is the second volunteer to report monopoly agreement and provide material evidence. In the sodium hydrosulphite cartel investigation in 2012, the NDRC reduced fines by 60 per cent for three business operators who were the second volunteers to report the monopoly agreement and provide material evidence. The Rules of the Industry and Commerce Administration Authorities on the Prohibition of Monopoly Agreement Behaviours do not specify the extent of mitigation of penalties for the second voluntary reporter. According to article 11(1) of the Rules, for other business operators to voluntarily report relevant information regarding the conclusion of the monopoly agreements and to provide material evidence, the SAIC may reduce their penalties by taking the circumstances into consideration.

In addition, according to article 12 of the Draft Leniency Guidelines, the enforcement agencies may in general grant leniency to at most three business operators in one case. If such case is significant and complex and involves a number of business operators, and the business operators that apply for leniency provide different important evidences, the enforcement agencies may consider granting leniency to more business operators.

25 Approaching the authorities

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?

Pursuant to article 4 of the Draft Leniency Guidelines, business operators involved in monopoly agreements may, before the enforcement agency takes any action under article 39 of the AML, file an application with the enforcement agency of the State Council for leniency.

Article 7 of the Draft Leniency Guidelines specifies how a 'marker' works in the context of the AML. According to this article, 'a preliminary report' is equivalent to a 'marker'. Undertakings that temporarily can't provide complete materials when then apply for leniency may submit a preliminary report regarding the monopolistic agreements to the enforcement agencies. Undertakings should explicitly confess in the preliminary report that they have engaged in monopolistic agreements in violation of the AML and briefly describe the basics in relation to the conclusion and implementation of the monopolistic agreements, including the participants to the monopolistic agreements, the products or services involved, the dates when these monopolistic agreements were concluded and implemented.

The enforcement agencies will provide written comments upon receiving the preliminary reports, requiring undertakings to submit supplemental materials within a prescribed period. Normally, that period should not be more than 30 days, and it can be extended up to 60 days under special circumstances. If undertakings have submitted the required supplemental materials within a prescribed period, the enforcement agencies will define the time when they received the preliminary reports as the time when undertakings made leniency applications. If undertakings fail to submit required supplemental materials within a prescribed period, the enforcement agencies will deem that the undertakings have not applied for leniency.

If the materials submitted by the undertaking that made formal leniency application for the first time need further additions or corrections, and if the submitted materials are sufficient for a basic description of the monopolistic agreement involved, the enforcement agencies will deem them as preliminary reports, and provided to the undertakings concerned such opinions in written form.

26 Cooperation

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?

In order to obtain full leniency, the first applicant must report the circumstances about its cartel activities and provide key evidence that can help the administrative agency to start the investigation or to make the final decision. Subsequent applicants should also do the same to obtain partial leniency.

Article 6 of the Draft Leniency Guidelines provides specific descriptions on the materials expected from an immunity applicant, including a report containing information about the monopoly agreement and the key evidences they have acquired. The report shall contain the following information:

- the participants to a monopoly agreement and their basic information (eg, names, addresses, contact information and representatives);
- the details regarding the participants' communication (eg, time, place and content of communication and participants);
- the products or services involved, their prices and quantities;
- the regions and markets that may be affected;
- the duration of such monopoly activity; and
- any notes on the evidence submitted by the business operator.

The criteria for an acceptable 'key evidence' shall be sufficient to enable an enforcement agency to initiate an investigation procedure under article 39 of the AML if the enforcement agency has not yet obtained a clue or evidence for a case; or shall be of significant value added for the ultimate identification of monopoly agreement practices if the enforcement agency has started an investigation procedure.

Besides, if a business operator fails to fully perform the following obligations after filing an application or submitting the preliminary report, according to the Draft Leniency Guidelines, the enforcement authority may not grant leniency to it:

- timely stop any alleged illegal practices, except in the case that the enforcement agency allows such practice to continue in order to ensure a smooth progress of the investigation (such as the case where an application is filed with an overseas enforcement agency for leniency and is required to continue such practice, report shall be submitted to the enforcement agency);
- sincerely cooperate with the enforcement agency in an investigation in a manner satisfactory to the enforcement agency;
- properly keep and provide evidence and information, and not conceal, destroy, transfer or falsify any evidence or information;
- not disclose any information as to the application for leniency without a prior approval of the enforcement agency; or
- not engage in any other conducts that may affect the enforcement of the AML.

27 Confidentiality

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

According to article 5 of the Provisions and Procedures on Investigation and Handling Cases of Monopoly Agreements and Abuse of Dominant Market Position, the SAIC will keep the identity of the reporting entity confidential.

Article 16 of Draft Leniency Guidelines provide to some extent a leniency application shall be kept confidential. All documents and reports submitted by business operators for leniency application hereunder and documents generated therefor shall be kept in special archives by the enforcement agency and shall not be disclosed to any third party without the consent of the business operators concerned. However, the Draft Leniency Guidelines do not specify for how long such leniency application shall be kept confidential.

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Update and trends

The NDRC has outlined the key antitrust enforcement priorities in 2016. In product-related areas, the NDRC will closely focus on pharmaceuticals, medical devices, and auto parts, as well as industrial materials. In service-related areas, the NDRC will pay close attention to shipping, telecoms and finance. Apart from the above, the intellectual property rights (IPRs) will also be prioritised in the NDRC's antitrust enforcement.

In the meantime, the NDRC determines to widen the case sources and encourage more whistle blowers to report any information pointing to a potential violation.

We notice that it gradually becomes a routine for the NDRC to publish its enforcement priorities at the beginning of each year. In 2015, several key areas were announced by the NDRC, which include pharmaceuticals, medical devices, household electrical appliances, LCD panels, IPRs, shipping and auto parts. Following the announcement, the NDRC indeed investigated the undertakings active in the foregoing sectors and punished them accordingly. Below is an overview of the NDRC's enforcement in 2015:

In the field of pharmaceuticals, five undertakings were fined by the NDRC due to their practices of fixing prices and sharing markets. In the field of medical devices, the NDRC conducted market and industry research in relation to three international medical device manufactures. In the field of household electrical appliances, the NDRC conducted an inspection at a domestic giant manufacturer in relation to its resale maintenance practice. In the field of LCD panels, the NDRC obliged the relevant undertakings to reach a settlement with TV manufactures, which led to the saving of litigation costs and the creation of a fair competition environment for the undertakings concerned.

In the IPRs-related industry, the NDRC investigated a case concerning a wireless communication technology research company by abusing its dominant position. The NDRC required the undertaking to cease its illegal behaviour while imposing significant fines. As for the international ocean shipping industry, the NDRC imposed penalties on eight rolling cargo shipping companies for reaching and enforcing a price-fixing agreement. In the auto parts industry, Price Bureau of Jiangsu Province penalised an auto company for reaching and implementing a monopoly agreement with fines imposed on some distributors. The local Guangdong bureau of the NDRC punished an auto company for reaching and implementing a resale price fixing agreement, together with a fine imposed on 17 distributors in Guangzhou region. Apart from the above-mentioned publicly available cases, we are aware that some of the NDRC's investigations in certain sectors are still ongoing, therefore the results are not yet available.

In view of the above, the NDRC is actively engaged in its highlighted sectors, imposing severe penalties on behaviours that affect market competition, industry development and consumer benefits. For companies that are active in these highlighted industries in 2016, we have sufficient reasons to believe that the regulatory risk is relatively high.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Yes; as mentioned in question 8, article 45 of the AML provides that, during the process of an investigation, the NDRC or the SAIC may accept commitments from business operators in which the business operators undertake to eliminate the alleged conduct within a period approved by the NDRC or the SAIC. The NDRC and the SAIC may then suspend the investigation of these business operators.

Such commitment will not be recognised by the court as evidence proving the existence of a monopolistic conduct.

The Draft Guidelines for Operator Commitment in Anti-monopoly Cases released by the NDRC on 2 February 2016 provide specific procedures for the commitment mechanism.

29 Corporate defendant and employees

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

There are no administrative or criminal penalties imposed on employees of a company under the AML, except if they hinder the progress of the investigation.

30 Dealing with the enforcement agency

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

The Draft Leniency Guidelines to some extent provide procedures for immunity applicant and subsequent cooperating party to conduct their applications and help them manage their application process. According to the draft guidelines, a business operator may communicate with the enforcement agency prior to the application, either orally or in writing. During the leniency or immunity application process, since the application filing time will be set on the date when the enforcement agency receives the complete materials, it is for the applicant's interest to submit the documents required by the agency as soon as possible.

In addition, for both immunity applicants and subsequent cooperating parties, we are of the view that it would be useful to keep in close contact with the SAIC or the NDRC during the course of investigation or during a leniency or immunity application process. It would also be useful to conduct informal consultations with these agencies to clarify any issues (whether substantive or procedural).

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As mentioned above, the NDRC released its Draft Leniency Guidelines for public comments on 2 February 2016.

Defending a case

32 Disclosure

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

The enforcement authorities usually do not disclose information or evidence in writing forms to the defendant under investigation.

33 Representing employees

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

There are no administrative or criminal penalties imposed on employees of a company under the AML, except if they hinder the progress of the investigation. As a general principle, counsel may represent employees under investigation as well as the corporation, provided there is no conflict of interest.

34 Multiple corporate defendants

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

Counsel may represent multiple corporate defendants, except where conflicts of interest exist and it does not necessarily depend on whether they are affiliated.

35 Payment of penalties and legal costs

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

There are no administrative or criminal penalties imposed on employees under the AML, except if they hinder the progress of the

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investigation. In that case, the company can pay the legal penalties imposed on that employee and their legal costs as there are no rules or regulations preventing the company from doing so.

36 Taxes

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

According to article 10 of the Enterprise Income Tax Law of the People's Republic of China and article 32 of the Implementing Regulations of Enterprise Income Tax, fines, penalties and damages awards are not tax-deductible.

37 International double jeopardy

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 no regulation about whether penalties imposed in other jurisdictions will not be taken into account in the making of sanctions. In practice, there is no precedent suggesting that the administrative agency will consider international double jeopardy when making the sanction.

There are no specific laws or regulations in China providing clear rules on overlapping liability for damages in other jurisdictions.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Our recommendation would be to approach the NDRC or the SAIC early, as soon as the facts are known (or as soon as the entity becomes aware that it is being investigated). The entity could also consider being 'first in' in terms of applying for leniency or immunity.

In addition to the leniency policy, business operators participating in monopoly agreements may also consider:

- the termination of the investigation based on the business operator's guaranty provided in article 45 of the AML;
- the voluntary cessation of acts amounting to monopoly agreements; and
- proactively eliminating or mitigating the harmful result.

According to article 10(5) of the Rules of the Industry and Commerce Administration Authorities on the Prohibition of Monopoly Agreement Behaviours, where business operators voluntarily cease the acts amounting to monopoly agreements, the SAIC may, at its discretion, reduce or exempt the penalty for such business operators.

Under the current practice, the mere existence of a compliance programme is not recognised by the authorities as a factor that could affect the level of the fine.

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Cyprus

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant statute regulating competition law in the Republic of Cyprus is the Protection of Competition Laws of 2008 to 2014 (the Competition Law). The Law on the Protection of Competition of 2008 was amended by the Protection of Competition (Amending) Law of 2014. In addition, EC Council Regulation No. 1/2003 and the Competition Law confer on the Commission for the Protection of Competition (the Commission) the power to apply and enforce articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), where applicable.

2 Relevant institutions

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 Commission, an independent administrative authority, is the relevant competent institution for the application of competition law and the investigation of cartel matters in Cyprus. The Commission has the authority to investigate and adjudicate on cartel matters on its own initiative, following a complaint or a leniency application, as well as a sector enquiry. The Commission is assisted by the Service of the Commission in investigations.

3 Changes

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

The Protection of Competition (Amending) Law of 2014 brought no changes on the treatment of cartel matters per se. However, the power of the Commission to proceed to sector enquiries, introduced by the 2014 Law, could lead to an increase of cartel investigations, depending on the outcome of such enquiries. The Leniency Programme (Regulatory Administrative Act 463/2011) entered into force in 2011 and remains unaltered with no proposals to change to date.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Section 3(1) of the Competition Law is the relevant legal basis for the regulation of cartel matters in Cyprus and it is modelled upon article 101(1) TFEU.

Section 3(1) provides that subject to the provisions of sections 4 and 5, all agreements between undertakings or associations of undertakings, all decisions by associations of undertakings and any concerted practices having as their object or effect the elimination, restriction or distortion of competition within the Republic of Cyprus shall be prohibited, and in particular those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investments;
- divide markets or sources of supply into geographical or other sectors;
- 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 which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Accordingly, such agreements, decisions or concerted practices are being examined by the Commission from an object or competitive effect angle.

The burden of proof relates to the balance of probabilities test and the Commission decides, regarding the presence of knowledge or intention on the basis of the available and admissible evidence.

Section 3(2) promulgates that subject to the provisions of sections 4 and 5, agreements, decisions and concerted practices mentioned in the provisions of subsection (1) of this section, shall be void ab initio, no prior relevant decision by the Commission being required.

Section 4(1) of the Competition Law, which is identical to article 101(3) TFEU exempts an individual agreement, decision or concerted practice, if it:

- contributes to improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and
- 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 product in question.

The burden of proof that the three cumulative criteria have been met rests upon the undertakings involved, as per section 4(2). However, it should be noted that it is highly unlikely that such undertakings will be able to successfully invoke the said provision.

Block exemption orders have been issued by the Council of Ministers of the Republic of Cyprus regarding industry-specific agreements, under section 5(1) of the Competition Law and preceding Protection of Competition Legislation.

Furthermore, under section 5(2), the European Union Regulations issued in accordance with article 101(3) TFEU are applicable to an agreement, decision or concerted practice to which the provisions of the Competition Law apply rather than the European Union law provisions, to the degree that there is no contrary provision of any order issued pursuant to section 5(1) of the Competition Law.

It should also be noted that the Council of Ministers has issued the Exemptions by Categories (Vertical Agreements and Concerted Practices) Order of 2014 providing that the Regulation (EU) No. 330/2010 of the Commission dated 20 April 2010 on the application of article 101(3) TFEU to categories of vertical agreements and concerted practices applies by analogy regarding vertical agreements, to which the Competition Law rather than European Union law is applicable, between an association of undertakings and its members or such an association and its suppliers, provided that all members of the said association are retailers of goods and that no such member,

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including its associated undertakings, has an annual turnover exceeding €2 million.

The Immunity and Leniency Programme comprises the Immunity and Reduction of the Administrative Fine in case of Collusions in violation of section 3 of the Competition Law and/or article 101 TFEU (Leniency Programme) Regulations of 2011 (Secondary Administrative Act 463/2011).

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are no industry-specific infringements as such, and any cartel-related infringements are examined under the general provision of section 3(1) of the Competition Law.

Further, there is no defence or exemption for a government-sanctioned activity.

Pursuant to section 5(1) of the Competition Law, the Council of Ministers may, following a reasoned opinion of the Commission, issue orders published in the Official Gazette of the Republic of Cyprus, which declare and render section 3 of the Competition Law inapplicable to certain categories of collusions. Block exemptions, on the basis of such orders, have been issued in relation to the following sectors:

- agreements on research and development;
- specialisation agreements;
- liner shipping company consortia;
- agreements for the transfer of technology;
- production or trade in agricultural products;
- technical cooperation in the field of air transport;
- agreements, decisions and concerted practices in the road transport industry;
- maritime transport;
- the insurance sector; and
- the automobile industry.

6 Application of the law

Does the law apply to individuals or corporations or both?

Section 3(1) of the Competition Law and article 101(1) TFEU prohibitions apply to agreements, decisions and concerted practices between undertakings as defined by section 2 of the Competition Law and the relevant EU case law. Section 2 defines as 'an undertaking' any entity that performs an economic activity irrespective of its legal status and the way the said entity is being financed. It is settled case law that undertakings include both natural and legal persons. The same approach has been adopted by the Commission regarding the application of the Concentration Control Law.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Section 3(1) prohibitions are applicable only where the relevant agreement, decision or practice has as its object or effect the elimination, restriction or distortion of competition within the Republic of Cyprus.

In addition, under section 23(1)(f) of the Competition Law, the Commission can apply section 3(1) in parallel with article 101 TFEU, either upon the receipt of a complaint, or on its own motion, or as otherwise provided by Regulation (EC) 1/2003.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

There are no time frames in the Commission investigations, although the time period for conducting such an investigation could take into account the limitation periods for imposing administrative fines as set out in section 41 of the Competition Law. Investigations commence either following an official complaint or by the Commission's own motion, including after a sector enquiry. In the case of the filing of complaints, pursuant to section 35, the Commission examines whether the complaint contains all the necessary information and whether it falls within its competences. Then, the Commission instructs the Service to conduct a preliminary investigation and submit a report on its findings. If, following the preliminary investigation of the Service, the Commission concludes that the complaint does not fall within the scope of application of the Competition Law and/or article 101 TFEU, or there are not reasonable grounds for suspected infringement, then the Commission issues a relevant decision. If there is a prima facie case of infringement, section 17 applies and the Commission prepares and serves on the interested parties a statement of objections. The Commission is also entitled to request interested parties to submit information and observations and to hold public hearing proceedings. Proceedings before the Commission are also being governed by the General Principles of Administrative Law Statute of 1999. Subject to the confidentiality provisions of section 33, the Commission's decisions are duly reasoned, notified to the undertakings or associations of undertakings concerned, thereby having effect, and published in the Official Gazette of the Republic of Cyprus as per section 18 of the Competition Law.

9 Investigative powers of the authorities

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

The Commission, which enjoys broad investigative powers, is entitled to collect information necessary for the performance of its duties under the Competition Law, addressing such a written demand to undertakings, associations of undertakings, or other natural or legal persons or public or private organisations, as per section 30(1).

Under the newly introduced section 30A of the Competition Law, the Commission is entitled to conduct an interview with a natural or legal person that consents to that effect, with the purpose of taking a statement regarding the subject matter of the investigation under way. The said interviewee is then provided with a written copy of their statement for their approval and signature.

Regarding inspection, search and seizure powers, section 31 of the Competition Law entitles the Commission, without the need to secure a court order to that effect, to conduct all the necessary searches in undertakings or associations of undertakings, by:

- entering any office, premise, field and means of transport of undertakings and associations of undertakings, as well as any other business premises, with the exemption of residences;
- examining the records, books, accounts, as well as any other business activity documents, irrespective of the medium on which they are stored;
- receiving or taking copies or parts of records, books, accounts as well as any other business activity documents, irrespective of the medium on which they are stored and of the location they are stored;
- sealing any business premises and records, books, accounts and other business records, for the period and to the extent necessary for the inspection; and
- asking any representative or member of staff of the undertaking or association of undertakings, for explanations on facts or documents relating to the subject matter and purpose of the inspection and recording the answers.

The Court's prior approval, in the form of a duly reasoned court order, is required regarding the performance of an inspection in any other place from the above-mentioned or in residential premises. Each such search order bears the signature of the issuing judge, the date and time of issue, as well as the assurance of the judge that he or she has been reasonably satisfied regarding the need for issuance of the said order.

Inspections are being conducted, most often without prior notification, by the responsible officers of the Service of the Commission at the Commission's order, which must be in writing and specify accurately the subject and purpose of the investigation, fix the date on which it is to begin, the provision on which this power of the Commission is based and the possible sanctions where the undertaking or association of undertakings refuses to comply with the Commission's request.

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The Commission is entitled to request, where appropriate, the assistance of the Cyprus police for carrying out the above-mentioned functions.

It is also noted that, although the undertakings concerned are entitled to the presence of and consultation with their counsel during the inspection, the counsel's presence does not constitute a legal prerequisite for the validity of the inspection or a defence for non or defective compliance with the Commission's request.

The Commission may impose administrative fines on undertakings or associations of undertakings in case of incomplete or corrupted evidence (up to 1 per cent of their previous year's turnover) and, in addition, for each day they fail to comply with an order of the Commission to conduct an inspection (up to 5 per cent of their previous year's average daily turnover). In addition, it is a criminal offence for legal and natural persons to refuse or omit to comply with an obligation imposed on them to assist the investigative officers when required or to provide false, incomplete, inaccurate or misleading information.

Lastly, as per the newly introduced section 32A, the Commission is entitled, inter alia, to:

- conduct an enquiry into a specific sector of the economy, or specific types of agreement in various sectors, where the course of commercial transactions, the inelasticity of prices or other circumstance creates suspicions of a possible limitation or distortion of competition in Cyprus;
- request such information as is demanded for the application of section 3 or 6 of the Competition Law or article 101 or 102 TFEU, as well as carrying out any other necessary checks to this effect (in particular, the commission can request that undertakings or associations of undertakings make known to the commission any agreement, decision or concerted practice); and
- use the information that results from such search during investigation cases regarding potential infringements of section 3 or 6 of the Competition Law or article 101 or 102 TFEU.

International cooperation

10 Inter-agency cooperation

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

There is cooperation with the competition authorities of the European Union member states and the European Commission in the context of the European Competition Network (ECN), as required by Regulation (EC) 1/2003. The relevant provisions of the competition law on the issue of inter-agency cooperation can be found in section 23B of the Competition Law. Further, under section 23B(3), cooperation with other national competition authorities is possible in the event that a memorandum of cooperation is being concluded with the Commission. On 30 October 2014 the Commission signed a Memorandum of Cooperation with the Hellenic Competition Commission (HCC), as per the relevant commission's press release dated 7 November 2014.

The Commission is also a member of the European Competition Network (ECN) and the International Competition Network (ICN).

On a national level, the Commission is entitled, under section 23B(2), to request the assistance of regulating or other authorities exercising control over specific sectors of the Republic of Cyprus economy.

11 Interplay between jurisdictions

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

The Commission has often cited, in its reasoning, relevant decisions of the European Commission as well as the Hellenic and United Kingdom national competition authorities. Apart from this aspect, there is no significant interplay with other jurisdictions.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

See question 8.

13 Burden of proof

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

Each party bears the burden of proof for their respective claims. The level of proof is on the balance of probabilities.

14 Appeal process

What is the appeal process?

A decision of the Commission, being an act of an administrative authority, can be appealed by any legal or natural person with a legitimate interest in the said decision, whether a party to the decision or not, by filing administrative review proceedings before the Supreme Court of Cyprus within the time frame of 75 days of being notified of the decision or of the date of publication of the decision in the Official Gazette, whichever happens first.

Sanctions

15 Criminal sanctions

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

There are no criminal sanctions for cartel activity as such. It is noted, however, that Competition Law provides for criminal offences, including failure to provide information upon the Commission's request or destruction of evidence, and failure to abide by the relevant decision of the Commission, including a commitment decision.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Under section 24 of the Competition Law, as amended, regarding infringements of section 3 or 6 of the Law or article 101 or 102 TFEU committed by undertakings or associations of undertakings, the Commission may by its decision impose the following administrative sanctions:

(i) administrative fines, according to the gravity and duration of the infringement, not exceeding 10 per cent of the total turnover of the undertaking, or not exceeding 10 per cent of the sum of the total turnover of every undertaking that is a member of the infringing association of undertakings, where the turnover corresponds to the preceding financial year;
(ii) force the undertakings or associations of undertakings involved to bring to an end, within a fixed time limit, the infringement ascertained and avoid any repetition of it in the future; in case the infringement is brought to an end before the issuing of the decision of the Commission, the Commission may condemn the infringement by a declaratory decision;
(iii) any terms and measures whether behavioural or corrective, depending on the infringement ascertained, which are necessary to bring to an end of the relevant infringement; and
(iv) in case of failure of the undertakings or associations of undertakings involved to comply with the decision of the Commission as per points (ii) or (iii) above, an administrative fine of up to 5 per cent of the average daily turnover during the preceding financial year for each day during which the infringement continues.

An aggrieved party can also seek redress for damages before a competent District Court (Civil Jurisdiction) of the Republic of Cyprus. The maxim restitutio in integrum constitutes the basic principle of the damages award enshrined in the jurisprudence of the Cypriot courts, subject always to the principle that the award must be inter partes fair. Regarding relevant future legislative initiatives, it is noted that the Ministry of Energy, Commerce, Industry and Tourism of the Republic of Cyprus had placed the draft proposed bill, transposing EU Directive 2014/104/EU, into a public consultation process during the period 1–31 July 2015.

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17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Section 42(2) of the Competition Law provides that the Commission must inform the undertaking or association of undertakings affected about its intention to impose the administrative fine stipulating the reasons for which it intends to do so, and granting the said undertaking or association of undertakings or person the right to submit objections within a period of 30 days, which cannot be extended.

Section 24(a) provides that the Commission may exempt or reduce the amount of the administrative fine which would have been imposed on an undertaking or association of undertakings, according to the criteria and conditions of section 46 and, consequently, the Leniency Programme, if the said undertaking or association of undertakings cooperates or gives such assistance or proof which will assist the Commission in proving the infringement.

The limitation periods for the imposition of administrative fines are set out in section 41 of the Competition Law.

There are no published set of sentencing principles or guidelines for the imposition of administrative sanctions, including administrative fines, neither in the form of soft law or in the Competition Law. Nevertheless, the Commission may consult and draw guidance from the European Commission's Fining Guidelines.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

The Competition Law and in general Cyprus law do not provide for debarment from public procurement procedures for cartel infringements.

19 Parallel proceedings

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

There are no criminal sanctions for cartel activity per se. Administrative and civil sanctions can be pursued for the same conduct, due to their different nature. Administrative sanctions, including in the form of fines, could be pursued within the ambit of the Commission's proceedings and they have a punitive and deterrent nature. Civil proceedings before the competent district court aim at receiving compensation for damages caused as a result of the relevant infringement. In this sense, an assertion of the ne bis in idem principle may fail.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Private damage claims for violation of the relevant provisions of the Competition Law or TFEU can indeed be filed and tried by the competent district court and, on appeal, before the Supreme Court of Cyprus.

To that effect, section 40(1) of the Law explicitly provides that, in case of an action for damages brought by any person who has suffered loss or financial damage from any acts or omissions of an undertaking or associations of undertakings which acted in violation of section 3 or 6 of the Competition Law or article 101 or 102 TFEU, a final decision of the Commission, another competition authority or of the European Commission, ascertaining the said infringements, constitutes a rebuttable presumption about the truth of its context.

The private litigant claimant has also the right, under section 40(2), to apply to the competent district court for the issuance of an injunction to stop the continuous violation of the above-mentioned provisions of the Competition Law or TFEU.

It should be noted that, as also stated in Regulation 28 of the Leniency Programme, the grant of immunity from the imposition of an administrative fine or its reduction, by a Commission decision, does not absolve the applicant undertakings from civil liability emanating from a violation of section 3 of the Competition Law or article 101 TFEU, under section 40 of the Law.

In July 2015 the Ministry of Energy, Commerce, Industry and Tourism placed before a public consultation procedure a draft Bill entitled 'The Law regulating Civil Actions for Damages from the Infringement of the provisions of the Protection of Competition Laws of 2008 and 2014 and any amendments from time to time thereof of 2016', thereby seeking to incorporate 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 into the legislation of the Republic of Cyprus.

21 Class actions

Are class actions possible? If yes, 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 in Cyprus.

Cooperating parties

22 Immunity

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

The Immunity and Reduction of the Administrative Fine in case of Collusions in violation of Section 3 of the Competition Law and/or article 101 TFEU (Leniency Programme) Regulations of 2011 (Secondary Administrative Act 463/2011), largely based on the ECN Model Leniency Programme, is the current immunity and leniency programme (the Leniency Programme).

Under Regulation 4(1) of the Leniency Programme, the Commission may grant exemption from the imposition of the administrative fine that would have otherwise been imposed on an undertaking if the applicant is the first to present adequate evidence thereby enabling the Commission to, either (i) commence investigative proceedings for infringement of section 3 of the Law or article 101 TFEU, or (ii) reach a finding of infringement of section 3 of the Competition Law or article 101 TFEU. In either case, the exemption is granted only if, at the time of the application, the Commission did not possess adequate evidence. In addition, under Regulation 5 of the Leniency Programme, the applicant must fully, actively and continuously cooperate with the Commission until the end of the proceedings, including having its employees – both present and, if possible former – at the disposal of the Commission, refrain from any destruction or falsification of evidence as well as from disclosing the submission of the immunity application prior to the notification of the statement of objections to the relevant undertakings, unless otherwise agreed, abstain from any involvement in the alleged infringement, unless otherwise instructed by the Commission, as well as refrain from urging other undertakings to participate in the alleged infringement.

In the event the first applicant does not qualify for full immunity under Regulation 4(1) of the Programme, then, pursuant to Regulation 16, it is possible to be granted a reduction in the administrative fine, if the said applicant: (i) submits evidence bearing significant added value to the evidence already in the Commission's possession; and (ii) fulfils the conditions of Regulation 5. Pursuant to Regulation 22, the Commission may grant a reduction in the administrative fine at the rate of 30–50 per cent to the first applicant that meets the criteria in Regulations 16 and 5.

It should be noted that, as also stated in Regulation 28 of the Leniency Programme, the grant of immunity from the imposition of an administrative fine or its reduction, by a Commission's decision, does not absolve the applicant undertakings from civil liability emanating from a violation of section 3 of the Competition Law or article 101 TFEU, under section 40 of the Law.

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23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, 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 do not qualify for immunity under Regulation 4(1) of the Programme. However, as noted above, in accordance with Regulation 16 of the Programme, it is possible to be granted a reduction in the administrative fine, if the said parties (i) submit evidence bearing significant added value to the evidence already in the Commission's possession and (ii) fulfil the conditions of Regulation 5. The Commission, pursuant to Regulation 22, may grant a reduction in the administrative fine at the rate of 20–30 per cent to the second applicant and up to 20 per cent to subsequent applicants that meet the criteria in Regulations 16 and 5.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

In such case, only progressive reduction of the administrative fine is possible. As noted in the answers to questions 22 and 23, the Commission, pursuant to Regulation 22, may grant a reduction in the administrative fine at the rate of 20–30 per cent to the second applicant and up to 20 per cent to subsequent applicants that meet the criteria in Regulations 16 and 5.

25 Approaching the authorities

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?

Prior to filing the application for immunity before the Commission, as per Regulation 7 of the Leniency Programme, the applicant may, unofficially and anonymously, approach the Commission, through its chairperson, seeking unofficial guidance regarding the immunity application, with the Chairperson immediately informing the members of the Commission.

As per Regulation 4(2) and (3) of the Leniency Programme, in order for an immunity applicant to take benefit of the said programme, the applicant must have filed the relevant application prior to the Commission possessing enough evidence enabling it to issue an order for the performance of investigation under the Competition Law for alleged infringement of section 3 of the Competition Law and/or article 101 TFEU or prior to the Commission proceeding to such an investigation.

26 Cooperation

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?

Both the first applicant seeking immunity, under Regulation 4(1) of the Leniency Programme, as well as the subsequent cooperating parties seeking reduction of the administrative fine, under Regulation 16, must meet the conditions of Regulation 5, detailed in the answer to question 22.

The difference lies in the provision of Regulation 16 to the effect that the subsequent cooperating parties must submit evidence bearing significant added value to the evidence already in the Commission's possession (ie, said evidence must, owing to its nature or level of detail, or both, enhance the Commission's capability to prove the existence of the alleged cartel). Different degrees of significant added value are listed in Regulation 16(2).

Update and trends

The Commission published on its official website on 19 July 2016, the fact that the Commission had sent a statement of objections (SO) to a number of undertakings, operating in the ready mixed concrete regarding public tender bid manipulation.

Regarding relevant future legislative initiatives, it is noted that the Ministry of Energy, Commerce, Industry and Tourism of the Republic of Cyprus had placed the draft proposed Bill, transposing Directive 2014/104/EU, into a public consultation process during the period 1–31 July 2015.

27 Confidentiality

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

Under Regulation 27(2) of the Leniency Programme, the Commission protects the identity of the applicants, both for immunity and leniency, and the content of the application up until the statement of objections stage, unless the Commission is bound by another legal obligation or has consent of the applicant. Subsequent cooperating parties are afforded the same protection.

In addition, as per Regulation 27(1), the Commission does not use evidence and/or information submitted by an immunity or leniency applicant whose application has been rejected, unless the applicant has provided its consent or the Commission has obtained them in another manner.

In relation to the obligation of the Commission to notify to the respondent undertaking or association of undertakings the entire file of the case, including the applicant's submissions, Regulation 27(3) states that sections 17(9) and 33 of the Competition Law, on the duty to confidentiality, as well as the Regulations issued on the basis of section 46(1) of the Law are applicable.

Section 23(2)(k) of the Competition Law entitles the Commission, subject to the provisions of Regulation (EC) No. 1/2003, to publish announcements for the information of any party interested in the issues within its competence. To that effect, the Commission has issued that being, published online on its official website, a number of press releases stating the fact of compiling a statement of objection (SO), the identities of the SO addressees as well as a brief summary of the alleged violations of the Competition Law to which the SO relates (see www.competition.gov.cy).

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

There is the possibility to discuss early settlements, although there are no official guidelines. The Commission may draw guidance from the relevant Commission Notice on Settlements in Cartel Cases. In addition, under section 25 of the Competition Law, it is possible for the Commission to accept commitments where it intends to issue a decision demanding the end of infringements of section 3 or 6 of the Competition Law or article 101 or 102 TFEU.

29 Corporate defendant and employees

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

There is no express provision in either the Competition Law or in the Immunity and Reduction of the Administrative Fine in case of Collusions in violation of section 3 of the Competition Law and/or article 101 TFEU (Leniency Programme) Regulations of 2011 (Secondary Administrative Act 463/2011) regarding how current or former employees will be treated in the event immunity or leniency is granted to a corporate defendant.

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30 Dealing with the enforcement agency

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

The undertaking that submits an application for immunity must either provide immediately all the necessary evidence or provide the necessary information and submit the evidence as soon as possible thereafter. In the latter case, the undertaking must submit a detailed list of the evidence that it intends to submit at a later stage.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or anticipated assessments or reviews of the immunity/leniency regime at present.

Defending a case

32 Disclosure

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

As per section 17(9)(a) of the Competition Law, the Commission is not bound to communicate to the undertaking or association of undertakings against which the complaint or the ex officio investigation is turned to, the whole file formed by the Commission on the case; however, subject to the provisions of section 33, the Commission is bound to communicate to it all of those documents of the file on which it intends to base its decision, with the exception of those documents constituting business secrets; or, if those documents are already available to the undertaking or association of undertakings, it must indicate them to the undertaking in writing, so that this undertaking or association of undertakings be informed in due course of all the documents that shall be used by the Commission as evidence. Section 33(1) provides that the Chairperson, the other members and the substitute members of the Commission, the persons working under the supervision of the Commission, the staff of the Service of the Commission and other public officers, who by reason of their post or in the performance of their official duties, obtain information on business secrets and information of a confidential nature, shall have a duty to secrecy and shall be bound not to communicate or publicise such information, except in so far as this proves necessary (i) to prove an infringement of sections 3 and/or 6 of the Competition Law and/or articles 101 TFEU and/or 102 TFEU and (ii) to implement the provisions of the Competition Law.

33 Representing employees

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

Although there is no explicit provision prohibiting counsel from representing both the undertaking concerned as well as a present or past employee, it should be evaluated from the outset whether a conflict of interests could arise, whereby independent legal advice must be sought.

34 Multiple corporate defendants

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

Although there is no explicit provision prohibiting counsel from representing multiple corporate defendants, it should be evaluated from the outset whether a conflict of interests could arise, whereby independent legal advice must be sought.

35 Payment of penalties and legal costs

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

There is no provision in the Competition Law prohibiting the payment by a corporation of the legal penalties and legal costs imposed on its employees.

36 Taxes

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

There are no tax deductions regarding fines or private damages.

37 International double jeopardy

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 explicit rules preventing international double jeopardy for cartel enforcement. However, the Commission may take into account fines and other sanctions imposed by the European Commission or other national competition authorities of the ECN before deciding on the level of the administrative fine.

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38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

As noted in question 17, there are no fining principles or guidelines for the establishment of the administrative fine neither in the form of soft law or in the text of the Competition Law. Nevertheless, the Commission may consult and draw guidance from the European Commission's Fining Guidelines. Further, under section 42(2) of the Competition Law, the Commission informs the undertaking or association of undertakings affected about its intention to impose the administrative fine stipulating the reasons for which it intends to do so, and grants the said undertaking or association of undertakings or person the right to submit objections within a period of 30 days. That said, the Commission may reduce the fine, at its discretion, if the undertakings concerned present valid mitigating reasons.

There has been no indication in the Commission's case law that the existence of a compliance programme, or compliance initiatives undertaken after the investigation has commenced, affects the level of the fine.

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Denmark

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Danish rules on cartel regulation are laid down in the Danish Competition Act (the Act), which entered into force in 1998. An English version of the Act is accessible through the website of the Danish Competition and Consumer Authority (DCCA) on http://en.kfst.dk/Competition/Legislation.

Section 6 of the Act contains a general prohibition against certain anticompetitive agreements.

Danish competition law is, to a large extent, similar to EU competition law. For instance, sections 6 and 8 of the Act largely correspond to article 101(1) and 101(3) of the Treaty on the Functioning of the European Union (TFEU). Moreover, the Danish rules are interpreted in accordance with practice from the European Commission as well as the European Court of Justice.

2 Relevant institutions

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 is the authority investigating cartel matters and other competition law infringements and for ensuring compliance with the competition rules in general. Thus, the DCCA is essentially responsible for enforcing the Act.

The DCCA constitutes together with the Danish Competition Council (the Council) an independent competition authority. Cartel cases are generally investigated and prepared by the DCCA and subsequently decided by the Council in the first instance.

Decisions by the Council may be appealed to the Danish Competition Appeal Tribunal (the Appeal Tribunal) and, subsequently, to the Danish courts.

Where the Council finds that an intentional or grossly negligent breach of competition law has been committed, the Council may decide to refer the case directly to the State Prosecutor for Serious Economic and International Crime (the State Prosecutor) for further investigation and prosecution. The Council may delegate this authority to either the chairman of the Council or, in specific cases, to the Director General of the DCCA.

3 Changes

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

In July 2015, an amendment to the Act entered into force, changing the composition of the Council.

Previously, the Council consisted of 18 members, including nine members appointed by industrial and trade organisations. The presence of business and consumer interests in the Council raised doubts as to the autonomy of the Council and the legitimacy of its decisions.

Accordingly, the Council has been reorganised. The Council now constitutes a professional board of the DCCA, consisting of seven members with practical and theoretical expert knowledge on competition matters, business management and consumer affairs. The members are appointed by the Minister for Business and Growth.

Following the new composition, the decisions of the Council are expected to be less influenced by politics and more characterised by professional insight and expertise.

Finally, the Damages Directive (Directive 2014/104/EU) is expected to be implemented in 2016. A new draft bill for the implementation of the Directive was presented in the summer of 2016. The bill is expected to enter into force on 27 December 2016.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

As noted above, Danish competition law is generally consistent with EU competition law. Accordingly, the substantive provisions of the Act largely correspond to the similar provisions of the TFEU.

Section 6 of the Act lays down a general prohibition against certain anticompetitive agreements and provides that such agreements are void unless covered by the exceptions in section 7 (de minimis rule for non-hard-core infringements) or the exemptions in section 8 of the Act (see below).

Section 6(1) of the Act provides that it is prohibited for undertakings etc, to enter into agreements that directly or indirectly have as their object or effect the restriction of competition. The prohibition laid down in section 6(1) applies to decisions made by associations of undertakings as well as concerted practices between undertakings (see section 6(3) of the Act).

The principle of per se illegality is not applied under Danish law. As is the case under EU law, certain anticompetitive agreements are considered hard-core infringements under Danish law (ie, price-fixing agreements, restrictions on production or sales, market and customer sharing and bid rigging). However, there are no specific provisions dealing with these types of agreements. Thus, all anticompetitive agreements are dealt with under the general prohibition set out in section 6(1) of the Act and are subject to a competitive effects test (section 8 of the Act).

Section 8(1) of the Act provides that the prohibition set out in section 6(1) does not apply if agreements, decisions or concerted practices between undertakings (i) contribute to improving the efficiency of the production or distribution of goods or services or to promoting technical or economic progress, (ii) provide consumers with a fair share of the resulting benefits, (iii) do not impose restrictions on the undertakings that are not necessary to attain these objectives, and (iv) do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are no industry-specific infringements and no industry-specific defences or antitrust exemptions. The Act does not, however, apply to

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pay and working conditions or to agreements, decisions or concerted practices within the same undertaking or group of undertakings.

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 all the consequences of anticompetitive agreements required by public regulation. In this respect, section 2(2) is fairly similar to the state compulsion defence under EU competition law (see, for example, case C-280/08 P, *Deutsche Telecom*).

6 Application of the law

Does the law apply to individuals or corporations or both?

The substantive provisions of the Act apply to agreements between undertakings, decisions made by associations of undertakings and concerted practices between undertakings.

The Act applies to economic activity, whether carried out under private or public management. There are no requirements in terms of corporate form. The decisive criterion is whether or not the undertaking concerned carries out economic activity on a market.

The Act also applies to individuals who carry out economic activity or have a controlling interest in one or more undertakings. Furthermore, the Act applies to individuals practising a liberal profession, such as lawyers, accountants, doctors and dentists. Finally, members of the board, the management and employees of the relevant undertakings must adhere to the competition rules and may be held liable for competition law infringements, as criminal sanctions may be imposed on both undertakings and individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Act contains no provisions on extraterritoriality (except for section 29, which provides that the Act does not extend to the Faroe Islands and Greenland).

However, in general, it is assumed that the Act extends to conduct that has anticompetitive effects in Denmark. Consequently, a cartel between two undertakings situated outside Denmark may infringe the Danish competition rules.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Cartel investigations are primarily carried out by the DCCA, but may also be carried out by the State Prosecutor if there is reasonable cause to suspect an infringement that will lead to a penalty.

The DCCA may initiate a cartel investigation on its own initiative, for example following an analysis of the competitive environment in a specific sector. Cartel investigations may also be initiated on the basis of a leniency application, a complaint or a tip from a third party. In this regard, the DCCA has introduced a feature on its website making it possible for employees or others who may have knowledge of a cartel to inform the DCCA anonymously.

During the investigation, the DCCA will generally carry out a dawn raid on the premises of the relevant undertaking in order to secure evidence. Following the dawn raid, the DCCA will conduct a review of the secured material, which can be a lengthy procedure. Electronic material copied from the undertaking's IT system must be reviewed within 40 days after the dawn raid has been carried out.

The review may result in a decision by the DCCA (i) to close the case, (ii) to refer the case to the State Prosecutor (if the DCCA finds that an intentional or grossly negligent infringement of competition law has been committed), or (iii) to continue the investigation and present the case to the Council in order for the Council to render a decision (whereafter the DCCA may refer the case to the State Prosecutor).

9 Investigative powers of the authorities

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

Under section 17 of the Act, the DCCA may demand all the information deemed necessary to carry out its tasks or to decide whether the provisions of the Act apply to a certain situation.

Furthermore, the DCCA is entitled to carry out dawn raids on the premises of an undertaking and make forensic copies of its IT system pursuant to section 18 of the Act. During a dawn raid, the DCCA is allowed to request employees to present the contents of their pockets and briefcases. The DCCA is also entitled to access company vehicles. However, the DCCA is not allowed to access private homes or private cars when conducting dawn raids under Danish law (as opposed to dawn raids carried out under EU law in accordance with Regulation 1/2003).

Before conducting a dawn raid, the DCCA is required to obtain a court order containing information on the subject matter and purpose of the inspection. The DCCA must stay within the limits of the court order when collecting and reviewing material.

If there is a confirmed suspicion of cartel activity, the case may be referred to the State Prosecutor, who, under the Danish rules on criminal procedure, is entitled to conduct searches (including searches of private homes) subject to court approval.

Furthermore, the State Prosecutor may, subject to a court order, among other things, (i) conduct wiretapping, (ii) search the premises of individuals who are not suspected of participating in a cartel, (iii) conduct monitoring (including the filming of individuals at non-public locations and registration of individuals' locations based on mobile phones), and (iv) install 'sniffer programs' on computers. The legal basis for these measures entered into force on 1 March 2013 and is thus relatively new.

It should be noted that the DCCA does not have the right to review an undertaking's correspondence with its external legal counsel concerning the undertaking's compliance with competition law. This corresponds to the EU rules on legal privilege. However, it has not yet been tested in case law whether the State Prosecutor will have access to such correspondence.

International cooperation

10 Inter-agency cooperation

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

Denmark is part of the European Competition Network (ECN) and thereby participates in the cross-border cooperation between the European Commission and the national competition authorities of the other Member States. The DCCA also participates in the informal cooperation of the European Competition Authorities.

On a Nordic level, the Danish competition authorities cooperate with Norway, Sweden, Finland, Iceland, Greenland and the Faroe Islands. An annual meeting is held, the purpose of which is to exchange legislative experiences and discuss cases and subjects of common interest.

Furthermore, Denmark has entered into a formal agreement with the national competition authorities in Sweden, Norway and Iceland on the exchange of confidential information.

Finally, Denmark is also active within the OECD (which has set up the Global Competition Network), the International Competition Network and WTO.

11 Interplay between jurisdictions

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

In general, jurisdictions within the EU (and the ECN) interplay with the Danish competition authorities (see also question 10).

Moreover, under section 18a of the Act, the DCCA may, subject to reciprocity, disclose information covered by its duty of confidentiality to other competition authorities if such information is necessary to assist in the enforcement of the competition rules by these authorities,

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and if the DCCA thereby fulfils Denmark's bilateral and multilateral obligations.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Decisions on cartel infringements can be made by the Council based on investigations by the DCCA or directly by the courts in a criminal trial.

The Danish competition authorities do not have the power to impose administrative fines or criminal sanctions on undertakings or individuals.

If the case is referred to the State Prosecutor (either directly by the DCCA or following a Council decision), the undertakings involved and/or the responsible individuals may be formally charged with a competition law infringement, and the case will be brought before the courts.

Under section 23b of the Act, the Danish competition authorities or the State Prosecutor may offer undertakings a fine in lieu of prosecution by issuing a fixed penalty notice. (Fixed penalty notices issued by the Danish competition authorities are subject to approval by the State Prosecutor.) If the undertaking accepts the fine, there will be no further proceedings and the case may therefore be closed relatively quickly. If the fine is not accepted, the case will be brought before the courts.

13 Burden of proof

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

The Act contains no provisions on the burden of proof or the level of proof required. Consequently, the general rules of Danish law apply as regards the burden of proof.

As a general rule, it is for the competition authorities to prove their case, including the existence of an anticompetitive agreement under section 6 of the Act. If, however, the authorities prove an anticompetitive agreement, it is for the parties to prove that the agreement meets the conditions of section 8 (similar to article 101(3) TFEU).

In civil proceedings, the competition authorities and the courts are generally free to assess evidence. No hierarchy or forms of evidence are set out in any statutory provisions. Accordingly, it is for the authorities and the courts to determine when the burden of proof has been lifted with the result that the burden of counter proof shifts to the undertaking.

In criminal proceedings, it is required that there is no reasonable doubt about the guilt of the defendant (the in dubio pro reo principle). For fines to be imposed, 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.

14 Appeal process

What is the appeal process?

Decisions made by the Council may be appealed to the Appeal Tribunal. Decisions made by the Council may not be brought before any other administrative authority than the Appeal Tribunal and may not be brought before the courts until the Appeal Tribunal has made its decision.

An appeal must be lodged with the Appeal Tribunal within four weeks after a decision by the Council has been communicated to the party concerned. The Appeal Tribunal generally conducts a full and thorough review of the case.

Decisions made by the Appeal Tribunal can be challenged before the courts. A strict eight-week time limit applies. If a decision made by the Appeal Tribunal has not been brought before the courts within eight weeks after the relevant party has been notified of the decision of the Council, the decision becomes final.

Sanctions

15 Criminal sanctions

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

In case of intentional or grossly negligent breaches of competition law, criminal sanctions may be imposed on both undertakings and individuals.

In cartel cases, imprisonment may be imposed on individuals if their participation in a cartel has been intentional and if the breach has been of a grave nature, especially due to the extent of the infringement or its potentially damaging effects. The maximum term of imprisonment is usually one and a half years but may be increased up to six years in case of aggravating circumstances.

Imprisonment, as well as an increase in the level of fines, was introduced on 1 March 2013. The new rules apply to both infringements committed after 1 March 2013 and to incidents commenced before 1 March 2013 and continuing after this date.

When meting out a penalty to be imposed, consideration must be given to the gravity of the infringement and its duration.

As regards legal persons, consideration must also be given to the legal person's turnover (see section 23(5) of the Act).

The gravity of the infringement will be defined as either less grave, grave or very grave. The indicative level of the fines for each category of gravity is specified below (before and after 1 March 2013, respectively):

Gravity	Less grave	Grave	Very grave
Examples	Exclusive purchasing obligations lasting more than five years	Resale price maintenance, non-compete clauses in joint production agreements	Coordination of prices, production, customers or bids
Before 1 March 2013 (undertakings)	Up to 400,000 kroner	From 400,000 to 15 million kroner	More than 15 million kroner
After 1 March 2013 (undertakings)	Up to 4 million kroner	From 4 million to 20 million kroner	More than 20 million kroner
Before 1 March 2013 (individuals)	Minimum 10,000 kroner	Minimum 25,000 kroner	Minimum 50,000 kroner
After 1 March 2013 (individuals)	Minimum 50,000 kroner	Minimum 100,000 kroner	Minimum 200,000 kroner

As regards a legal person's turnover, it is stated in the preparatory works of the Act that fines should not exceed 10 per cent of the undertaking's worldwide turnover.

It should be noted that the level of fines under the new 2013 regime has not yet been dealt with in practice, and that the courts will have considerable discretion when imposing penalties. Furthermore, the courts have yet to impose the first imprisonment. Imprisonment is expected primarily to be imposed on members of the board and the management. In this respect, the State Prosecutor has unofficially stated that, in general, he will ask for unconditional imprisonment in cartel cases, including bid-rigging cases.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

There are no civil or administrative sanctions under Danish law.

However, as described under question 12, the Danish competition authorities may offer undertakings and individuals a fine in lieu of prosecution, subject to acceptance by the State Prosecutor.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

See question 15.

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18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

As of 1 January 2016, it is possible for a contracting authority to exclude an operator from participation in a procurement procedure if the contracting authority has sufficiently plausible indications to conclude that the economic operator 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 Danish Act on Public Procurement (Act No. 1564 of 15 December 2015) is based on Directive No. 24 of 26 February 2014 of the European Parliament and of the Council on Public Procurement.

The contracting authority has the decision-making power. The decision is usually a discretionary sanction but under certain circumstances debarment is mandatory. The usual time period of debarment is two years from the date when the relevant anticompetitive behaviour ended. The economic operator 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 economic operator cannot be excluded from the procurement procedure.

Any questions in this regard can be brought before the Danish Complaints Board for Public Procurement.

19 Parallel proceedings

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

Civil and administrative penalties do not exist under Danish competition law.

The Danish competition authorities have the power to decide whether agreements are in breach of competition law and whether agreements must be reported to the State Prosecutor. The competition authorities may choose to make their own decision before reporting a case to the State Prosecutor or, alternatively, may report the case directly to the State Prosecutor for criminal investigations without making their own decision. If the authorities have a confirmed suspicion of an infringement, the case will be reported directly to the State Prosecutor.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Private damage claims are possible under Danish law. As there is no special Danish legislation on damages for breach of competition law, the rules on private damage claims reflect general principles and practice concerning liability in tort. It should be noted that, in the summer of 2016, a draft bill for the implementation of the Damages Directive (Directive 2014/104/EU) was presented. The bill is expected to enter into force on 27 December 2016.

The factors that need to be established in order for a plaintiff to be awarded damages are proof of fault, the existence and size of a loss, the causation between the fault and the loss and the foreseeability or adequacy of damages.

As regards liability in tort, it is a fundamental principle for the assessment of damages that the plaintiff's financial position before the occurrence of the damage must be restored. The level of damages must not be such as to enrich the injured party. Furthermore, the injured party is under a duty to mitigate his or her loss.

The Danish courts generally have a conservative approach to damage claims.

The Danish courts accept the passing-on defence in competition law cases. Thus, the defendant can argue that the plaintiff did not suffer any loss as any overcharge attributed to anticompetitive behaviour has been passed on to a subsequent purchaser. As a starting point, the burden of proof lies with the defendant. However, the burden of proof may shift during the case.

Indirect purchaser claims are permitted under Danish law; thus, indirect purchasers may claim damages.

21 Class actions

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

Class actions for follow-on damage claims are generally possible under Danish law. Class actions are regulated by the rules of the Danish Administration of Justice Act, and, as a general rule, a class action is subject to the same procedure as other Danish court cases.

Additionally, section 26 of the Act states that where several persons have raised claims for damages due to infringements of the Act or articles 101 or 102 TFEU, the Consumer Ombudsman may be appointed as a representative for the class for the purpose of recovering such damages under a class action.

Cooperating parties

22 Immunity

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

The Act provides for a leniency programme, which is by and large comparable to the leniency programme set out under EU law.

Thus, section 23a of the Act provides that anyone who acts in breach of section 6 of the Act or article 101 TFEU by entering into a cartel agreement will, upon application, be granted withdrawal of the charge that would otherwise have led to a fine or imprisonment for participating in the cartel, provided the applicant, as the first one, approached the authorities about the cartel, submitting information which the authorities were not in possession of at the time of the application.

The possibility of withdrawal of the charge is subject to certain conditions. First, withdrawal of the charge will only be granted (i) if before having conducted an inspection or a search regarding the matter in question, the authorities are given specific grounds to initiate an inspection, conduct a search or inform the police of the matter in question, and (ii) if the authorities are enabled to establish an infringement in the form of a cartel after an inspection or search regarding the matter in question has been conducted (see section 23a(1) of the Act).

Furthermore, withdrawal will only be granted if the applicant (i) cooperates with the authorities throughout the entire case, (ii) brings the participation in the cartel to an end no later than by the time of the application, and (iii) has not coerced any other party into participating in the cartel (see section 23a(2) of the Act).

If the requirements set out in section 23a(1) of the Act are not met (ie, if the leniency applicant is not the first one to apply for immunity) the leniency application will be treated as an application for a reduction of the penalty (see section 23a(3) of the Act). Thus, anyone acting in breach of section 6 of the Act or article 101 TFEU by entering into a cartel agreement will be granted a reduction of the fine that would otherwise have been imposed for participation in the cartel, provided the applicant submits information about the cartel that constitutes significant added value compared to the information already in the authorities' possession, and provided the requirements in section 23a(2) of the Act, as described above, are satisfied.

23 Subsequent cooperating parties

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

See question 22.

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Update and trends

In early 2010, the DCCA conducted a dawn raid at the premises of five undertakings in the construction industry, which led to the opening of a major case referred to as 'the construction cartel' case (the case consists of several individual cartel cases). The State Prosecutor filed charges against 33 building contractor companies for competition law infringements such as bid rigging and exchange of information on prices and terms. Fine notices have been issued to 26 companies, 21 of which have accepted the fines without objections. Furthermore, 22 leading employees have been fined 15–25,000 kroner each for participation in the construction cartel. During the second half of 2015, the first three judgments in the construction cartel case were rendered, two of which were affirmed by the appellate court (the High Court) during the first half of 2016. A fourth judgment was also rendered and later affirmed by the appellate court in 2016, and finally in a fifth case, judgment was rendered in favor of the defendant. Combined, the fines issued amount to almost 31 million kroner. It should be noted that the cases are dealt with under the previous sanctions regime. The construction cartel remains the largest Danish cartel case to date.

In June 2015, the Council found that two companies, LKF Vejmarkering and Eurostar Danmark, had entered into an anticompetitive agreement by creating a consortium while being competitors on the market for road marking. The two companies were the two largest contractors on the market and placed a joint tender in a public procurement by the Danish Road Directorate for a period of four years, covering road marking in most of Denmark. The consortium was awarded the contract. The Council stated that the consortium restricted competition by object. It should be noted that as the procurement geographically covered most of Denmark, it was possible to submit tenders on different lots of the contract – covering only part of the geographical area – instead of submitting one (joint) tender. As such the contractors in question could have individually submitted geographically divided tenders – in competition with each other – instead of bidding jointly (as a consortium) for the whole contract. In April 2016, the Tribunal upheld the decision of the Council.

In February 2016, five Danish real estate agents accepted fines for colluding to boycott a property finding website, Boliga.dk, which is a competitor to the real estate agents' own property finding website, Boligsiden.dk. The fines total 12 million kroner, not including the additional personal fine of 25,000 kroner to one senior executive from each of the five companies. Two other real estate agents have rejected fines and will challenge the State Prosecutor in court. The case concerns a period in 2009–2010, in which the real estate agents discouraged their employees from providing photographs to the competing property finding website. According to the DCCA, the boycott activity protected the real estate agents' own property finding website from competition and thereby constituted a breach of competition law. The two remaining real estate agents will meet the State Prosecutor in court, presumably during 2016.

Furthermore, the Damages Directive (Directive 2014/104/EU) is expected to be implemented in 2016. A new draft bill for the implementation of the Directive was presented in the summer of 2016. The bill is expected to enter into force on 27 December 2016.

Finally, Danish competition authorities have an increased focus on consortia and the distinction between a legal consortium and an illegal cartel. In 2014, the DCCA issued guidance on this issue, which was followed up by specific cases in 2015. Furthermore, it is expected that the DCCA will review and amend its guidance on consortia in 2017.

24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Pursuant to section 23a(5) of the Act, the applicant that goes in second (and is therefore unable to obtain full leniency, see question 22) will receive a 50 per cent reduction of the fine. The penalty reduction for the third cooperating party is 30 per cent, and, finally, the penalty reduction for subsequent applicants will be up to 20 per cent of the fine that would otherwise have been imposed on the party concerned for participating in the cartel.

25 Approaching the authorities

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

As such, there are no formal deadlines for the initiation or completion of a leniency application. However, it should be stressed that a leniency application must be submitted at a point in time when the authorities have not yet conducted an inspection or a search regarding the matter in question or when the submitted information constitutes significant added value to an ongoing investigation. Moreover, the applicant must bring the participation in the cartel to an end before submitting the application (see question 22).

26 Cooperation

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?

See question 22.

To date, there have been very few leniency cases in Denmark and no ministerial orders or the like have been issued. Nonetheless, the competition authorities will expect full cooperation throughout the process, both by the first leniency applicant and by any subsequent cooperating parties.

27 Confidentiality

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 'further access'.

Generally, the practice of the DCCA is to keep the identity of leniency applicants confidential. This practice was confirmed by the Appeal Tribunal in a specific case from 2015. Furthermore, the DCCA is reluctant to publish information that may lead to the identification of the leniency applicants.

Confidentiality is, however, not guaranteed as the DCCA publishes a summary of any case involving a fine. Furthermore, the DCCA notifies the European Commission and national competition authorities in other EU member states when receiving applications for leniency.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Plea bargaining as such does not exist under Danish law. However, it is, to some extent, common for the DCCA and the State Prosecutor to enter into negotiations or talks with the undertakings involved regarding the level of the fine to be imposed.

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29 Corporate defendant and employees

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

Under section 23a(11) of the Act, a leniency application from an undertaking or an association will automatically cover current and former board members, senior managers and other employees, provided that each person satisfies the requirements set out in section 23a(2) (described in question 22).

30 Dealing with the enforcement agency

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

A leniency application can be submitted to the DCCA or to the State Prosecutor.

There are no formal requirements as to the application itself; however, the DCCA has prepared a standard application. An application may be submitted to the DCCA in person, by letter or electronically through the website of the DCCA.

In practice, the DCCA will generally invite the applicant to a meeting in order to discuss the application.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

At present, there are no ongoing or anticipated assessments or reviews of the leniency regime.

Defending a case

32 Disclosure

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

Usually the defendant will receive a notice of concern (NOC) from the DCCA at the beginning of the case. The NOC will contain the DCCA's immediate opinion in regard to the claimed breach of the Competition Act. The opinion is non-binding for the DCCA.

As stated above in question 27, the Danish Public Administration Act applies to competition cases and provides a right of access to documents for the defendant. The right of access includes all registered documents in regard to the defendant, excluding internal working papers and confidential material as, for example competition sensitive information.

If it is clear to the DCCA that the defendant is liable to punishment the case will be referred to the State Prosecutor who will enforce criminal proceedings. This information is not necessarily disclosed to the defendant. According to the general procedural rules in criminal cases, the defendant has the right to be informed of any criminal charges against oneself.

33 Representing employees

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

As a general rule, counsel may represent both parties unless the representation will create a conflict of interest. If there is a conflict of interest – or an immediate risk that a conflict of interest will arise – a present or past employee should be advised to seek independent legal advice.

It should always be considered carefully whether there is a conflict of interest.

34 Multiple corporate defendants

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

It is possible for counsel to represent multiple corporate defendants unless there is a conflict of interest. See also question 32.

35 Payment of penalties and legal costs

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

A corporation may pay the legal penalties imposed on its employees as well as their legal costs. However, such payments must be taxed as income for the relevant employees.

36 Taxes

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

Under Danish law, the general rule is that expenses incurred by an undertaking are tax-deductible if the expenses are considered a natural operating expense.

Generally, fines and other penalties are not considered a natural operating expense and will thus not be tax-deductible.

With regard to damages incurred as a consequence of a criminal offence, the issue of whether such an expense is considered a natural operating expense and thus tax-deductible depends on a specific assessment. However, the courts will generally be reluctant to accept any deduction if the undertaking concerned has acted with intent or gross negligence.

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37 International double jeopardy

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

In general, companies and individuals sanctioned in a criminal proceeding outside Denmark cannot be sanctioned for the same action in a subsequent Danish criminal proceeding (the ne bis in idem principle).

As regards private damage claims, it is a fundamental principle for the assessment of damages that the injured party's financial position must be the same as before the damage occurred. Consequently, any compensation received by the injured party in another jurisdiction will be taken into account in a subsequent Danish case.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The optimal way in which to get the fine down is to apply for leniency. Furthermore, undertakings that contact the DCCA in order to settle the case by paying a fine in lieu of prosecution (as described in question 12) will generally be granted a reduction of the fine.

Additionally, section 82 of the Danish Criminal Code provides for a number of mitigating circumstances, the most relevant of which provides the basis for the leniency programme.

Finally, according to the preparatory works of the Act, the existence of a compliance programme at the time of the offence and the continuance of such a programme may constitute mitigating circumstances, which can affect the level of the fine, provided the undertaking does in fact seek to ensure compliance with the competition rules.

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Ecuador

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The primary piece of Ecuadorian legislation dealing with economic competition matters is the Organic Law for the Regulation and Control of Market Power (LORCPM), in force since 11 October 2011.

The Regulation for the Application Organic Law for the Regulation and Control of Market Power (RLORCPM) is the most relevant piece of secondary legislation dealing with competition matters, in force since 7 May 2012.

The Organic Telecommunications Law sets forth a set of special competition rules for the sector.

On 1 September 2015, the Regulation Board enacted the Regulation for Supermarket Chains, which sets forth specific provisions that apply to the commercial relationships between supermarket chains and their suppliers, establishing preferential conditions for small and medium-sized suppliers.

2 Relevant institutions

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 in charge of investigating cartels is the Superintendency for Control of Market Power (the Superintendency), the only national enforcement agency.

The existence of a cartel is determined by the national enforcement agency. The Superintendency is a decentralised and independent administrative agency.

Any investigation initiated for the detection of a cartel will be conducted by an independent prosecuting division of the Market Abuse and Restrictive Practices Intendency (the Intendency).

If the Intendency determines that there is sufficient evidence that indicates the existence of a cartel, it will refer the matter to the First Instance Resolution Commission (the Commission) for a determination or adjudication regarding the existence of a cartel.

Any decision by the Commission may be appealed before the Superintendent for the Control of Market Power (the Superintendent), the final instance in the administrative jurisdiction.

A decision by the Superintendency (whether it is the Commission or the Superintendent) may be reviewed by the contentious administrative courts.

Finally, there is a parallel institution that is also relevant, the Regulation Board (the Board), which unlike the Superintendency, is entirely composed of members designated by the Executive Branch of government. The Board does not have any enforcement powers, but the LORCPM trusts it with the task of proposing and enacting secondary legislation for the application of the LORCPM and other industry-specific regulation.

3 Changes

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

There have not been any relevant changes to the regime, or any official proposal for any changes.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 11 of the LORCPM enumerates the types of forbidden anticompetitive agreements. Perhaps the most serious flaw of the aforementioned article 11 of the LORCPM is that it does not entirely differentiate between horizontal and vertical agreements. Nor does it distinguish between horizontal agreements forbidden by its object and other types of procompetitive collaborations between competitors (ie, some kinds of joint ventures).

Fortunately, article 8 of the RLORCPM (enacted almost a year after the passing of the LORCPM) brought much needed refinement, as norm that was exclusively conceived for the interpretation of article 11 of the law and the entire regime of forbidden anticompetitive agreements. Article 8 of the RLORCPM introduced a clear rule for the distinction between those types of agreements that shall be analysed under a rule of reason framework, and other types of agreements that are considered to be forbidden or as per se violations of the law.

The following horizontal agreements are forbidden by article 8 of the RLORCPM: naked price-fixing agreements; output limitation or distribution coordination agreements; geographic zones and client allocation; and bid-rigging.

Article 8 of the Regulation is also very clear when it indicates that all other horizontal agreements must be analysed under a rule of reason.

There are no vertical agreements that are considered as infringements.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are no industry-specific infringements. There are no industry-specific defences or exemptions.

Article 28 of the LORCPM grants the Regulation Board the power of authorising conduct which might otherwise be illegal under the general regulatory framework of the law, always in the benefit of the 'public interest'. For instance, anticompetitive conduct may be authorised for the development of state-owned monopolies; the development of 'strategic sectors' (as defined in the Constitution); the development of 'public services' (as defined in the Constitution); the development of the national economy's industrial and technology sectors; and the introduction of affirmative action policies in favour of the 'popular and solidary economy' (as defined in the Constitution).

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6 Application of the law

Does the law apply to individuals or corporations or both?

The law applies to individuals and corporations alike.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The extraterritorial reach of the law has not been discussed so far as a matter of law. Article 2 of the LORCPM states that any conduct taking place outside the national territory, which may have a 'prejudicial effect on the national market' is subject to the jurisdiction of the national competition authority.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

An investigation can start by the initiative of the competition authority (ex officio) or following the presentation of a complaint by a third party. In the second case, the competition authority has three days to verify if the complaint fulfils the formal requirements set forth in the LORCPM.

After the investigation starts ex officio, or after the authority determines that a complaint fulfils all formal requirements, the investigated parties have 15 days to present initial exculpatory evidence and arguments.

After such evidence and arguments have been received and analysed by the authority, it has 10 days to decide whether a full investigation will be launched by the agency, provided there is sufficient evidence, prima facie, to establish the presumption of a violation.

Once the merits for the opening of a full investigation have been duly determined by the competition authority, the duration of this investigation may be 180 days, and may only exceptionally be extended once for an additional 180 days. At the end of the investigation period, the authority must produce a preliminary results report.

Once the preliminary results report is notified to the investigated parties, they may present defence statements within the next 15 days.

After this, the evidentiary term will be opened for a maximum of 90 days. At this point, the investigated parties may present all the additional evidence and arguments that they deem necessary to support their previous defence statements. Subsequently, the competition authority's organ in charge of the investigation (Market Abuse and Restrictive Practices Intendency), will produce a final report after 15 days.

The Intendency will in turn submit its final report to the First Instance Resolution Commission. Thirteen days after this submission, a public hearing may take place, where all interested parties may assist and present their final pleadings.

Within 90 days, the First Instance Resolution Commission must issue its final ruling.

9 Investigative powers of the authorities

What investigative powers do the authorities have?

The Authority has broad investigative powers. Investigative powers include the capacity to execute searches, dawn raids, subpoenas, production orders and to compel testimony from parties or any other person or company required that may be related or hold relevant information. A court order is not necessary unless the dawn raid or search takes place in the domicile of a physical person, as per article 49(3) of the LORCPM.

International cooperation

10 Inter-agency cooperation

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

The Ecuadorian competition authority has been very active in executing all sorts of cooperation agreements with other competition authorities around the world. The Superintendency for Control of Market Power is a member of the International Competition Network.

11 Interplay between jurisdictions

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 Ecuadorian competition regime is too recently established to determine if there are any specific interplays with specific jurisdictions and the actual form and effect of such interplay. However, it is very likely that the Authority is informed of foreign investigations since it has initiated investigations on undertakings being investigated in neighbouring jurisdictions.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

In accordance with the process described in question 8.

13 Burden of proof

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

According to article 48 of the LORCPM, the competition authority has the burden of proof. However, if an undertaking denies, makes difficult, or impedes access to information or if it provides false information in the course of an investigation, the Authority may revert the burden of proof. The level of proof, under the generally accepted standard of Ecuadorian civil procedure, is that of the 'reasoned appraisal of all the available evidence'. From an objective perspective, this level of proof resembles the 'balance of probabilities' standard, rather than the more rigorous 'beyond reasonable doubt'.

14 Appeal process

What is the appeal process?

As provided in article 67 of the LORCPM, the resolutions adopted by the Intendency or by the Commission can be reviewed by the Superintendent by means of an administrative appeal.

The appealing party can file the recourse within 20 days counting from the passing of the resolution of the Intendency and the appellate body has a 60-day term to resolve on the recourse.

The Administrative Courts, by means of judicial recourse, can review and set aside the Superintendent's resolution. The judicial recourse can be filed within 90 days after the parties were notified with the resolution.

Sanctions

15 Criminal sanctions

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

As a general rule, antitrust infringements do not trigger criminal sanctions within Ecuadorian jurisdiction. Since the enactment of the LORCPM, and to the extent of our knowledge, no single cartel case has been resolved yet.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Beside the remedial actions, the Superintendency may also impose economic sanctions for cartelisation, under the following terms (see article 79 of the LORCPM):

- If the abusive conduct was considered severe, then the fine can reach up to the 10 per cent of the business volume of the undertaking (gross sales without VAT).
- If the abusive conduct was considered very severe, then the fine can reach up to the 12 per cent of the business volume of the undertaking.

It is worth noting that the legal representatives of the undertaking and any individual who has been involved in the decision taking (regarding

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the cartel) may be sanctioned with a fine equal to 500 basic salaries (at the time of writing, the basic salary is equal to US$366).

Since the enactment of the LORCPM, no single cartel case has been resolved, therefore we cannot provide a deeper analysis on how fines are levied in such cases.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Yes. Article 80 of the LORCPM sets forth the mandatory criteria for fining. The criteria to be taken into consideration by the authority are the following:

- the size and characteristics of the market affected by the infringement;
- the market share of the operators under investigation;
- the scope of the infringement;
- the duration of the infringement;
- the effect of the infringement on the rights and legitimate interests of consumers and users or other operators;
- the benefits obtained as a result of the infringement; and
- aggravating and mitigating circumstances existing in relation to each of the companies or economic operators responsible.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

There is no automatic debarment from government procurement procedures. The Superintendency may resolve, as a discretionary sanction, the debarment of an operator from a specific procurement process or bid, as precautionary measure or as a cease action to reinstate competition.

19 Parallel proceedings

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

The Superintendency has exclusive jurisdiction to investigate, pursue and resolve on cartel matters. However, the Superintendency only has powers to mandate administrative sanctions.

If the Superintendency finds within its investigation that a crime has been committed, it is obliged to provide with a copy of the investigation to the Public Prosecutor in order initiate a criminal investigation upon the Penal Code provisions.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Any person or entity that has suffered losses or damages due to a cartel that is sanctioned by the law has the right to be repaired for such losses or damages. For this purpose, the affected person might initiate proceedings in an ordinary court under the general rules of Ecuadorian law. The right to initiate proceedings expires in five years counted since the decision imposing the sanction is enforceable.

Ecuadorian legislation does not allow double recovery under any circumstance.

21 Class actions

Are class actions possible? If yes, 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 under Ecuadorian antitrust legislation.

Upon the Consumer Law provisions, an association of consumers is entitled to file for a collective damage claim. Such damage claims have to be brought by identified parties or members of the association.

The process is conducted upon standard civil procedure rules.

Cooperating parties

22 Immunity

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

Yes. Full leniency is available in cartel cases as provided in article 83 of the LORCPM.

The Superintendency of Control of Market Power will hold an individual or company exempt of the sanction that it would have applied when the following conditions are met:

- it is the first entity or person to provide proof that, in the opinion of the Superintendency of Control of Market Power, allows for ordering an investigation to be performed with regards to a cartel; or
- it is the first entity or person to provide proof that, in the opinion of the Superintendency of Control of Market Power, allows for a cartel to be proven.

23 Subsequent cooperating parties

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

Yes. Article 84 of the LORCPM provides a specific partial leniency programme for those entities or persons who apply after the one with full leniency or immunity. The partial leniency has the following terms:

- the first company or person may benefit from a reduction of between 30 and 50 per cent;
- the second company or person may benefit from a reduction of between 20 and 30 per cent; and
- successive companies or individuals will benefit from a reduction of up to 20 per cent of the amount of the fine.

24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

See question 23.

25 Approaching the authorities

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 LORCPM does not provide for a specific deadline for initiating or completing an application for immunity. However, if an investigation process has been initiated, then the leniency application can be submitted until a party is charged with the infringement.

Is important to note that Ecuadorian legislation does not provide for a marker system and there are no precedents of leniency applications; therefore, the Superintendency might need to enact procedural guidelines in order to incentives such applications.

26 Cooperation

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?

The cooperation is a procedural action that involves the request for leniency and the supply of evidence, upon the regulations contained in articles 83 and 84 of the LORCPM. If such request is applied for, the facts being informed and evidence presented should be specified since the Authority has the discretion to grant or deny the leniency.

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27 Confidentiality

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 LORCPM does not specifically address confidentiality protection afforded to full leniency applicants. However, article 47 of the law deals with the confidentiality that must be afforded by officials of the Authority to the information and documentation provided by (or obtained from) undertakings in the course of an investigation or other processes. This obligation extends to other individuals (who are not officials) who by means of their profession have obtained access to such information.

However, the last paragraph of article 47 of the LORCPM establishes that notwithstanding the confidentiality protection granted to information and documentation, in the case a judge or tribunal expressly requests such information in the course of a specific case, such information shall be provided; thus, full leniency applicants will not be protected from damages actions deriving from violations to the law through the confidentiality protection afforded to the information and documentation provided by them.

The same situation applies to subsequent cooperating parties.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Pursuant to article 89 of the LORCPM, the Ecuadorian antitrust authority has the ability to enter into a binding cease agreement with a party at any point during an investigation before a final resolution is adopted, by means of which the party expressly accepts undertaking the anticompetitive conduct, agrees to stop undertaking the conduct, and undertakes to remedy any damage caused by the conduct to the market; the authority has interpreted the obligation to remedy damages caused to the market as an obligation to pay what they have called a 'remediation sum', which ends up being no more than a fine. This provision is not expressly limited to some kinds of conducts, and thus, is also available in cartel cases.

Undertakings may request the authority to reach a cease-agreement at any point during an investigation, and the Superintendency may accept or deny such agreement at its discretion. Secondary legislation that regulates this subject has been issued, which regulates among other things, the way to calculate the 'remediation sum'. The remediation sum will be calculated taking into account the turnover of the party and the time lapsed from the time the investigation begun until the cease was reached. No oversight applies to such settlements. Reaching a settlement of this kind does not protect the undertaking from damages lawsuits that may derive from anticompetitive conducts.

29 Corporate defendant and employees

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

Pursuant to the last paragraph of article 83 of the LORCPM, current and former employees will be granted the same treatment (immunity) as the company, so long as they have cooperated during the investigation.

30 Dealing with the enforcement agency

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

There is no practical experience on this subject, the leniency programme as far as we know has not been used by any undertakings, and there is no secondary legislation that regulates the subject. However, pursuant to article 83 of the law, full cooperation is required immediately. There is no marker system; undertakings considering applying to the leniency programme must have the information and documentation ready by the time they approach the Authority. Additionally, the Authority may deny the leniency request if it deems the information and documentation provided is not sufficient, thus, undertakings considering applying must be certain that the information and documentation they will provide is sufficient for the authority.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As we mentioned, we are not aware of the leniency programme ever being successfully implemented. Secondary regulation needs to be issued clarifying the procedure and the guarantees to applicants, for example, through the establishment of a marker system.

Defending a case

32 Disclosure

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

Defendants may access all information and documentation contained in the process, except for such information classified by the Authority as confidential, reserved and sensitive as per article 3 of the LORCPM.

33 Representing employees

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

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There are no rules against it within the scope of the LORCPM. Lawyers should abide by rules of conflict of interest.

34 Multiple corporate defendants

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

There are no rules against it within the scope of the LORCPM. Lawyers should abide by rules of conflict of interest.

35 Payment of penalties and legal costs

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

There are no rules against it.

36 Taxes

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

Neither fines nor private damage awards are tax deductible pursuant to article 10 of the Internal Taxation Regime Organic Law.

37 International double jeopardy

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 that take into account penalties imposed elsewhere. Penalties will be imposed on the basis of the effects caused in Ecuador regardless of penalties that may have been applied elsewhere. In the eyes of the Authority there would not be double jeopardy because it will limit its analysis to the conducts that took place or had effect in Ecuador.

In private damage claims overlapping liability may be taken into account in so far as receiving double compensation for the same damage would constitute double jeopardy in so far as the claim relates to the same conduct and involves the same parties.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Article 82 of the LORCPM establishes the extenuating circumstances, which are:

- undertaking activities that put an end to the conduct;
- lack of effective application of the prohibited conducts;
- undertaking activities intended to repair the damage caused; and
- full and active collaboration with the enforcement agency during an investigation.

The existence of a compliance programme is not in principle an extenuating circumstance, but could in theory let the authority know that the undertaking is attempting to avoid incurring anticompetitive conducts. The Authority has a lot of discretionary power to impose fines, thus, even if the existence of a compliance programme is not listed as an extenuating circumstance, it could aid in getting the fine down.

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European Union

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Within the EU member states (as well as Iceland, Liechtenstein and Norway, by virtue of the 1992 EEA Agreement), both national and EU competition laws apply to cartels. As far as EU competition law is concerned, the relevant provision is article 101 of the Treaty on the Functioning of the European Union (TFEU). Council Regulation No. 1/2003 contains the implementing rules and procedural rules.

2 Relevant institutions

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

Cartel matters can be investigated by the European Commission (the Commission) or national competition authorities (NCAs), or by both. Regulation No. 1/2003 contains the implementing rules regarding enforcement procedures. The key provisions that relate to cartel proceedings are as follows:

- the principal enforcement agency in the EU is the Commission, with DG Competition being the service responsible for the enforcement of the competition rules;
- where an NCA within the EU uses domestic competition law to investigate a cartel, if that cartel affects trade between member states, it must also apply article 101 TFEU;
- there is close cooperation between the Commission and the NCAs of member states, including exchange of confidential information, within the framework of the European Competition Network (ECN) established between the Commission and the NCAs;
- the Commission has extensive powers of inspection, including the power to take statements, seal premises or business records, and ask for oral, on-the-spot explanations about particular documents or facts during an inspection;
- the Commission can impose substantial fines for breaches of the procedural rules (eg, for failure to provide information); and
- the Commission has the power to impose structural remedies (eg, divestments) and fines for breaches of article 101 TFEU.

The Commission has also adopted an implementing Regulation (Regulation No. 773/2004) further clarifying the proceedings under Regulation No. 1/2003. This lays down rules concerning the initiation of proceedings and the conduct of investigations by the Commission, as well as the handling of complaints and the hearing of the parties concerned.

In addition, the Commission has published various notices providing guidance for the application of article 101 TFEU. Notices have been adopted, inter alia, on cooperation within the ECN, on cooperation between the Commission and the courts of EU member states, on the handling of complaints and on the effect on trade concept contained in articles 101 and 102 TFEU.

National courts must apply, in addition to national antitrust rules, articles 101 and 102 TFEU. They may not adopt decisions that run counter to a Commission decision on the same subject matter. The Commission can transmit opinions and statements as amicus curiae in proceedings before national courts that must apply articles 101 and 102 TFEU.

3 Changes

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

There are no current proposals to change the overall legislative regime. However, in November 2014 a directive on actions for damages for violations of EU competition law was adopted (the Damages Directive), which the member states must implement by 27 December 2016. The directive establishes, inter alia, common limitation periods for actions and a rebuttable presumption that cartels cause harm. It also clarifies the application of the 'passing-on' defence and the binding nature of national competition authority decisions (see further question 20). In August 2015, the Commission adopted amendments to its Regulation No. 773/2004 and four related notices (Notices on Access to the File, Leniency, Settlements and Cooperation with National Courts) to reflect the provisions of the new directive on accessing and using information in the files of competition authorities for the purposes of follow-on damages litigation.

In June 2015, the Commission published guidance on the data it can release to the public in non-confidential antitrust decisions, including explanations of what companies can claim for redaction as business secrets and confidential information.

In September 2015, the Commission updated its explanatory note on the conduct of surprise antitrust investigations ('dawn raids'). The new guidance allows officials to search 'private devices... used for professional purposes,' as well as information held on external hard drives or in cloud-computing services. The note also includes an explanation of how the Commission will handle and review data copied from servers.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 101(1) TFEU provides that 'all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market' are prohibited. Article 101(1) TFEU provides a non-exhaustive list of prohibited practices which includes agreements, decisions or concerted practices which: directly or indirectly fix purchase or selling prices or any other trading conditions (price fixing); limit or control production, markets, technical development or investment (eg, output restrictions); or share markets or sources of supply. Both horizontal and vertical restraints fall within article 101(1) TFEU. For horizontal agreements, specific guidance is given on the status of R&D agreements, production agreements, joint purchasing agreements, commercialisation agreements and standardisation agreements. For vertical agreements specific guidance is given on single branding agreements, exclusive distribution agreements, exclusive customer allocation, selective distribution, franchising, exclusive supply, upfront access payments, category management agreements, tying and RPM.

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Article 101(2) TFEU provides that agreements prohibited by article 101(1) TFEU shall be automatically void and unenforceable without there being a need for a prior finding by the Commission that the agreement breaches article 101 TFEU. Article 101 TFEU is also capable of enforcement before the national courts and NCAs in EU member states.

As a matter of practice, any agreement that fixes prices, limits output, shares markets, customers or sources of supply or involves other cartel behaviour such as bid rigging will almost inevitably be regarded as an agreement restricting competition within the meaning of article 101(1) TFEU. The Commission's view is that these types of restriction are hard-core and may be presumed to have negative market effects (recently confirmed by the European Court of Justice (ECJ) in *Dole* (2015)).

According to article 1(2) of Regulation No. 1/2003, agreements that satisfy the conditions of article 101(3) TFEU are not prohibited, no prior decision to that effect being required. This requires that the efficiencies flowing from the agreement outweigh the anticompetitive effects. It is almost inconceivable that a hard-core cartel agreement could qualify for such an exemption. As regards vertical restraints, article 4 of Regulation No. 330/2010 (vertical agreements block exemption) provides a blacklist of agreements to which the block exemption will not apply (eg, where the object of the agreement is to impose a fixed or minimum resale price or an export ban). Horizontal cooperation agreements between competitors (such as information exchange, standardisation and R&D agreements), are assessed in line with the Commission's 2010 Regulations and Guidelines.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are no industry-specific offences or defences. There are, however, special rules governing the application of article 101 TFEU to the agricultural, transport and insurance sectors. The Insurance Block Exemption Regulation will expire on 31 March 2017.

6 Application of the law

Does the law apply to individuals or corporations or both?

Article 101 TFEU applies only to undertakings, not to individual employees or officers of undertakings. The concept of 'undertaking' is defined broadly and can extend to any legal or natural person engaged in an economic or commercial activity (whether or not it is profit-making). It covers, for instance, limited companies, partnerships, trade associations, individuals operating as sole traders, state-owned corporations and non-profit making bodies. National legislation within some member states may, however, provide for criminal sanctions (see, eg, the UK chapter), administrative fines (see, eg, the Netherlands chapter) or other personal sanctions (see, eg, directors' disqualification orders in the UK chapter) where individuals participate in infringements of article 101 TFEU.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Article 101 TFEU can apply to agreements, decisions and concerted practices concluded between undertakings located outside the EU but that have an effect on competition within the EU. This is wide enough to cover indirect sales provided the conduct may affect trade between member states and has as its object or effect the prevention, restriction or distortion of competition within the internal market. The Commission may choose not to take indirect sales into account if the fine based on direct sales alone is regarded as having a sufficient deterrent effect (*LCD*, 2010). When setting its fine the Commission is entitled to take into account sales of products in the EEA that include cartelised component products produced and sold outside the EEA (ECJ, *InnoLux* (2015)). As a consequence, manufacturing companies that produce and sell components outside Europe can still come under the Commission's scrutiny if those components are then built into products sold in Europe. The EU courts have recognised that it is not necessary that companies involved in the alleged cartel activity have their seats inside the EU, that the restrictive agreements were entered into inside the EU, or that the alleged acts were committed or business conducted within the EU. In *Wood Pulp I* (1988), the ECJ found that the decisive factor in determining whether the EU competition rules apply is where the agreement, decision or concerted practice is implemented. Where parties established in third countries implement a cartel agreed outside the EU with respect to products sold directly into the EU, the cartel will be subject to investigation under article 101 TFEU. Overall, according to the 'effects doctrine', the application of competition rules pertaining to cartels is justified under public international law whenever it is foreseeable that the relevant anticompetitive agreement or conduct will have an immediate and substantial effect in the EU (see also Commission Notice of 27 April 2004 on the effect on trade concept contained in articles 101 and 102 TFEU, paragraph 100). Recent cases in which the Commission assumed jurisdiction over cartel members incorporated outside the EEA include *Automotive Wire Harnesses* (2013), *Power Cables* (2014), *Smart card chips* (2014), *Automotive Bearings* (2014), *Optical Disc Drives* (2015) and *Alternators and Starters* (2016).

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Investigations may be triggered as a result of one or more of the parties to an agreement or a concerted practice approaching the Commission (as a whistle-blower under the Commission's leniency programme), a third party making a complaint, an NCA raising the matter with the Commission or the Commission launching an inquiry on its own initiative.

If complainants wish to make formal complaints, they are required to use form C. However, the Commission may dispense with a complainant's obligation to provide all the information and documents required by form C where it considers that this information is unnecessary for the examination of the case. The form must be provided in triplicate and, if possible, an electronic version should be sent to the Commission (see article 5 of Regulation No. 773/2004).

Once a case comes to its attention (which may be as a result of a leniency or immunity application – see questions 22 and 25), the next step for the Commission is to collect further information, either informally or using its formal powers of investigation (including dawn raids – see question 9) to decide whether to take action on the complaint. Following the initial fact-finding, if the Commission considers that there is evidence of an infringement of article 101 TFEU that should be pursued, it will decide to open formal proceedings.

The Commission may then make use of the formal settlement procedures (see question 28) or proceed to serve a formal statement of objections on the parties setting out the Commission's case. If the Commission issues a statement of objections, the parties are then allowed to examine the documents in the Commission's file (access to the file) and to respond to the statement of objections, in writing and at a hearing within the time limit set by the Commission (see article 27 of Regulation No. 1/2003 and article 10 et seq of Regulation No. 773/2004). In 2011, the Commission strengthened and expanded the role of the hearing officer to safeguard the parties' procedural rights and issued a notice on best practices in antitrust proceedings. The Commission further expanded on this Notice by publishing the Antitrust Manual of Procedures in March 2012, which is its internal working document intended to give practical guidance to staff on how to conduct an investigation applying articles 101 and 102 TFEU.

Before the Commission takes its final decision it must consult the Advisory Committee on Restrictive Practices and Dominant Positions, which consists of officials from each of the member states' competition authorities (see article 14 of Regulation No. 1/2003). The final decision is taken by the full College of Commissioners and then notified to the undertakings concerned.

It is difficult to generalise about the timing of cartel cases. However, from initial investigation to final disposition they usually take several years.

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9 Investigative powers of the authorities

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

The Commission's principal powers of investigation under Regulation No. 1/2003 are the power to require companies to provide information (article 18), and the power to conduct voluntary or mandatory on-the-spot investigations (dawn raids) on company premises (article 20) and to inspect employees' homes and cars, etc (article 21). It also has the power to take voluntary statements for the investigation from natural or legal persons under article 19.

Generally, the Commission has a wide discretion to collect any information that it considers necessary. The Commission may also request a member state's NCA to undertake any investigation or other fact-finding measure on its behalf (article 22). These powers are, however, subject to the general principles of proportionality and the rights of the defence. Certain documents will be protected by the principle of lawyer–client confidentiality (or legal professional privilege, LPP), although what this covers is limited and is ultimately for the courts to decide. In September 2010, the ECJ in *Akzo Nobel* confirmed its decision in *AM&S* (1982), which excluded the advice of in-house legal counsel from LPP. The ECJ clarified that, for the confidentiality of legal advice to be protected by LPP, such communication must emanate from independent EEA-qualified lawyers, and that the requirement of independence means the absence of any employment relationship. The adherence of many in-house lawyers to professional and ethical obligations was not sufficient to render them independent from their employers for this purpose. National rules may, however, continue to recognise LPP for in-house lawyers (see, eg, the UK chapter).

Information requests

Information requests ('article 18 requests' under Regulation No. 1/2003) are widely used by the Commission as a means of obtaining all necessary information from undertakings and associations of undertakings. A company that is the subject of an investigation can receive several such requests. Information requests may also be addressed to third parties, such as competitors and customers. These requests are addressed in writing to the companies under investigation and must set out their legal basis and purpose, as well as the penalties for supplying incorrect or misleading information. The requests must also be adequately reasoned. The statement of reasons cannot be excessively brief, vague or generic, having regard in particular to the length of the questions asked (ECJ, *Heidelberg Cement* (2016)).

The Commission can either issue simple information requests or require undertakings and associations of undertakings to provide all necessary information by way of a formal decision. The addressees of a formal decision are obliged to supply the requested information. This is not the case for simple information requests. The Commission's choice whether to issue a simple information request or a formal decision needs to be proportionate (ECJ, *Schwenk Zement* (2014)). With respect to non-EU companies, the Commission is often able to exercise its jurisdiction by sending the information request to an EU subsidiary of the non-EU parent company or group. Otherwise, it sends out letters requesting information, to which the non-EU addressees usually respond.

Undertakings or associations of undertakings that supply incorrect or misleading information in reply to a simple information request or incorrect, misleading or incomplete information to a formal decision, or who do not supply information within the time limit set by a formal decision, are liable to fines that may amount to up to 1 per cent of their total annual turnover.

The EU courts have recognised a privilege against self-incrimination, albeit one limited in scope. In *Orkem* (1989), the ECJ held that undertakings are obliged to cooperate actively with the Commission's investigation. The Court also observed, however, that the Commission must take account of the undertaking's rights of defence. Thus, the Commission may not compel an undertaking to provide it with answers that might involve an admission on its part of the existence of an infringement that it is incumbent on the Commission to prove. In this respect, the Court distinguished between requests intended to secure purely factual information, on the one hand, and requests relating to the purpose of actions taken by the alleged cartel members on the other. Whereas the former type of questioning is generally permitted, the latter infringes the undertaking's rights of defence. The approach taken in *Orkem* was confirmed in *Mannesmannröhren-Werke* (Court of First Instance 2001, now the General Court (GC) after the entry into force of the Lisbon Treaty) and *Tokai Carbon* (GC 2004, ECJ 2006). The European courts have refused to acknowledge the existence of an absolute right to silence, as claimed by the applicants by virtue of article 6 of the European Convention on Human Rights. However, the GC held in *Tokai Carbon* (2004) that the Commission may not request undertakings to describe the object and the contents of meetings when it is clear that the Commission suspects that the object of the meetings was to restrict competition. The same applies to requests for protocols, working documents, preparatory notes and implementing projects relating to such meetings. On the other hand, in *Tokai Carbon* (2006), the ECJ clarified that undertakings subject to a Commission investigation must cooperate and may not evade requests for production of documents on the grounds that, by complying with the requests, they would be required to give evidence against themselves.

Dawn raids

Dawn raids may be conducted under two grounds: pursuant to a written authorisation only (article 20(3) of Regulation No. 1/2003) and pursuant to a formal Commission decision (article 20(4)). In an investigation made pursuant to a decision, the company must permit the investigation to proceed, and fines may be imposed for refusal to submit to the investigation. However, if the investigation is by request only, the company is not obliged to comply but is asked to submit to the investigation voluntarily.

When carrying out a surprise inspection visit (or dawn raid), Commission officials may:

- enter the premises, land and means of transport of undertakings or an association of undertakings;
- examine the books and other business records of the company (including computers, private devices used for professional purposes, external hard drives and cloud-computing services) falling within the scope of their investigation;
- take copies of books and records; and
- require on-the-spot oral explanations of facts or documents relating to the subject matter and purpose of the inspection.

The Commission may also seal any business premises and books or records for the time necessary for the investigation. The breach of a seal is considered a violation of the undertakings' obligation to cooperate and can lead to significant fines, with a fine of €38 million imposed on E.ON confirmed by the GC in 2010 and by the ECJ in 2012, and fines of €8 million imposed on Suez Environnement and Lyonnaise des Eaux in 2011. The Czech company EPH was also fined €2.5 million in 2012 for obstructing the Commission's inspection. The Commission can also – subject to obtaining a court warrant – inspect private premises, land and means of transportation, including the homes of directors, managers and other members of staff of the undertaking concerned, if there is reasonable suspicion that books and other records related to the business and to the subject matter of the inspection are located there. During the investigation procedures in *Marine Hose* (2009), the Commission carried out an on-the-spot investigation in a private home.

Commission officials have no power of forcible entry under Regulation No. 1/2003. They may, however, rely on the cooperation of member states' NCAs, who may use force to enter premises according to national procedural law. Forcible entry may require a court warrant under the applicable national law. In practice, officials will have obtained such a warrant before conducting the search. Under Regulation No. 1/2003, a national court called upon to issue such a warrant cannot call into question the legality of the Commission's decision or the necessity of the inspection. It may only assess whether the Commission decision is authentic and verify that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. To that end, it may ask the Commission for detailed explanations, in particular on the grounds the Commission has for suspecting infringement of article 101 TFEU, as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. It cannot demand that it be provided with the information contained in the Commission's file.

The Commission team conducting a dawn raid usually consists of between five and 10 officials, of whom at least one is likely to be a technical expert who will aim to concentrate on electronically stored information. The Commission officials are normally accompanied by two

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or three officials from the relevant NCAs assisting the Commission in its investigation.

As is the case for information requests, the company is only required to cooperate if the Commission has taken a formal decision. The Commission usually issues such a decision in the case of a dawn raid. The decision must specify the subject matter and the purpose of the inspection, so that the undertakings understand the scope of their duty to cooperate (ECJ, *Nexans* (2014)). Apart from relying on the cooperation of national authorities to gain forcible entry, the Commission may also impose periodic penalty payments if the undertaking does not submit to an inspection ordered by a Commission decision. These penalty payments may amount to up to 5 per cent of the average daily turnover in the preceding business year.

The Commission has the power to ask for on-the-spot oral explanations on facts or documents relating to the subject matter and purpose of an inspection from any representative or member of staff of a company and to record the answers. The company must cooperate actively and ensure that the most appropriate staff of sufficient seniority and knowledge of operations are available to deal with the enquiries. The Commission may also compel an undertaking to provide copies of pre-existing documents and factual replies.

As is the case for information requests, a company has certain fundamental rights of defence during a dawn raid, including:

- the right not to be subject to an unauthorised investigation;
- the right to legal advice;
- the right not to be required to produce legally privileged documents (limited to correspondence with EEA-qualified external counsel – see above); and
- the right not to be required to incriminate itself (see above).

In the *Deutsche Bahn* case (2015), the Commission had informed the officials conducting the dawn raid of another complaint against Deutsche Bahn, which was not the subject of the investigation at hand, and was not mentioned in the warrant. The ECJ ruled that the use of the documents relating to the suspected infringements of which the officials had been informed, but that were not mentioned in the warrant, violated the right of defence of the companies involved.

Power to take statements

In addition, the Commission has the power to take statements from any natural or legal person on a voluntary basis only (that is, such persons cannot be summoned to testify). This power is additional to the Commission's power to ask for on-the-spot oral explanations during a dawn raid.

International cooperation

10 Inter-agency cooperation

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

The EU has cooperation agreements (either multilateral or bilateral) with certain non-EU countries, notably the US, Canada, Japan, Switzerland, Brazil and South Korea. These agreements can help the Commission to obtain information and evidence located outside the EU. The Commission also has memoranda of understanding (MOUs) with China, Brazil, Russia, India and South Africa which allow the relevant authorities to engage in discussions on competition legislation, share non-confidential information on legislation, enforcement, multilateral competition initiatives and advocacy, and engage in technical cooperation regarding competition legislation and enforcement. The MOUs also provide a mechanism for positive comity (allowing one authority to request that another engages in enforcement activity) and negative comity (to avoid conflicts if one authority's enforcement activity may affect the other in its enforcement).

The most significant of the cooperation agreements are the 1991 and 1998 EU–US agreements envisaging the exchange of information and establishing positive comity between the Commission and US antitrust authorities. They provide for the Commission and US authorities to notify each other where their enforcement activities may affect the interests of the other, to assist each other in their enforcement activities and to cooperate regarding the investigation of anticompetitive activities in the territory of one party adversely affecting the interests of the other. As a result, there has been growing cooperation between the EU and the US in cartel matters (for example, in *Automotive Wire Harnesses* (2013) and *Automotive Bearings* (2014)). These cooperation agreements do not allow the Commission to disclose confidential information received from companies in the course of its investigations.

The Commission is a member of the International Competition Network (ICN), a network of competition agencies and a multilateral forum to address international cooperation and convergence.

Obviously, the Commission also cooperates extensively with the NCAs in member states. Regulation No. 1/2003 increased the scope of this cooperation within the framework of the ECN, which encompasses all member states' competition authorities as well as the Commission. The members of the ECN closely cooperate in the application of the EU competition rules. One authority may ask another for assistance by collecting information on its behalf. When an authority is assigned a case, it may decide to reallocate that case to another authority that is better placed to deal with it. The Commission may decide to take up a case, which will end the NCA's competence to apply article 101 TFEU (but not its equivalent national rules). Members of the ECN can also exchange information, including confidential information, for the purpose of applying article 101 TFEU or for parallel national proceedings under national competition law. Information so exchanged may only be used as evidence to impose sanctions on natural persons when similar sanctions are present in the member state that transmitted the information, or where the information was collected respecting the same level of rights of defence as in the receiving state and where the sanction does not involve imprisonment. Case allocation and cooperation procedures are further detailed in the 2004 Commission Notice on cooperation within the Network of Competition Authorities. In particular, the Commission will be assigned a case if it has an impact in more than three member states. Recently, the Commission held a consultation on how to empower the NCAs to be more effective enforcers of the EU competition rules. The results of the consultation were published in May 2016 and show strong support for NCA independence, sufficient resources, investigative tools and enforcement powers. According to the Commission, new legislation could be introduced as early as 2017.

11 Interplay between jurisdictions

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

It is increasingly the case that a cartel investigation in the US may lead to the Commission launching an investigation in the EU. This raises a particular problem, in that information provided to the EU authorities (for instance, in responses to information requests) may be discoverable in actions brought by third parties in the US and could increase exposure to civil damages (see question 30).

As regards the interplay between the EU and the NCAs in the member states, the work allocation between the different authorities is regulated within the framework of the ECN (see question 10). There is generally cooperation between the different authorities to decide which authority pursues a case. Once the Commission decides to initiate proceedings, the NCAs lose their competence to apply article 101 TFEU. However, there is no formal rule on avoiding double sanctions in the event that there are multiple investigations by several authorities. Nevertheless, the ECJ in its *Walt Wilhelm* judgment (1969) recognised a general requirement of natural justice that any previous punitive decision must be taken into account in determining any sanction that is to be imposed. By contrast, the Commission does not consider that fines imposed elsewhere (outside the EU), especially in the US, have any bearing on the fines to be imposed for infringing European competition rules. Nor does the possibility that undertakings may have been obliged to pay damages in civil actions have any relevance (*Lysine*, 2000). The GC confirmed this view (*Lysine*, 2003).

The cooperation between NCAs and the Commission does not always lead to perfectly harmonious outcomes: in April 2015 the German NCA pursued antitrust charges against Booking.com while the French, Italian and Swedish regulators settled the case. This has prompted a statement by the current Commissioner for Competition that the Commission should intervene earlier to avoid such divergent outcomes.

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Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The Commission both investigates and adjudicates on cartel matters. At the end of an investigation by the officials of DG Competition, the final decision is taken by the College of Commissioners.

13 Burden of proof

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

The burden of proof lies with the Commission to establish the facts and assessments on which its infringement decision is based. However, if a party is claiming that the relevant agreement or concerted practice satisfies the conditions for an exemption under article 101(3) TFEU, the burden of proof lies with the party making that claim. The legislative framework does not provide for precise rules regarding the standard of proof. Case law emphasises the presumption of innocence and clarifies that the Commission must produce 'sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place' (GC, *Danone* (2005)).

14 Appeal process

What is the appeal process?

Commission decisions can be appealed to the GC in Luxembourg. The GC has jurisdiction to review the legality of and reasons for Commission decisions and the procedural propriety of the decision, and to assess the appropriateness of the amount of the fines imposed. The GC may cancel, reduce or increase the fine. From the GC, appeals on points of law may be made to the ECJ in Luxembourg.

Companies do not necessarily have to pay their fine immediately if they lodge an appeal before the GC. However, in this case, they are required to provide a bank guarantee covering the full amount of the fine plus interest. Alternatively, the company may pay the fine into a ring-fenced account pending the outcome of the appeal. Typically, cartel cases before the GC last approximately four years and cases before the ECJ an additional two to three years.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity? (What are the maximum and minimum sanctions? Do individuals face imprisonment for cartel conduct?

EU law only sanctions undertakings, and not individuals. National legislation within some member states may, however, provide for criminal sanctions where individuals participate in infringements of article 101 TFEU (see, for example, the UK chapter). For penalties on undertakings, see question 16.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The sanction available to the Commission is the imposition of fines on the undertakings or associations of the undertakings concerned. In general, the EU courts have confirmed that the Commission has wide discretion in setting the level of fines within the limits of Regulation No. 1/2003. The fines imposed can be up to 10 per cent of worldwide group turnover in the preceding business year where an undertaking or association of undertakings has infringed article 101 TFEU. The ECJ has confirmed that fines may exceed the turnover in products concerned by the infringement, provided that they stay within the 10 per cent ceiling (*Pre-insulated Pipe Cartel Appeals* (2002)). Regulation No. 1/2003 states that these fines are not of a criminal nature. However, given the size of the potential fines, there are strong arguments as to why, pursuant to the European Convention on Human Rights (ECHR), the fines should be characterised as criminal or quasi-criminal (with the higher level of procedural protection this involves under article 6 of the ECHR).

The Commission imposes fines according to its Guidelines on the method of setting fines using a two-step method. In a first step, the basic amount of the fine is calculated taking into account the value of the undertaking's direct or indirect sale of goods or services concerned by the infringement within the EEA. For undertakings without EEA sales the Commission has used an alternative method taking into account sales outside the EEA to calculate the hypothetical turnover within the EEA. This happened, for example, in *Automotive Wire Harnesses* (2013), *Power Transformers* (2009), *Marine Hoses* (2009) and *Aluminium Fluoride* (2008). In a second step, the amount of the fine may be adjusted taking into account aggravating or mitigating circumstances. The basic amount of the fines may be increased by up to 100 per cent in the case of recidivism. A fine may also be increased for the purpose of deterrence. In *InnoLux* (2015), the ECJ confirmed that for a vertically integrated company the fine calculation may be based on non-EEA sales of cartelized components if they are built into a final product that is subsequently sold in the EEA as a 'direct EEA sale through transformed products'. In *AC Treuhand II* (2015) the ECJ confirmed that the Commission was entitled to fix the fine as a lump sum instead of using value of sales because AC Treuhand, a consultancy firm, did not have any sales in the markets concerned.

The Commission also has the power to require the parties to terminate the infringement and may require them to undertake any action necessary to ensure their conduct in future is lawful. For this purpose, it has in some circumstances the power to impose structural remedies and to accept binding commitments. The Commission also has the power to take interim measures in relation to infringements of article 101 TFEU. Such measures are intended to preserve the position before the parties entered into the agreement in question. Performance of such orders can be compelled by means of periodic payments not exceeding 5 per cent of the average daily turnover in the preceding business year per day.

The Commission's policy on cartels has evolved substantially during the past 40 years. During the 1960s and 1970s, the Commission intervened only in a few major cases with relatively low fines being imposed. In the 1980s, the Commission began to impose much heavier fines in landmark cases such as *Polypropylene* (1986), where fines of nearly €60 million were imposed on 15 companies. Since the early 1990s, the Commission has pursued its policy of imposing heavy fines, and has also started to combat cartels in regulated sectors such as maritime transport. In recent years, the Commission has at various times reaffirmed its commitment to detecting and punishing hard-core cartels, increasing the number and intensity of its investigations and imposing record fines. Recent years have brought new record fines: the *Trucks* cartel (2016) was fined €2.93 billion, the largest fine ever imposed by the Commission in a single cartel investigation, including a fine of €1.01 billion on Daimler and €753 million on DAF, being to date the largest fines imposed on single companies for their involvement in cartel activity. In *Car Glass* (2008), the Commission fined members of the alleged cartel over €1.19 billion, including a fine of €715 million on Saint Gobain. Saint Gobain's fine included a 60 per cent increase to reflect its previous involvement in cartel activity. The *TV and Computer Monitor Tubes* cartel (2012) was fined €1.41 billion. The Commission investigated the attempted manipulation of benchmark interest rates and imposed fines totalling €1.51 billion split across two separate investigations (*Euro Interest Rate Derivatives* and *Yen Interest Rate Derivatives* (2013)).

It is very difficult to rebut the presumption of actual decisive influence by a parent company over a wholly-owned subsidiary. The failure to comply with a parent company's instruction is not sufficient, as long as the failure to carry out instructions is not the norm (ECJ, *Evonik Degussa and Alzchem* (2016)). The ECJ has, in *DuPont and Dow* (2013), confirmed that, in addition to penalties for infringements by their wholly-owned subsidiary companies, parent companies may also be held liable for the penalties imposed in respect of article 101 TFEU infringements committed by their full-function joint venture subsidiaries, provided that the Commission is able to establish that the parent company did, in fact, exercise 'decisive influence' over that joint venture company. More recently in *Power Cables* (2014), Goldman Sachs, the former 47 per cent financial investment shareholder of Prysmian, was fined €37 million jointly and severally with Prysmian. Liability was based on Goldman Sachs' decisive influence over Prysmian, which, the Commission found, was to all intents like that of a traditional industrial owner.

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17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

The Commission's Guidelines on the method of setting fines, having the status of soft law, are only self-binding on the Commission, and do not have a binding effect on the General Court or on NCAs or national courts.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

The sanctions available under Regulation No. 1/2003 do not include the possibility of debarment from government procurement procedures for cartel infringements. However, an exclusion from the tendering process is possible under the rules on public procurement (article 57 of Directive 2014/24/EU). The public contracting authorities may, in a discretionary decision, exclude the undertaking where they have sufficiently plausible indications to conclude that the undertaking has entered into agreements with other undertakings aimed at distorting competition. They may further apply the catch-all element of grave professional misconduct. The time period for debarment due to anticompetitive conduct is subject to national law and fixed at a maximum of three years by Directive 2014/24/EU. It can be terminated earlier if measures taken by the undertaking sufficiently demonstrate its reliability.

19 Parallel proceedings

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

Not applicable; see questions 15 and 16.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Third parties (and in certain circumstances, even parties involved in the infringement) who have suffered loss as a result of cartel behaviour in breach of article 101 TFEU can sue for damages before the national courts. For example, the European Commission, on behalf of the EU's institutions, filed a claim for damages in Belgium against manufacturers of elevators and escalators that were fined for price fixing in 2007. The Commission argued that the price fixing had led to increased costs for equipment installed in institutional buildings, however its claim was dismissed by the Brussels commercial court in November 2014 on the basis that the Commission's cartel decision did not provide sufficient proof that the elevators were more expensive and economic evidence did not prove there was any damage linked to the EU institutions.

The precise rules of standing, procedure and quantification of damages vary in the different EU member states. In November 2014, however, the Damages Directive was adopted. The directive is designed to ensure that victims of competition law infringements in Europe have access to effective mechanisms for obtaining compensation for the harm they have suffered. Victims should obtain full compensation for the actual loss suffered as well as for lost profits. The directive also allows for the use of passing-on as a defence, and for Commission and NCA decisions to be binding on the national courts and to serve as evidence of an infringement. This further reinforces the requirement that Commission infringement decisions must be unambiguous (GC, *British Airways* (2015)). In the event that an antitrust infringement is shown by the injured party the directive provides, with regard to the establishment of fault, a reversal of the burden of proof to the detriment of the infringer in terms of a rebuttable presumption that cartels cause harm. The directive also provides a common standard for limitation periods and the protection of leniency applicants. Member states must implement the Damages Directive in their national legal systems by 27 December 2016.

A further interesting development is that the ECJ recently held that there should be no national rule preventing third parties from seeking compensation from cartelists for loss allegedly suffered due to the surcharge applied by non-cartelists who, independently and rationally, adapted to a price increase resulting from the cartel by increasing their own prices (*Kone* (2014)).

In relation to the jurisdiction of national courts over cartel damages claims, the ECJ held in May 2015 that cartel victims may sue for damages in the country where any one of the cartelists is domiciled and that the jurisdiction of the national court is not in principle affected by the claimant's withdrawal of its action against the sole participant domiciled in the member state in which the court is seised. The claimant also has the option to bring its action for damages in the jurisdiction where the cartel was concluded, where an agreement implying the existence of the cartel was concluded, or where the loss arose (the latter generally presumed to be the claimant's registered office). Furthermore, the ECJ found that jurisdiction clauses which derogate from the provisions of the Brussels I Regulation only encompass disputes relating to the payment of damages arising from an unlawful cartel if the claimant has consented to such derogation (*Cartel Damage Claims (CDC) Hydrogen Peroxide SA* (2015)).

21 Class actions

Are class actions possible? If yes, 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 directive on damages actions for breaches of EU competition rules does not include provisions opening the possibility for opt-out class actions. The Commission has, however, recognised that many member states provide for collective redress mechanisms under national law. While the directive on damages actions does not include a requirement for member states to introduce collective redress mechanisms for the enforcement of competition rules, the Commission has in the past published a non-binding Recommendation setting out common principles regarding collective redress mechanisms. The Recommendation aims at bringing more coherence in the different systems of collective redress within the EU. As a general rule, collective redress mechanisms should be based on the opt-in principle, according to which every represented party individually needs to join the action (in contrast to opt-out actions, which are possible without identifying the individual parties to the lawsuit). Member states should also provide for mechanisms that provide for safeguards against an abuse of collective redress. Possible safeguards could be a requirement for entities that are representing claimants to be of a non-profit character or the exclusion of punitive damages. The Commission invited member states to put in place appropriate measures by 26 July 2015. Within two years of that date, the Commission will assess the state of play on the basis of practical experience and, if necessary, take further measures to promote the principles set out in the Recommendation. It is noteworthy that some member states (see, eg, the UK chapter) have declined to follow the Recommendation and have introduced some form of opt-out system.

Cooperating parties

22 Immunity

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

To qualify for full immunity from fines (and, under the Damages Directive, to benefit from a softening of joint and several liability in any follow-on actions such that a successful applicant can generally only be liable to compensate their direct or indirect purchasers or providers) a party must be the first to inform the Commission of an undetected cartel, and must provide sufficient information for the Commission to carry out an inspection at the premises of the companies allegedly involved in the cartel. If the Commission has already begun an investigation into the suspected cartel, the informing party must provide sufficient information for the Commission to prove the alleged infringement. The informing party must also cooperate fully with the Commission on an ongoing basis throughout the investigation, offer up all evidence in

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its possession, and cease committing the infringement immediately. A party cannot, however, benefit from immunity if it was active in coercing other parties to participate in the cartel.

Companies that have recently benefited from full immunity include:

- Webasto in *Parking Heaters* (2015);
- Linpac in *Retail Food Packaging* (2015);
- K + N in *Blocktrains* (2015);
- Philips, Lite-On and Philips & Lite-On Digital Solutions in *Optical Disc Drives* (2015);
- Denso in *Alternators and Starters* (2016); and
- MAN in *Trucks* (2016).

Any information and documents submitted by a party in the course of an application for immunity or leniency (see further below) are treated with confidentiality by the Commission. The response to question 25 provides more information on the practicalities of approaching the Commission.

23 Subsequent cooperating parties

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

Under the Leniency Notice (part III), favourable treatment is also available to companies that do not qualify for immunity but that provide evidence representing 'significant added value' to that already in the Commission's possession, and that immediately terminate their involvement in the cartel activity. Provided these conditions are met, the cooperating company may receive up to a 50 per cent reduction in the level of fine that would have been imposed had it not cooperated. The envisaged reductions are split into three bands:

- 30 to 50 per cent for the first company to provide significant added value;
- 20 to 30 per cent for the second company to provide significant added value; and
- zero to 20 per cent for any subsequent companies to provide significant added value.

The amount received within these bands depends upon the time at which they started to cooperate and the quality of evidence provided.

Companies that have recently benefited from a reduction of their fines include:

- Eberspächer (45 per cent) in *Parking Heaters* (2015);
- EXIF and Schenker (45 per cent and 30 per cent respectively) in *Blocktrains* (2015);
- Hitachi-LG Data Storage (50 per cent) in *Optical Disc Drives* (2015);
- Hitachi and Melco (30 per cent and 28 per cent respectively) in *Alternators and Starters* (2016);
- Riberebro (50 per cent) in *Mushrooms* (2016); and
- Volvo/Renault, Daimler and Iveco (40 per cent, 30 per cent and 10 per cent respectively) in *Trucks* (2016).

There is currently no 'immunity plus' or 'amnesty plus' option.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

See response to question 23.

25 Approaching the authorities

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

In practice, the decision on whether to apply for leniency if a violation is discovered internally requires an assessment of the risks, advantages and disadvantages. Factors include:

- risk of the authorities being on the track already;
- the danger that another participant will get in first and 'slam the door';
- the jurisdictions in which liability to sanctions may arise;
- the exposure of individuals to criminal prosecution and imprisonment in other jurisdictions if they do not secure amnesty;
- the consequences in terms of civil liability, including punitive or triple damages in some jurisdictions; and
- the implications of a leniency application in terms of document disclosure requirements in other jurisdictions.

Where the Commission grants a marker, it will specify the time period in which the applicant undertaking must perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. If the undertaking complies within the time frame, the marker is deemed perfected at the time it was first granted. If the undertaking fails to supply the information and the deadline is not extended, the undertaking can still present an application for immunity, but its place in the queue is no longer protected.

There is no specific deadline for immunity or leniency applications; these are possible at any time in the Commission's investigation provided the criteria are met (see questions 22 and 23). However, applications cannot be made once settlement discussions have commenced.

Recent cases have shown that international cartels are highly likely to result in exposure to prosecution in multiple jurisdictions. If it is decided to apply for leniency, applications to the different regulators should therefore be made as quickly as possible and, where appropriate, simultaneously. If an undertaking wishes to benefit from full leniency at the EU level, it needs to tell the Commission as soon as it has gathered evidence of the cartel's existence sufficient for purposes of the Leniency Notice. Otherwise, it runs the risk that one of the other cartelists may blow the whistle first.

Within the ECN (see question 10), an application for leniency to a given authority is not considered as an application for leniency to any other authority and leniency programmes of the national competition authorities are autonomous in respect of other national programmes and the EU leniency programme (ECJ, *DHL* (2016)). When an undertaking decides to seek immunity, it is therefore in its interest to apply for leniency to all competition authorities that are competent to apply article 101 TFEU and that may potentially deal with the case under the work allocation rules within the ECN.

The ECN Model Leniency Programme, launched on 29 September 2006, is not binding on ECN members, but they are committed to it. It provides for summary applications to be made to NCAs where an applicant is seeking full immunity on the basis that it is the first to reveal a cartel and no inspections have yet taken place; that the Commission is 'particularly well placed' to deal with the case in accordance with the Notice on Cooperation Within the ECN; and that the NCA authority 'might be well placed' to act. Summary applications may be made orally and allow applicants to secure their place in the queue before NCAs. The NCAs will not decide on granting conditional immunity. NCAs are not required to assess a summary application submitted to them in the light of an application for immunity submitted to the Commission, or to contact the Commission where the summary application has a more limited material scope (ECJ, *DHL* (2016)).

26 Cooperation

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?

To receive immunity, the Leniency Notice provides that the applicant must provide a corporate statement including a detailed description of the alleged cartel arrangement and explanations of the evidence provided, full details of the applicant and the other members of the cartel and information on which other competition authorities have been or will be approached, as well as all other evidence relating to the alleged cartel where no inspection has yet been conducted.

Only one undertaking can qualify for full immunity. To obtain full immunity a company must, in addition, cumulatively satisfy the following conditions:

- put an end to its involvement in the illegal activity immediately following its application, except for what would, in the Commission's

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view, be reasonably necessary to preserve the integrity of the Commission's inspection;
- cooperate genuinely, fully, on a continued basis and expeditiously with the Commission – the company is expected to provide the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel; and
- not have taken steps to coerce other undertakings to participate or remain in the cartel.

The Leniency Notice explains that full cooperation also entails:
- providing the Commission promptly with all relevant information and evidence that comes into the undertaking's possession or is available to it;
- remaining at the Commission's disposal to respond to any request promptly;
- making current and, if possible, former employees and directors available for interview;
- not destroying, falsifying or concealing evidence of the cartel, or disclosing any information, except to other competition authorities; and
- unless otherwise agreed, not disclosing the fact or any content of the application before a statement of objections has been issued.

A company is not required to provide decisive evidence for a grant of full immunity, nor is the company automatically excluded for having acted as an instigator of, or for having played a determining role in, the cartel. Full immunity may also still be available after an investigation has been initiated.

A noteworthy case in 2005 concerned the Italian raw tobacco market. The immunity applicant, Deltafina, had been granted conditional immunity at the beginning of the procedure under the terms of the 2002 Leniency Notice. However, the final decision withheld such immunity due to a breach by Deltafina of its cooperation obligations (confirmed by the GC in 2011): Deltafina had revealed to its main competitors that it had applied for leniency before the Commission could carry out dawn raids.

As far as the level of cooperation is concerned, any subsequent leniency applicants must satisfy the same conditions as the first. Only the quality of evidence differs insofar as the second (and subsequent) applicant has to provide evidence representing significant added value to that already in the Commission's possession.

27 Confidentiality

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

Information and documents communicated to the Commission under the Leniency Notice are treated with confidentiality. Any subsequent disclosure, as may be required by the proceedings, will be made in accordance with the rules relating to access to file. According to the Commission Notice on Access to the File (December 2005, as amended in August 2015), no access will be granted to internal documents of the Commission or of NCAs (including correspondence between the Commission and NCAs or between NCAs, and the internal documents received from such authorities), documents containing business secrets and other confidential information (which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking). The Commission's notes of meetings with leniency applicants are classified as internal documents. Where, however, the leniency applicant has agreed to the minutes, such minutes will be made accessible to third parties after deletion of any business secrets or other confidential information. Such agreed minutes constitute part of the Commission's evidence in the case.

The Leniency Notice further provides that any written statement made as regards the Commission in relation to the leniency application forms part of the Commission's file and may not, as such, be disclosed or used by the Commission for any other purpose than the enforcement of article 101 TFEU. The amendments made to the Leniency Notice in August 2015 following adoption of the Damages Directive add that the Commission will not transmit leniency corporate statements to national courts for use as evidence in support of actions for damages for breaches of EU antitrust law. The Commission also stresses that documents received in the context of the Leniency Notice will not be disclosed under Regulation No. 1049/2001 regarding public access to European Parliament, Council and Commission documents (Transparency Regulation), as such a disclosure would undermine the protection of the purpose of inspections and investigations.

In practice, the Commission does not reveal the name of the whistle-blower as long as the investigations continue. In the *Stanley Adams* case (1985), the ECJ held that, where information is supplied on a voluntary basis and accompanied by a request for confidentiality to protect anonymity by an individual whistle-blower, if the Commission accepts such information it is bound to comply with such a condition. Failure to do so meant that the Commission was liable to pay damages. Eventually, however, details of the cartel investigation and the applicant's wrongdoing may be made publicly available in the final Commission decision. The 2015 Guidance on the preparation of public versions of Commission Decisions explains the types of information that companies may request be redacted on the grounds that it contains business secrets or is confidential. The GC highlighted in *AGC Glass Europe* (2015) that the Commission should not be prevented from publishing, in its decision bringing the administrative procedure to an end, information relating to the description of an infringement which has been submitted to it as part of the leniency programme.

Parties to international cartels need to bear in mind that written submissions to the Commission may be subject to US civil discovery rules in US proceedings regarding damages claims. In the interest of its leniency policy, the Commission has attempted to address these concerns by adjusting both the Leniency Notice and its overall practice as regards US civil proceedings (see question 30). In such cases, it may be advisable to make a paperless application to the Commission via external lawyers benefiting from legal privilege. The continuing conflict between public and private enforcement of competition law raises concerns over the future effectiveness of leniency programmes at national and European level. In its *Pfleiderer* ruling (2013), the ECJ held that the provisions of European law did not per se preclude private damages claimants from obtaining access to documents submitted to a national competition authority under a leniency programme. However, the ECJ left open the question of how to weigh conflicting concerns of obtaining compensation versus protecting leniency programmes.

Further, in the recent UK case *National Grid v ABB & Ors*, National Grid applied to the High Court seeking disclosure from the defendants of the Commission's confidential decision and some leniency materials from the defendants. In light of the *Pfleiderer* decision, National Grid argued that the national court had jurisdiction to order the disclosure of such documents and was no longer required to make a request to the Commission under article 15 of Regulation No. 1/2003.

The High Court concluded that the ruling of the ECJ clearly applies to the Commission leniency programme as well as to national leniency programmes, and that the Commission does not have exclusive jurisdiction to determine the disclosure of leniency materials submitted under its leniency programme. It is open for a national court to request the Commission to provide leniency materials, and there is nothing in Regulation No. 1/2003 precluding a national court from applying its national procedures for access to documents. Further, *Pfleiderer* expressly established that, in the absence of binding regulation under EU law on the subject, the question of access to leniency materials by the victim of a cartel is to be determined under national rules. The High Court also commented that if every application for disclosure of leniency materials had to be referred to the Commission, it would place a significant burden on the Commission to carry out the balancing exercise required by *Pfleiderer* and would also give rise to significant delay.

The High Court held that other relevant considerations for the *Pfleiderer* balancing exercise included whether the information is available from other sources, the relevancy of leniency materials to the issues in context, and the evidential difficulties facing claimants seeking damages for an infringement of EU competition rules.

In November 2014 the Damages Directive was adopted (see also question 20). The directive provides that national courts must be able to order a defendant or third party to disclose evidence independently of whether such evidence is in the possession of a competition authority and regardless of the medium in which the information is stored. The directive provides, however, a specific exemption to this rule which

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affords absolute protection to leniency corporate statements and settlement submissions held by the Commission or an NCA. Under the directive, no national court can order the disclosure of such documents in a damages action, as their disclosure would pose a serious risk to the effectiveness of the leniency programme and settlement procedures. The directive was followed by, among others, amendments to the Notices on Access to the File and Leniency in August 2015. Access to the file will only be granted on the condition that the information thereby obtained is used for the purposes of judicial or administrative proceedings for the application of EU competition rules. In addition, the Commission will not send leniency corporate statements to national courts for use in actions for damages for breach of EU antitrust provisions (except for the sole purpose of confirming that they are 'leniency statements' or 'settlement submissions' as defined by the Damages Directive).

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The Commission does not have authority to enter into plea bargaining or similar arrangements. However, in 2008 the Commission introduced procedures for a simplified handling of cases in which the parties to a cartel and the Commission concur about the nature and scope of the illegal activity and the appropriate penalty. These rules on the conduct of settlement procedures aim at ensuring the continued effectiveness of the Commission's long-term zero-tolerance policy by simplifying the administrative proceedings and reducing litigation in cartel cases, thereby freeing Commission resources to pursue more cases. The rules allow for settlements of cartel cases where the parties not only acknowledge their involvement in the cartel and their liability for it, but also agree to a faster and simplified procedure, as well as the imposition of lower fines on those who agree to the settlement procedure.

The Commission's initiative is intended to complement the Leniency Notice (see questions 22 to 27) and the Fining Guidelines. The settlement procedure aims at simplifying the administrative proceedings and reducing litigation in cartel cases, thereby freeing Commission resources to pursue more cases.

Under the settlement procedure, the Commission neither negotiates nor bargains the use of evidence or the appropriate sanction. Instead, the parties are expected to acknowledge their participation in and liability for the cartel, and reach a common understanding with the Commission about the nature and scope of the illegal activity and the appropriate penalty. In return for such cooperation, the parties are rewarded with a 10 per cent reduction in fines (cumulative to any reduction received under the Leniency Notice) and a cap on the multiplier that may be applied to the fine for specific deterrence (to a multiple of two). Parties also benefit from a shorter public decision. Such cooperation differs from the voluntary production of evidence to trigger or advance the Commission's investigation, which is already covered by the Leniency Notice. Parties have neither the right nor the duty to settle. Parties would be made aware of the Commission's anticipated objections and be given an indication of the potential maximum fine they can expect. They would be informed about the evidence and allowed to state their views prior to any formal objections. If parties chose to introduce a settlement submission (which would include an acknowledgment of liability), the Commission's statement of objections could be much shorter than the usual statements of objections issued to face contradiction. The abbreviated statement of objections would endorse the contents of the parties' settlement submission.

Since parties would have been heard effectively in anticipation of the 'settled' statement of objections, other procedural steps would be simplified. After confirmation by the parties, the Commission could, after consulting member states in the framework of the Advisory Committee, adopt an accelerated final decision. However, the Commission retains the possibility to depart from the parties' settlement submission until the final decision, in which case the standard procedure would apply. Once parties choose to dispense with the settlement procedure, the Commission is not bound by its indications given during settlement discussions with regard to the levels of fines (GC, *Timab* (2015)).

The amendments to Regulation No. 773/2004 accommodate the settlement option within the existing framework. The changes amend provisions on issues such as the initiation of proceedings, access to the file and oral hearings and choice for a different sequence of procedural steps, advancing some before the adoption of the statement of objections.

The Settlement Notice sets out the specifics of the procedure. It provides guidance for the legal and business community and foresees that companies could anticipate the kind and extent of cooperation expected from them to settle and estimate the individual benefits of settling. The Settlement Notice also provides that settlement submissions may be given orally and will be given the same protections as those granted to leniency applications. Settlement decisions may be appealed to the General Court and, on points of law, to the Court of Justice.

The Commission has settled over 20 cases so far. Recently, in *Alternators and Starters* (2016) all fines were reduced by 10 per cent for settling the case with the Commission. In *Trucks* (2016), the Commission is pursuing a 'hybrid' decision. It has agreed a 10 per cent reduction in fines for those undertakings which agreed to settle and is currently pursuing Scania under the ordinary procedure. *Trucks* was also notable as the procedure only shifted to a settlement procedure after issuing of a formal statement of objections pursuant to the ordinary procedure. In *Panalpina* (2016) the GC recalled that the efficiency gains arising from a settlement procedure are greater when all the parties concerned accept settlement. It confirmed that the Commission was entitled to choose not to apply the settlement procedure, particularly given the large number of parties involved (47) and the fact that many were not willing to cooperate on the basis of the Leniency Notice.

29 Corporate defendant and employees

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

Not applicable at the EU level, as the Commission cannot impose penalties on individuals. However, there may be implications for criminal proceedings against individuals that may arise under national legislation (see, eg, the UK chapter).

30 Dealing with the enforcement agency

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

In general, the procedure applicable to cartel investigations is the standard one for all antitrust cases as provided for by Regulation No. 1/2003 (see questions 1, 3 and 9).

If an undertaking wishes to take advantage of the leniency programme, it should contact DG Competition, primarily through the following dedicated email address: comp-leniency@ec.europa.eu (assistance is given via the following dedicated telephone numbers: +32 2 298 4190 or +32 2 298 4191). Only persons empowered to represent the enterprise for that purpose or intermediaries acting for the enterprise, such as legal advisers, should take such a step.

Application for immunity (part II of the Leniency Notice)

Following initial contact, the Commission will immediately inform the applicant if immunity is no longer available for the infringement in question (in which case the applicant may still request that its application be considered for a reduction of fines, under part III of the Notice). If immunity is still available, a company has two ways to comply with the requirements for full immunity. It may choose:

- to provide the Commission with all the evidence of the infringement available to it; or
- to initially present this evidence in hypothetical terms, in which case the company is further required to list the evidence it proposes to disclose at a later agreed date; this descriptive list should accurately reflect – to the extent feasible – the nature and content of the evidence; the applicant will be required to perfect its application by handing over all relevant evidence immediately after the Commission determines that the substantive criteria for immunity are met.

In either of the two scenarios, immunity applicants will be informed speedily about their situation and, if they meet the substantive criteria,

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Update and trends

Following several years of development in various guises, in November 2014 a directive on actions for damages for violations of EU competition law was adopted and must be implemented in the member states by 27 December 2016. The directive establishes, inter alia, common limitation periods for actions and a rebuttable presumption that cartels cause harm. It also clarifies the application of the 'passing-on' defence and the binding nature of national competition authority decisions. Several member states already have significant levels of competition litigation and the damages directive will likely increase further the prevalence of damages actions for violations of EU competition law across the EU.

The European Commission has also continued to make use of its settlement procedure with approximately one half of cases settled since the first settlement decision in 2010. Notably, the Commission has also pursued settlements cases in 'hybrid' situations (ie, where some parties choose to remain outwith the settlement procedure and continue their case under the conventional procedure). Hybrid cases undermine much of the efficiencies associated with the settlement process and require careful management to ensure the rights of defence of non-settling parties are protected. As a result, hybrid cases are (rightly) likely to remain the exception rather than the rule. That said, there has been an incremental increase in the number of hybrid cases which the European Commission has been prepared to pursue. For example, hybrid cases resulted from the withdrawal or abstention from the settlement procedure by Scania (*Trucks*), Riberebro (*Mushrooms*), Pometon (*Steel Abrasives*), Credit Agricole, HSBC and JP Morgan (*Euro Interest Rate Derivatives*), ICAP (*Yen Interest Rate Derivatives*) and Timab/CFPR (*Animal Feed Phosphates*).

With respect to substantive law, in recent years there has been an increasing focus on looser forms of anticompetitive coordination between competitors, such as informal, indirect or one-way disclosure of information or infringements by participants active in different markets (ECJ, *AC Treuhand II* (2015)).

Finally, in February 2016, Commissioner for Competition Margrethe Vestager announced that the Commission will in future focus on cases that can serve as precedents, and set priorities on sectors that have a direct impact on consumers, such as energy, the financial services and the digital economy.

conditional immunity will be granted to them in writing. If they subsequently comply with their obligation for complete and continuous cooperation, this conditional immunity will be confirmed in the final decision.

Application for reduction of a fine (part III of the Leniency Notice)

Applicants wishing to benefit from a reduction in fine should provide the Commission with evidence of the cartel activity at issue. Following the necessary verification process by the Commission, they will be informed of whether the evidence submitted at the time of their application passed the 'significant added value' threshold, as well as of the specific band within which any reduction will be determined, at the latest on the day of adoption of a statement of objections. The specific amount to be imposed will be finalised in the Commission's decision.

In practice, companies applying either for immunity or reduction of fines provide a written statement (sometimes referred to as the corporate statement) for the purposes of the leniency application, in which they give their own description of the cartel activity and assist the Commission in understanding any related evidence (internal notes, minutes of meetings, etc). Given the broad scope of US civil discovery rules, producing such documentary evidence may expose EU leniency applicants in the event of US civil litigation (in particular, regarding claims for treble damages), where US plaintiffs are keen to get hold of documents, statements and confessions provided to the Commission by companies. To avert the undermining of its leniency policy, the Commission protects leniency applications from disclosure in the following ways:

- asserting in the Leniency Notice that any written statement made as regards the Commission in relation to the leniency application forms part of the Commission's file and may not, as such, be disclosed or used for any other purpose than the enforcement of article 101 TFEU (see, however, recent case law re disclosure in the context of private enforcement and also the position under the Damages Directive in question 27);
- intervening in pending US civil proceedings where discovery of leniency corporate statements is at stake by means of amicus curiae (the Commission has intervened in this way in a number of cases); and
- accepting oral corporate statements (paperless submissions).

In addition, it may be advisable for companies to restrict their statements and evidence to activities in the EU only, with a view to avoiding admission of misconduct with effects in the US or elsewhere.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

At the time of writing, there are no ongoing or proposed leniency or immunity policy reviews.

Defending a case

32 Disclosure

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

See also responses to questions 27 and 28.

The disclosure of information and evidence depends on whether the normal or the settlement procedure is followed (see questions 8 and 28).

In the normal procedure, the written statement of objections must contain all factual and legal aspects that the Commission intends to use in its decision, ie, clarification of the nature, area, duration and gravity of the infringement and the responsibility of each undertaking, but not the range of potential fines. The objections must be sufficiently clear to enable the undertakings concerned to properly identify the alleged conduct. The parties are then allowed to examine the documents in the Commission's file (access to the file), but no access will be granted to internal documents of the Commission or of NCAs, documents containing business secrets and other confidential information, unless it is necessary to prove the infringement (article 27(1), (2) of Regulation No. 1/2003, articles 10(1) and 15(1), (2), (3) of Regulation No. 773/2004).

In the settlement procedure, parties are informed of the Commission's anticipated objections and are given an indication of the potential maximum fine they can expect. They are given access to the evidence the Commission intends to base its findings upon (such as corporate statements by the other participants in the alleged conduct and historical documents) and are allowed to state their views prior to any formal objections. The Commission's statement of objections may be much shorter than the document used in non-settlement proceedings. A subsequent access to the file is only granted if the statement of objections does not reflect the contents of the parties' settlement submissions, as parties should have been sufficiently informed beforehand (article 15(1a) of Regulation No. 773/2004).

33 Representing employees

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

As individuals cannot be penalised for breach of the EU competition rules, this is not generally a concern at the EU level. However, the issue of separate representation may arise where, for instance, the employee may be subject to disciplinary measures pursuant to his or her contract of employment, or in the event of possible criminal proceedings under relevant national legislation (see, eg, the UK chapter).

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34 Multiple corporate defendants

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

Conflicts of interest are governed by the relevant bar rules in each member state. Conflicts of interest arise fairly regularly between alleged parties to a cartel.

35 Payment of penalties and legal costs

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

Penalties cannot be imposed on individual employees at the EU level.

36 Taxes

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

The tax consequences of fines or other penalties for competition law infringements are governed by national law. The Commission has the power under article 15(3) of Regulation No. 1/2003 to present written observations to national courts as amicus curiae. Notably, on 30 October 2012, the Commission published amicus curiae observations on a case then before the Belgian Constitutional Court which concerned the question of whether fines imposed by the Commission for competition law infringements are tax-deductible. The Commission was of the opinion that allowing such penalties to be tax-deductible would diminish their deterrent effect, and would effectively mean that a part of the fine was borne by the relevant state. The Belgian Constitutional Court followed the Commission's opinion.

In respect of private damages awards, tax consequences are governed by national law.

37 International double jeopardy

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

In principle, penalties imposed in other non-member state jurisdictions (re member state jurisdictions see question 11) are not taken into account by the Commission when determining sanctions for a cartel (recently reaffirmed by the ECJ in *InnoLux* (2015)). However, when it comes to including indirect sales for the purpose of calculating the amount of the fine, the Commission may take into account the fact that these sales have also been included in sanctions imposed in another jurisdiction. In *Automotive Wire Harnesses* (2013), the Commission is believed to have refrained from including the indirect sales of cars manufactured in Japan and exported into the EEA in its calculation, taking into consideration the fact that the Japanese FTC had already imposed sanctions with respect to these cars.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The Commission's leniency programme has led to a significant change in the defence strategy of companies involved in cartel cases. Whereas in the past undertakings accused of being part of a secret cartel tended

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to present a joint defence based on denial and silence, today such an approach is rare given the advantages that can be obtained from cooperation with the Commission. The Commission has repeatedly emphasised its willingness to give companies the chance to get off the hook if they cooperate actively at the earliest possible opportunity. At the same time, it has made clear that companies that do not seize this chance must be aware of the responsibilities they will face. If the company decides to cooperate, it is therefore crucial to develop a cooperation strategy as early as possible tailored to the particular case and with the aim of providing the Commission with as much evidence as possible. The rules on the conduct of settlement procedures (introduced in 2008) allow the Commission to reward companies for their cooperation to attain procedural economies by means of a 10 per cent reduction in fines in addition to any reduction granted under the Leniency Notice.

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Finland

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation is set out in the Finnish Competition Act (948/2011) (the Competition Act). The Competition Act contains a prohibition against anticompetitive agreements and concerted practices, a prohibition against abuse of dominant position as well as provisions on merger control.

The current Competition Act entered into force on 1 November 2011 following a substantial review of the old law. The material provisions of the Competition Act are fully harmonised with articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Related legislation includes provisions on the functions and powers of the authorities, such as the Act on the Finnish Competition and Consumer Authority (661/2012), the Decree on the Finnish Competition and Consumer Authority (728/2012) and the Market Court Act (99/2013).

The Finnish Competition and Consumer Authority (FCCA) has also issued a set of guidelines relating to the application of the Competition Act, including guidelines on leniency and on penalty payments.

2 Relevant institutions

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: (i) the FCCA, which is responsible for investigating competition restrictions; (ii) the Market Court, which may, for example, impose fines on undertakings upon the FCCA's proposal; and (iii) the Supreme Administrative Court (SAC), to which the decisions of the Market Court can be appealed.

The FCCA is an administrative authority that operates under the Ministry of Employment and the Economy. It was established at the beginning of 2013 by joining the operations of the Competition Authority and the Consumer Agency. The FCCA is headed by a Director General and it has four units dealing with competition matters. In addition to these units, there are three groups specialising in cartel investigations, economic analysis and juridical analysis and they consist of the personnel from the units. Unlike, for example, the European Commission, the FCCA does not itself have the authority to impose fines on undertakings for competition infringements but shall make a penalty payment proposal to the Market Court.

The Market Court is a special court for market law, competition law, public procurement and civil IPR cases in Finland. It has a dual role in competition restriction matters. On the one hand, it is the first instance ruling on the FCCA's penalty payment proposals, and on the other hand, it is the first instance of appeal for decisions made by the FCCA.

The SAC is the ultimate appellate body in competition cases. The SAC is the second and final instance of appeal for the FCCA's decisions and the first and final instance of appeal for the Market Court's decisions imposing fines.

In addition to the three main institutions, the regional state administrative agencies have powers to investigate competition infringements in cooperation with the FCCA. In practice, however, it is almost exclusively the FCCA that bears responsibility for the investigation of suspected cartels.

3 Changes

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

The most recent overall review of Finnish competition law was conducted with the new Competition Act entering into force on 1 November 2011. The new Competition Act brought Finnish competition law even more into line with that of the EU and introduced some changes to, for example, the provisions concerning penalty payments. There have since been a few amendments to the Act, but these have not affected cartel matters.

Following the entry into force of the EU Directive on Antitrust Damages Actions on 26 December 2014, the Ministry of Employment and the Economy set up a working group to prepare the Directive's implementation into Finnish legislation. In June 2015 the working group proposed a new Finnish Act on Antitrust Damages Actions. The Government bill was published in May 2016 and the final Act is expected to come into effect in December 2016.

The Ministry of Employment and the Economy has also set up a working group to assess needs to reform the Competition Act. The group is expected to present its possible proposals by the end of February 2017.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The prohibition against anticompetitive agreements and concerted practices, section 5 of the Competition Act, corresponds to article 101(1) TFEU with the exception that it does not require that trade between the EU member states is affected. It prohibits all agreements and concerted practices between undertakings or associations of undertakings, which have as their object or effect the prevention, restriction or distortion of competition. Section 5 contains a list of practices which are in particular prohibited:

- directly or indirectly fixing purchase or selling prices or any other trading conditions;
- limiting or controlling production, markets, technical development or investment;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

As the list is not exhaustive, the FCCA and the courts have also found other practices, such as collective boycotts and exchange of sensitive information, to be in violation of section 5 of the Competition Act.

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Competition restrictions prohibited by section 5 may be covered by the legal exemption in section 6 of the Competition Act, the criteria of which are similar to those of article 101(3) TFEU. In practice, however, hard-core restrictions are unlikely to qualify for an exemption.

If a competition restriction affects trade between member states, the FCCA and the Finnish courts apply article 101 TFEU directly.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

The Competition Act is a general act that, as a main rule, covers all economic activities. However, by virtue of section 2 of the Competition Act, certain sectors are partly excluded from its scope of application: the Act is not applicable to agreements or arrangements concerning the labour market or to arrangements by the agricultural sector if such arrangement fulfils the substantive requirements established in accordance with article 42 TFEU. There are no specific rules governing cartel behaviour in specific industries.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Act applies to economic activity carried out by business undertakings. According to section 4 of the Competition Act, the term business undertaking comprises natural persons as well as private or public legal persons engaged in economic activity.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Competition Act is not applicable to competition restrictions outside Finland unless such restrictions are directed against Finnish customers. The Finnish government may nonetheless prescribe by decree that the Act is extended to cover a competition restriction outside Finland if this is required by an agreement made with a foreign state, or if it is in the interests of Finland's foreign trade.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

If the FCCA suspects that an undertaking or an association of undertakings is engaged in conduct contrary to the Competition Act or EU competition law, it shall initiate the necessary proceedings to eliminate such conduct. Investigations into suspected competition restrictions can be commenced by the FCCA either on its own initiative, or following a complaint or a leniency application. Investigations of serious competition restrictions typically start with the FCCA's dawn raid at the undertakings' business premises.

Further along in the investigations, the FCCA normally requests written explanations and clarifications and may also conduct interviews. Having assessed all the obtained information, the FCCA generally either prepares a draft penalty payment proposal for the undertaking to comment on or closes the investigation without making any penalty payment proposal.

As the FCCA can merely make a penalty payment proposal, it is only after the Market Court proceedings that there is an appealable decision regarding the penalty payment. Other FCCA decisions can generally be appealed to the Market Court.

There are no legal time frames for the FCCA investigations apart from the statutory limitation periods.

9 Investigative powers of the authorities

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

The FCCA has extensive investigative powers which are largely similar to those of the Commission.

An undertaking or an association of business undertakings shall be obliged, at the request of the FCCA, to provide the authority with all the information and documents needed for the investigation of the content, aim and effect of a competition restriction. Such request may be supported by a conditional fine. Furthermore, submitting incorrect information to the authority such as the FCCA may cause criminal liability under the Finnish Penal Code.

The FCCA has the right to conduct inspections to supervise compliance with the Competition Act and is, at the request of the Commission, obliged to conduct an inspection as prescribed in EU competition law. After the 2011 reform of the Competition Act, the FCCA can now also carry out inspections outside business premises such as at private residences of directors with an authorisation of the Market Court. The Market Court does not grant an authorisation if it considers a search to be arbitrary or excessive.

The Competition Act does not expressly require the FCCA to present a written inspection decision when carrying out a dawn raid. It is nonetheless established practice that the FCCA issues a decision describing the scope and the aim of the inspection as well as the sanctions for opposing the inspection.

The FCCA officials must be allowed to enter any business premises, storage areas, land and vehicles in an undertaking's possession. Further, the officials performing the inspection shall have the right to examine all correspondence, financial accounts, computer files and other documents which may be relevant for ensuring compliance with Competition Act. The officials may also take copies of documents and seal business premises, books or records. When necessary, the police shall upon request provide official assistance in conducting the inspection.

The officials of the FCCA are also empowered to request oral explanations and conduct interviews on site as well as to record the interviews. The questions should be directly connected to the subject matter of the inspection. The officials of the FCCA are entitled to present only such questions that are of a factual nature (ie, necessary for identifying documents and understanding other facts). Further, the FCCA has a right to invite representatives of undertakings or persons who may, for a justified reason, be suspected of having acted in the implementation of a competition restriction, to appear before it. These interviews may also be recorded.

Undertakings' rights of defence, which pose certain limits on the FCCA's investigative powers, are set out in section 38 of the Competition Act. For example, an undertaking is not under an obligation to submit to the FCCA documents that contain confidential correspondence between an outside legal counsel and the client. Moreover, when an undertaking responds to the questions raised by the FCCA, it cannot be obligated to concede it has participated in a competition restriction.

International cooperation

10 Inter-agency cooperation

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

The FCCA is a member of the European Competition Network (ECN), the main purpose of which is to secure an efficient and uniform application of EU competition rules throughout the EU.

The FCCA also actively cooperates for example with the Nordic competition authorities and partakes in the international cooperation conducted within the Organisation for Economic Co-operation and Development (OECD), the International Competition Network (ICN) and the European Competition Authorities (ECA).

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11 Interplay between jurisdictions

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

12 Decisions

How is a cartel proceeding adjudicated or determined?

The FCCA is responsible for investigating suspected competition infringements and adopting the infringement decisions to that effect. It has competence to, for example, order an undertaking to terminate conduct that violates competition rules, but cannot impose any fines.

Should the FCCA consider it necessary to impose a fine for anti-competitive conduct, it has to make a penalty payment proposal to the Market Court. The Market Court provides the undertaking to which the proposal relates with an opportunity to respond in writing and/or orally. The Market Court shall include a statement of reasons in its decision which indicates which facts and evidence have affected the decision and on which legal grounds it is based. The Market Court decision may be appealed to the SAC.

13 Burden of proof

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

The burden of proof to demonstrate a competition infringement lies with the FCCA. The FCCA must provide sufficient proof to establish that there has been an infringement. However, to the extent an undertaking wishes to benefit from an exemption under section 6 of the Competition Act (or article 101(3) TFEU), the burden of proof lies with the concerned undertaking.

There are no statutory provisions as to the level of proof required in competition restriction matters. On the contrary, the courts follow the principle of free consideration of evidence. The SAC has confirmed in its rulings that the European Convention on Human Rights and the EU Charter of Fundamental Rights are applicable in competition cases where penalty payments have been proposed. At the same time, however, the SAC case law shows that these principles are not applied to the same extent in competition matters as in criminal matters.

14 Appeal process

What is the appeal process?

As the FCCA can merely make a penalty payment proposal, it is only after the Market Court proceedings that there is an appealable decision regarding the penalty payment. Most other FCCA decisions may be appealed to the Market Court. Therefore, a decision by the FCCA declaring an infringement of competition rules without any penalty payment proposal can generally be appealed. In the same manner, a decision finding that no infringement has occurred can be appealed by a third party if it has a direct impact on that party. Appeals shall normally be lodged within 30 days from receipt of the decision concerned.

A Market Court decision under the Competition Act is appealable to the SAC. Any person to whom the decision is addressed or whose right, obligation or interest is directly affected by the decision, as well as the FCCA, has the right of appeal. An appeal shall be lodged within 30 days of notice of the Market Court decision.

In the SAC, proceedings are predominantly conducted in writing whereas oral hearings are usually limited in scope.

Sanctions

15 Criminal sanctions

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

There are no criminal sanctions for competition law infringements in Finland. The Ministry of Employment and the Economy and the FCCA have investigated the possibility of extending personal criminal liability to cartel infringements. However, such criminalisation depends on political decision-making and is not likely in the near future.

Submission of false evidence to the FCCA in the course of its investigations may result in criminal sanctions in accordance with the Finnish Penal Code. To date, however, this has not been applied in practice.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Upon the proposal of the FCCA, the Market Court may impose a penalty payment on undertakings that have violated competition rules unless the conduct is deemed minor or the imposition of fine otherwise unjustified with respect to safeguarding competition. In fixing the amount of fine, the gravity, extent and duration of the competition restriction shall be taken into account. Repeat offenders may be fined more heavily. The amount of the fine may be up to 10 per cent of the total turnover of the undertaking concerned in the last year of its cartel participation.

A fine cannot be imposed if the FCCA has not made a penalty payment proposal to the Market Court within five years from the occurrence of the competition restriction or, in case of a continued infringement, from the date on which the restriction ended. The five-year limitation period is interrupted by certain FCCA investigatory measures. Moreover, there is an absolute limitation period according to which a fine cannot be imposed if the FCCA has not made a penalty payment proposal to the Market Court within 10 years of the applicable dates (date on which the restriction occurred, or on which it ended in case of a continued infringement).

The FCCA may also order an undertaking to cease the activities prohibited in the Competition Act (or article 101 TFEU), and support its order by imposing a conditional fine. A conditional fine can also be used to enforce an undertaking's obligation to provide information and documents as well as the obligation to contribute to the inspections conducted under the Competition Act. The enforcement of conditional fines rests with the Market Court.

By a decision, the FCCA may order that commitments offered by the parties shall be binding if the commitments are such that they eliminate the restrictive nature of the conduct. The FCCA may also take interim measures if the application or implementation of a competition restriction shall be prevented at once. Prior to issuing an interim order, the FCCA should provide the undertaking with an opportunity to be heard. However, this is not necessary if the FCCA considers that the urgency or another specific weighty reason demands otherwise.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

According to section 13 of the Competition Act, the amount of the penalty payment shall be based on an overall assessment, and in determining it, attention shall be paid to the nature and extent, the degree of gravity, and the duration of the infringement. The penalty payment shall not exceed 10 per cent of the turnover of an undertaking or association of undertakings concerned during the year in which the undertaking or association of undertakings were last involved in the infringement. In addition, the FCCA has issued guidelines on the assessment of the quantum of penalty payment and on the immunity from and reduction of fines in cartel cases. The guidelines are not binding on the FCCA or the courts, but at least the FCCA is unlikely to deviate from them.

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18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

According to section 54 of the Finnish Act on Public Procurement, debarment from government procurement procedures is available as a discretionary sanction for cartel infringements. The decision on debarment is made by the contracting entity. The Act does not provide for any set time period.

19 Parallel proceedings

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

As noted, criminal sanctions for cartel activities are not available under the Competition Act. Therefore, the sanctions that the FCCA and the Market Court can impose are administrative in nature. Civil law claims for liability for damage can be pursued simultaneously in respect of the same infringement. Such claims may also be made as stand-alone actions irrespective of any prior FCCA investigation or court decision.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Private damages claims are available under Finnish law. The Competition Act contains a specific provision, section 20, according to which an undertaking or association of undertakings that either intentionally or negligently commits a competition infringement is obliged to compensate the damage caused by the restraint on competition. Compensation can be claimed not only by undertakings but also by private persons and public entities that have suffered damage as a result of the infringement. Private damages claims are filed in the district courts as opposed to the Market Court. Such claims can also be tried in arbitration.

Section 20 of the Competition Act provides that the right to compensation covers direct and indirect economic losses resulting from the competition infringement (such as expenses, price differences and lost profit). A claim for damages under the Competition Act must be brought within 10 years following the date on which the infringement occurred or from the date on which it ended in case of a continued infringement. A claim can in any event be initiated within one year from a final infringement decision.

A new Finnish Act on Antitrust Damages Actions is expected to come into force in December 2016. The said Act implements the EU Directive on Antitrust Damages Actions and will mark considerable changes to the current regime.

21 Class actions

Are class actions possible? If yes, 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 Class Actions (444/2007) entered into force on 1 October 2007. The Act may be applied between consumers and undertakings in matters within the competence of the Finnish Consumer Ombudsman. It is therefore not applicable to competition restriction cases.

Notwithstanding the above, a representative action has been held admissible under Finnish law by the Helsinki District Court in July 2013 in an interim decision. The District Court's finding would have been challengeable upon appeal of the final ruling but the case was settled by the parties in May 2014. Thus, there is no established case law on the question of whether, and under which conditions, representative actions on damages concerning competition infringements are considered admissible under Finnish law.

Cooperating parties

22 Immunity

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

A leniency programme was first implemented in Finland in May 2004. In accordance with section 14 of the Competition Act, the first undertaking to expose a cartel may benefit from immunity if the undertaking:

- produces information or evidence, on the grounds of which the FCCA may conduct a dawn raid; or
- following such a dawn raid, delivers information or evidence, on the grounds of which the FCCA can establish that section 5 of the Competition Act (and/or article 101 TFEU) has been violated.

Section 14 of the Competition Act applies only where competitors have agreed to fix purchase or selling prices or other trading conditions, to limit production or sales or to share markets, customers or sources of supply. Only one undertaking can obtain full immunity. This means that the undertaking must be first to provide the required information or evidence to the FCCA. An undertaking that has coerced others to participate in the infringement cannot benefit from full immunity but can still qualify for a reduction in fine. A leading role in the formation and sustenance of the cartel does not as such debar the undertaking from applying for full immunity.

An immunity applicant is expected to provide the FCCA with comprehensive and precise information on:

- the nature of the competition restriction;
- which companies have been involved;
- which product markets are concerned;
- which geographic areas are concerned;
- how long the competition restriction has been in force; and
- how the competition restriction has been implemented.

In addition, the immunity applicant must satisfy all the criteria set out in section 16 of the Competition Act whereby it must:

- immediately cease participation in the competition restriction unless the FCCA has advised otherwise;
- cooperate with the FCCA throughout the entire investigation;
- not destroy any relevant evidence prior to or after submitting the application; and
- refrain from disclosing to third parties the fact that it has made or intends to make a leniency application or the content of said application.

Once the undertaking seeking immunity has provided the FCCA with all the required information and documents in its possession, the FCCA shall inform the undertaking in writing whether or not 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.

23 Subsequent cooperating parties

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

Undertakings that are not first in to submit the required information and documents to the FCCA may receive a reduction in fine under section 15 of the Competition Act. To receive a reduction, an undertaking must provide the FCCA with information and evidence that is significant for establishing the competition restriction or its entire extent or nature before the FCCA has obtained the information from elsewhere. An undertaking applying for reduction in fine must fulfil the same conditions set out in section 16 of the Competition Act as an immunity applicant.

The reduction depends on the order in which the applicant submitted the required information and evidence to the FCCA. The fine shall be reduced by 30 to 50 per cent if the undertaking is the first one

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Update and trends

Cartel enforcement in Finland is still very much focused on private enforcement actions. The most significant pending actions are based on competition restrictions in the asphalt, raw wood and car spare parts markets. In February 2016, the Supreme Court rendered a landmark private enforcement judgment. It ruled largely in favour of the defendants in the raw wood case, finding that the limitation period had started considerably earlier than the Court of Appeal had found. The judgment concerned one particular claim, but following the judgment, it is expected that a substantial number of claims will be time barred.

A new Finnish Act on Antitrust Damages Actions, which will implement the EU Directive on Antitrust Damages Actions, is expected to come into effect during in December 2016.

On the public enforcement side, there is one pending matter where the FCCA had proposed that the Market Court should impose a fine of €35 million on one participant in an alleged cartel concerning the Finnish power transmission line market. In March 2016, the Market Court rejected the proposal as time barred. The FCCA has appealed the decision to the Supreme Administrative Court. In another matter that has received media attention, the FCCA has proposed that the Market Court should fine nine parties in total €38 million for their involvement in an alleged bus cartel.

to submit significant information, by 20 to 30 per cent if the undertaking is second and by 20 per cent at most for other applicants fulfilling the criteria.

According to the FCCA's guidelines, the amount of the reduction depends on how significant the provided information and evidence has been for establishing the competition restriction. The FCCA may in its penalty payment proposal to the Market Court propose a reduction of fines concerning one or several cooperating undertakings. The Market Court is not bound by the proposal.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The Competition Act does not provide for an 'immunity plus' or 'amnesty plus' option. Applicants submitting significant information and evidence to the FCCA after the immunity applicant may be entitled to a reduction in the penalty payment as set out in section 15 of the Competition Act (see question 23).

25 Approaching the authorities

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

There are no set deadlines for making an application for immunity or leniency. As only the first undertaking to submit the required information and evidence is entitled to full immunity, timing is essential.

It is a normal practice that an undertaking first conducts a preliminary internal analysis to assess whether it is possible that it has engaged in a competition infringement which could qualify for immunity or leniency. Following this, an undertaking may contact the FCCA anonymously (typically through an external counsel) to ascertain whether immunity is still available. This contact does not affect the order of priority in case there are several applicants for immunity but the undertaking will only be told if another cartel participant has already applied for immunity. An application should be submitted as soon as possible following these steps.

A system similar to the Commission's marker procedure is operated by the FCCA. According to section 17 of the Competition Act, the FCCA may set a deadline for an applicant to provide the required information and evidence. As long as the applicant provides the information within the required time frame, the moment of application is deemed to be the point in time when the first application to the FCCA was submitted.

26 Cooperation

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?

An immunity applicant must provide all relevant information and evidence in its possession to enable the FCCA to conduct an inspection, or following an inspection, to enable the establishment of an infringement.

To receive a reduction in fine, subsequent cooperating parties must submit to the FCCA such information and evidence that is significant for establishing an infringement or its entire extent or nature before the authority has received the information from any other source. See questions 22 and 23 for further details.

27 Confidentiality

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

The Competition Act does not contain provisions on the issue of confidentiality in competition proceedings. Therefore, the Act on Openness of Government Activities (621/1999, as amended) applies. The Act applies to documents in the possession of a public authority that have been either prepared by the authority or provided to the authority for the consideration of the matter. Official documents are public unless a specific legal exception applies. As a main rule, a party to the proceedings shall have access even to the contents of such a document which is not public, if it may influence the consideration of the matter. Such access may be denied only under certain conditions, for example, where it would be contrary to a very important public or private interest.

In a previous competition restriction case, one of the investigated companies requested disclosure of materials which its competitor had submitted to the FCCA pursuant to a leniency application. The FCCA refused to grant access. Upon appeal, the Administrative Court of Helsinki concluded that the requested materials were not public. The competitor of the leniency applicant was considered as a party to the proceedings. Access to the materials was nonetheless denied by the Administrative Court on the basis that such access would have been contrary to a very important public interest at the stage when the matter was still pending before the FCCA. The SAC upheld the decision.

Further, according to section 17 of the Competition Act, information and evidence provided to the FCCA in immunity or leniency application can only be used in handling of the public enforcement case by the FCCA, the Market Court or the SAC. According to the government bill, such information and evidence cannot therefore be used, for example, for private damages actions. The FCCA may share the documents with other members of the ECN.

The new Finnish Act on Antitrust Damages Actions that is expected to come into force in December 2016 contains rules on the use of leniency material in private enforcement proceedings. The said rules will largely follow the EU Directive on Antitrust Damages Actions.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The Competition Act does not provide for any settlement procedure for cartel cases.

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29 Corporate defendant and employees

When immunity or 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.

30 Dealing with the enforcement agency

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

Please see questions 22 and 25.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are currently no ongoing assessments or reviews of the immunity/leniency regime.

Defending a case

32 Disclosure

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

Upon request, the undertaking under investigation has the right to receive information, orally or in another appropriate manner, on the documents concerning the investigation and the phase of the proceedings insofar as it cannot harm investigations in the matter, unless otherwise provided in the Act on the Openness of Government Activities (621/1999, as amended) or EU laws.

The Act on Openness of Government Activities applies to documents in the possession of a public authority that have been either prepared by the authority or provided to the authority for the consideration of the matter. Official documents are public unless a specific legal exception applies. As a main rule, a party to the proceedings shall have access even to the contents of such a document which is not public, if it may influence the consideration of the matter. Such access may be denied only under certain conditions, for example, where it would be contrary to a very important public or private interest.

An undertaking has the right to be heard prior to the FCCA making a proposal for a penalty payment, or a decision stating a violation of sections 5 or 7, or articles 101 or 102 of the TFEU. The FCCA shall inform the undertaking in writing of the claims and grounds relating to the issues that have arisen during the investigation. The FCCA shall fix a reasonable time limit within which the undertaking may present its comments either orally or in writing.

33 Representing employees

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

The FCCA's investigations of the suspected cartel infringements and the following Market Court and SAC proceedings are directed against undertakings only. An undertaking's employees are therefore out of the scope of the Competition Act. However, should an undertaking and its employee have diverging interests, it is advisable that they are represented by separate counsel.

34 Multiple corporate defendants

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.

35 Payment of penalties and legal costs

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

Penalties cannot be imposed on an undertaking's employees under the Competition Act. If there are legal costs associated with an employee as a result of his or her involvement in the FCCA's investigations, there is no prohibition under law for a corporation to pay them.

36 Taxes

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

Under Finnish tax laws, fines are generally not tax-deductible. By contrast, recent tax authority praxis indicates that private damages are tax-deductible under certain circumstances.

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37 International double jeopardy

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.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

An undertaking can take advantage of the immunity and leniency procedure as described in more detail in questions 22 to 26. The existence of a compliance programme does not, as such, affect the level of the fine. According to section 13 of the Competition Act the amount of the penalty payment shall be based on an overall assessment and, in determining it, attention shall be paid to the nature and extent, the degree of gravity and the duration of the infringement.

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France

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant substantive legislation regarding the prohibition of anticompetitive practices, including cartels, is set out under articles L420-1 to L420-7 of the French Commercial Code (FCC) (see question 4). Cartels, more specifically, are covered by the prohibition of anticompetitive agreements set out under article L420-1 of the FCC. The French Competition Authority (FCA) is also competent to apply articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Procedural rules are set out under articles L450-1 to L450-8 of the FCC (investigation powers of the FCA and of the French Minister for the Economy) and articles L461-1 to L470-8 (proceedings before the FCA).

2 Relevant institutions

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 authority responsible for enforcing the prohibition of cartels is the FCA, an independent administrative authority created in 2009 to replace the former Competition Council. The FCA has powers of investigation, prosecution, and decision-making (including the power to impose sanctions, see questions 15 to 17).

The first two powers are exercised by the FCA's investigating service, composed of *rapporteurs*, under the direction of a *rapporteur général*.

The decision-making power is exercised by the *collège* of the FCA, composed of 17 members who do not participate in investigations. The FCA is headed by a President, appointed for five years, who is a member of the collège. Mr Bruno Lasserre has occupied this position from 2004 until 2016 (as President of the Competition Council until 2009, then as President of the FCA). Although he was reappointed in 2014, Mr Lasserre announced in September 2016 that he would be leaving the FCA as of October 2016. He will be replaced as President by Mrs Isabelle de Silva, who has been a member of the *collège* since 2014.

The Minister for the Economy also has enforcement powers with respect to French competition rules (article L464-9 of the FCC), where the following conditions are met:

- the practices in question only affect local markets;
- they do not fall under articles 101 and 102 TFEU;
- the individual turnover in France of each undertaking does not exceed €50 million; and
- the combined turnover of all undertakings does not exceed €200 million.

Finally, French courts also have the power to enforce EU and French competition rules. The French Civil Code allows any entity or individual to bring civil actions before national courts if they have suffered damages from anticompetitive practices (see question 20).

3 Changes

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

Recently, there have been a few changes to the French regime regarding anticompetitive practices:

- the 'Macron' Law of 6 August 2015 strengthens the powers of the FCA within the ordinary investigation provided for in article L450-3 of the FCC (see question 9). This law also amended the settlement procedure in front of the FCA. Undertakings that do not contest the allegations of anticompetitive practices will now be proposed a settlement laying down minimum and maximum amounts of penalty (see question 28);
- the 'Hamon' Law of 17 March 2014 introduces a 'class action': consumers who consider themselves to be the victims of anticompetitive practices condemned as such by a final decision of a competition authority can be represented in court by a group action brought by a consumer association (see question 21); and
- Directive 2014/104/EU of 26 November 2014 provides for solutions allowing the victims of anticompetitive practices to be fully compensated. It also aims at increasing the effectiveness of leniency programmes. The transposition of this directive is ongoing and should take place before 27 December 2016.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article L420-1 of the FCC prohibits concerted practices, agreements and alliances, express or tacit, which have as their object, or may have as their effect, the prevention, restriction or distortion of competition in a market.

This text does not provide for an exhaustive list of prohibited practices. There are no specific provisions dealing with group boycotts or bid rigging, which are however caught by the general prohibition set out in this text.

As is the case under EU law, French authorities applying competition rules traditionally consider that evidence of effect on competition is not necessary where the object of an agreement is to restrict competition: such 'by object' restrictions are 'per se' illegal. Cartels are the most obvious example of 'by object' anticompetitive practices.

In any event, it is not necessary to establish that the restriction of competition was knowingly planned and intended by the parties, as repeatedly stated by the FCA: 'the lack of anticompetitive intent of the parties to the agreement has no bearing on the qualification of such agreement.'

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

Article L420-4 of the FCC sets out two exemptions from cartel prohibition.

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The first exemption covers practices implemented in application of a statute or regulation. For instance, in 2010, the French Court of Cassation (the highest court in the French civil judicial system – see question 14) held that the tariffs for the consultation and for the surgical acts of certain doctors were subject to price regulation in France, which excluded the application of article L420-1 of the FCC.

The second exemption concerns practices which the authors can prove: (i) have the effect of ensuring economic progress, including by creating or maintaining jobs; and (ii) reserve for users a fair share in the resulting profit, without giving the undertakings involved the opportunity to eliminate competition for a substantial part of the products in question. This mainly applies to the agricultural sector. Indeed, practices consisting in organising, for agricultural products or products of agricultural origin, under the same brand or trade name, production volumes and quality or even a commercial policy, including the setting of a common price, might be exempted if they are essential to achieve economic progress. For instance, in March 2012, the FCA fined endive growers and their professional organisation approximately €4 million for price fixing via exchanges of sensitive information. However, the Paris Court of Appeal ruled, in a judgment dated 15 May 2014, that the endive growers' organisation had not exceeded its legal mission consisting of price regulation regarding the regulatory specificities of the sector and regarding the Common Agricultural Policy.

6 Application of the law

Does the law apply to individuals or corporations or both?

French cartel law applies to any undertaking engaged in a production, distribution or service activity, regardless of its nature or legal form. This may apply to both natural and legal individuals, although in practice this concerns mostly corporations.

French law also provides for a criminal responsibility of natural individuals involved in anticompetitive practices such as cartels, under certain circumstances (article L420-6 of the FCC – see question 15). Criminal proceedings before criminal courts against individuals on the basis of this provision are separate from those brought before the FCA on the basis of article L420-1 of the FCC.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

French cartel rules apply as soon as such anticompetitive practice affects one or more markets located in France, in which case it will be assessed in the light of article L420-1 of the FCC. Anticompetitive practices committed directly or indirectly through the intermediary of a subsidiary located outside France are expressly included within the scope of the prohibition set out under article L420-1 of the FCC if they have anticompetitive effects in France.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The officers authorised to carry out investigations with respect to alleged anticompetitive practices are the agents of the FCA and of the General Direction of Competition, Consumption and Fraud Prevention (DGCCRF) (article L450-1 of the FCC).

Investigations by the FCA or the DGCCRF may be initiated on the basis of a complaint filed by an undertaking, or of their own initiative. The FCA may also start investigations on the basis of a leniency application (see question 22), while the DGCCRF may be seized by a referral from the FCA in cases where the latter deems itself incompetent.

Once the FCA is in charge of a case, an investigating agent (the *rapporteur*) is appointed to conduct the investigation under the supervision of the *rapporteur général*. The *rapporteur* will conduct further investigations in the context of one of the following: the ordinary investigation or the heavy investigation (see question 9).

There are no time limitations applicable to investigations by the FCA or DGCCRF.

9 Investigative powers of the authorities

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

Agents of the FCA and of the DGCCRF may conduct two types of investigation.

Ordinary investigations

The powers granted to FCA and DGCCRF agents in the context of ordinary investigations are governed by article L450-3 of the FCC.

Under this provision, agents have the power to:

- enter any premises, land or means of transport for professional use;
- request the communication of books, invoices and all other professional documents and obtain or copy by any means and on all media;
- gather convened on site or the information and justifications; and
- ask the authority to appoint an expert to carry out any contradictory expertise.

The 'Macron' Law of 2015 further allows agents to require the disclosure and obtain or take copies of business records 'of any kind, wherever they are, in order to facilitate the fulfilment of their mission.' On this occasion, they 'may require the necessary means to carry out their investigation.'

Heavy investigations

The powers granted to FCA and DGCCRF agents in the context of heavy investigations are governed by article L450-4 of the FCC.

First, the FCA or the Minister for the Economy must obtain judicial authorisation to conduct such heavy investigations, in the form of a court order.

If granted, FCA or DGCCRF agents may, accompanied by one or more police officers, visit all places, make searches, proceed to the seizure of documents and any data medium (dawn raids). They may also proceed with the sealing of all commercial buildings, information documents and materials within the limits of the duration of the visit to the premises.

The visited person has the right to be assisted by an external legal counsel, which must be specified in the court order, and may appeal such order until 10 days after its notification. However, the exercise of such rights of assistance and/or appeal does not suspend the course of the investigations.

International cooperation

10 Inter-agency cooperation

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

At the EU level, the FCA is a member of the European Competition Network (ECN), which has led it to cooperate with the European Commission (the Commission) and the national competition authorities (NCAs) of other member states.

The FCA is entitled to share with other NCAs information and documents that would already be in its possession, or to request such information and documents on the behalf of foreign NCAs, to the extent that the latter would be bound by reciprocal obligation towards the FCA (article L462-9 of the FCC).

With respect to international matters, the FCA is notably active in:

- the International Competition Network: the FCA acted in 2015 as vice-chair of the steering committee, co-chair of the group working on pedagogy of competition and the liaison function with non-government representatives;
- the OECD Competition Committee; and
- the United Nations' Intergovernmental Group of Experts (IGE) on Competition Law and Policy, which meets annually in Geneva.

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11 Interplay between jurisdictions

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 FCA very actively cooperates with the Commission and other NCAs, in particular in the context of the ECN.

Regarding cooperation with NCAs of other member states, the FCA may request the communication of information or documents, as well as the performance of inspections or other fact-finding measures on their own territory with a view to establishing an infringement of article 101 or 102 of the TFEU (Regulation (EC) 1/2003, article 22, section 1).

Regulation (EC) 1/2003 also organises the cooperation between NCAs (including the FCA), which have the power to enforce article 101 of the TFEU on their territory, and the Commission. In particular, the FCA shall inform the Commission before starting formal investigation measures when acting under 101 TFEU and shall be relieved of its competence to apply this article in case the Commission initiates proceedings. The FCA also actively cooperates with the Commission in the context of the latter's investigations, by performing investigation measures and/or communicating any relevant information or document.

In 2015, the FCA provided assistance to investigations of anticompetitive practices by the Commission or NCAs of other member states (Austria, Germany and Luxembourg) in seven instances. It submitted requests for documents collected by other NCAs in three instances, and received four requests for information, from the Commission and the British and German NCAs.

A recent example of cooperation between EU competition authorities is the *Booking.com* case. In France, investigations were initiated by the FCA following complaints by hotel chains and unions with respect to certain contractual clauses imposed by the online booking platform Booking.com. These practices were also under scrutiny in Italy and Sweden, and the French, Swedish and Italian competition authorities worked closely together, as well as with the Commission, in order to obtain similar commitments in the three countries. In France, commitments were given by Booking.com in April 2015. The FCA is currently a member of a study group designed to measure the impact of these commitments, together with the Commission and nine other NCAs (Belgium, Czech Republic, Germany, Hungary, Ireland, Italy, Netherlands, Sweden and UK). In this context, the FCA indicated in July 2016 that harmonised questionnaires would be sent to hotels located in these 10 countries.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Adjudication powers with respect to cartels lie notably with the FCA (see below) and national courts (see question 20).

A first phase (investigation and prosecution phase) allows the FCA's agents to gather all the relevant information and documents necessary to determine the existence of a cartel, or, more generally, an anticompetitive practice (see question 8).

At the end of the investigation, the FCA may either issue a statement of objections (SO) or dismiss the case. An SO is issued when the FCA has sufficient evidence of the existence of facts which are likely to amount to anticompetitive practices. The parties and the government, which is associated to every proceeding by the FCA, have two months (that may be extended by one additional month) to submit their comments. The FCA then issues a report, to which the parties and the government may respond within two months.

The case is then discussed before a different body of the FCA, the *collège*, which has decisional powers (decision phase). After a hearing with the parties, the FCA will issue its decision, which may:

- impose sanctions, in cases where it finds that article L420-1 of the FCC has been infringed (see questions 15 to 17); or
- dismiss the case, when the facts are time-barred, the FCA is not competent, or the practices are not sufficiently supported in fact or it has not been proved that they constitute an anticompetitive practice (see question 13).

For some anticompetitive practices, the FCA's decision may also accept commitments, in which case no sanction will be imposed (see question 28). This procedure, however, does not apply to cartels.

13 Burden of proof

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

Before the FCA, the latter bears the burden of providing the evidence to support the existence of the facts and establish that they amount to an anticompetitive practice. When proceedings are initiated by the filing of a complaint, the plaintiff has the obligation to provide the FCA with the information and/or documents supporting its claim.

Before national courts, the party alleging a breach of competition rules in case of proceedings must provide the relevant evidence.

Conversely, the burden of proof lies with the defendant who seeks the benefit of a defence against a finding of infringement (eg, the benefit of an exemption).

14 Appeal process

What is the appeal process?

A decision of the FCA may be appealed by the parties and/or the Minister for the Economy within one month of its issuance. The appeal must be lodged before the Paris Court of Appeal (article L464-8, section 1 of the FCC). It does not suspend the implementation of the decision in itself, unless a deferral of the implementation of the decision is ordered by the First President of the Court. The Court of Appeal has powers of full judicial review, and is thus competent to review the decision both in facts and in law.

A decision in the first instance issued by a national court relating to an anticompetitive practice (eg, follow-on damages) can be appealed within one month before the Court of Appeal of this court's jurisdiction.

Appeal decisions can afterwards be brought to the scrutiny of the French Court of Cassation, which may only review the judgment in law. The timeline for such appeal is:

- one month after a decision of the Paris Court of Appeal relating to cases previously adjudicated by the FCA (in application of article L464-8 of the FCC); or
- two months in other cases (in application of general civil rules of procedure).

Proceedings before appeal Courts and the Court of Cassation usually take one to two years.

Sanctions

15 Criminal sanctions

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

Under article L420-6 of the FCC, natural individuals may be subjected to criminal penalties amounting to fines of up to €75,000 and imprisonment for up to four years where they have 'fraudulently taken a personal and decisive action in the conception, organisation or implementation of the practices covered by article L420-1 [...][of the FCC].'

A court may jointly sentence the corporation to pay the fines ordered against its officers (article L470-1 of the FCC).

It appears from criminal courts' precedents that three elements must be established before criminal sanctions may be imposed: (i) there must be a personal role on the part of the accused in the conception, planning and implementation of the practice; (ii) the behaviour of the accused must have been decisive in the implementation of the practice; and (iii) the accused must have acted 'fraudulently' (ie, via intentionally misleading or bad faith actions).

This provision, however, is very rarely invoked, and even more rarely gives rise to actual sanctions. In particular, to the best knowledge of the authors, no individual has been imprisoned on the basis of this article.

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16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Administrative sanctions

The FCA has the power to impose various administrative sanctions on undertakings which implement anticompetitive practices.

First, in order to respond to emergency situations, the FCA has the possibility to grant interim measures on the basis of article L464-1 of the FCC. The granting of such measures requires that the facts alleged appear likely to constitute a practice contrary to article L420-1 or L420-2 of the FCC (including a cartel) and are an immediate threat to the overall economy, the concerned sector, the interest of consumers or the plaintiff. Such measures are used to order undertakings to suspend the concerned practice or return to the previous state.

The FCA also has the power to impose heavy financial penalties, pursuant to article L464-2 of the FCC.

If the offender is a company, the maximum amount of the penalty is up to 10 per cent of worldwide turnover, and €3 million if the offender is not a company (eg, public institutions, associations). The FCA can further impose a periodic penalty of up to 5 per cent of the daily average turnover for every day of delay.

The European Court of Human Rights has deemed that, in light of the high amounts incurred for breach of competition law, such fines constitute 'criminal' sanctions within the meaning of the European Convention on Human Rights, thus triggering the application of this document to competition proceedings, and in particular, its article 6 on the right to a fair trial.

The turnover to be taken into account for the calculation of fines will be the highest amount achieved by the undertaking in any financial year during the period over which the practices have taken place.

The FCA imposed its highest fine in December 2015, punishing 20 companies for taking part in a cartel in the delivery services sector for a total amount of €672.3 million. In 2016, the highest fine for a cartel was in the sector of heaters and amounted to €9 million.

In setting the amount of cartel sanctions, the FCA is bound by its fining guidelines, published in 2011 and largely inspired by the Commission's guidelines on the method of setting fines (see question 17).

In addition to financial penalties, the FCA may issue injunctions forcing undertakings to change their behaviour, and order the publication of the decision or certain parts thereof in the press.

The Minister for the Economy may impose injunctions, or financial penalties not exceeding €150,000, or 5 per cent of the undertaking's latest turnover in France if this results in a lower amount. If the undertaking fails to comply with the injunction or pay the penalty, the Minister may refer the case to the FCA.

Civil sanctions

French law does not provide for any specific civil sanctions. However, the French Civil Code allows any entity or individual who has suffered damages from an anticompetitive practice to bring civil actions before national courts (see question 20).

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

On 16 May 2011, the FCA published its final guidelines for setting antitrust fines.

The guidelines first define the basic amount of the penalty as a proportion of the sales value of the products or services to which the infringement relates. The basic amount is then adjusted to take into account the individual situation of the undertaking. Thus, repeated infringements or financial difficulties can respectively lead to an increase or a reduction. The amount can then be reduced to take into account leniency proceedings or a settlement.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not a sanction which may be imposed under French law.

However, under article 48 of regulation No. 2015-899 of 23 July 2015 on public procurement, a public purchaser may exclude individuals from public procurement procedures when the purchaser has sufficient evidence that they have implemented coordination practices with a view to distorting competition.

19 Parallel proceedings

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

Under French law, the same conduct can lead to both criminal and administrative sanctions, although such sanctions will not be imposed by the same court: criminal penalties are imposed by national courts (see question 15), while administrative sanctions are imposed by the FCA (see question 16).

Furthermore, any individual or entity who suffered a loss from an anticompetitive practice can bring a private damage claim. However, the purpose of this sanction is only to compensate a private damage (see question 20), whereas criminal and administrative sanctions protect public interests and have as main objectives punishment and deterrence.

Private rights of action

20 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Any individual or entity who suffered a personal loss from an anticompetitive practice can bring a private damage claim before national courts. Such action can be brought even if the FCA has not issued a decision regarding the anticompetitive practice in question.

Action of victims claiming compensation for damages caused by an anticompetitive practice are currently governed by the ordinary French rules of civil procedure and civil liability.

The plaintiff has to prove three elements: (i) a fault from the undertaking (ie, an infringement of competition rules); (ii) the damage suffered; and (iii) a causal link between the fault and the damage. French courts have always guaranteed the principle of full reparation of a damage. Punitive damages, however, are prohibited under French law. Apart from these principles, there are no specific rules governing the level of damages.

Plaintiffs may face numerous difficulties in proving the fault, damage and causal link. These difficulties increase if the plaintiff acts independently of any proceedings before a competition authority, since it is much more difficult to establish the existence of an anticompetitive practice. Proving the existence and quantifying the level of a damage can also be very complex, and may require the intervention of experts.

Directive 2014/104/EU of 26 November 2014 helps addressing these challenges. It reduces the evidentiary burden of the plaintiff by establishing: (i) an irrefutable presumption of the existence of an anticompetitive practice where such practice has been found by a final decision of a competition authority or appellate court; and (ii) a rebuttable presumption of a damage to the victims of a cartel. As a result, if a private action is brought after the intervention of such a decision, the person will not have to prove the infringement and thus the fault. Transposition of the directive is currently ongoing and should take place before 27 December 2016.

Regarding the assessment of damages, the directive states that the burden or standard of proof required for the quantification of harm must not render the exercise of the right to damages excessively difficult. Where it is established that a claimant suffered harm but it is

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excessively difficult precisely to quantify such harm on the basis of the evidence available, national courts must be empowered to make estimations (eg, by requesting an opinion from the NCA). They can also refer to the *Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* published in June 2013 by the Commission.

21 Class actions

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

Since the Hamon Law of 17 March 2014, consumers that are the victims of anticompetitive practices condemned by a final decision of a competition authority can be represented in court by a consumer association (article L623-1(2°) of the French Consumer Code).

This group action will allow a set of consumers placed in a similar situation to obtain, in the context of a single trial, compensation for damages resulting from anticompetitive practices within the meaning of EU or national law. Neither consumers acting alone nor professionals may engage in a group action.

Article L623-24 of the Consumer Code provides that group actions aiming to repair the damage caused by anticompetitive practices may only be undertaken by the consumer association 'on the basis of a judgment' of a competent court or authority issued against a professional, which establishes the facts in a final manner (ie, without any possible appeal or other recourse). The responsibility of the professional is then established res juridica for (ie, no matter in this respect that the company has benefited from a reduction in the fine, or a leniency application).

The group action is subjected to a limitation period of five years from the date of the final decision establishing the infringement of competition rules.

The procedure is conducted in two phases.

In the first phase, the judge rules on the responsibility of the professional and defines the consumer group for which the responsibility of the professional is engaged and the connecting factors to the group. The judge also determines which damages could be repaired as well as the period of time over which consumers may join the group (two to six months after completion of the disclosure requirements).

During the second phase, which is not contentious, consumers whose damage may be repaired as part of the group action decide, once informed of the judgment establishing the professional's responsibility, whether or not to join the action. They are then compensated under the terms of the judgment. Finally, the condemned undertaking will proceed to the compensation of damages suffered by each consumer in the conditions and limitations set out in the judgment.

Articles L623-14 to L623-17 of the Consumer Code also set up a simplified group action procedure, gathering phases 1 and 2, where: (i) the identity and number of affected consumers are determined; and (ii) it is established that they have suffered identical damages.

Cooperating parties

22 Immunity

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

Undertakings may be exonerated from financial penalties where they have 'contributed to establishing the reality of a prohibited practice and to determining its authors by providing elements which the Authority or the administration were previously unaware of' (article L464-2 IV of the FCC).

The 'Procedural Notice on French Leniency Proceedings', published on 3 April 2015, defines the conditions and procedure that must be followed to obtain immunity from fines.

It lays down two cases in which the undertaking may obtain full immunity from fines (type 1 cases):

- type 1A cases: the FCA has no information on the alleged agreement. Conditional benefit of full immunity will be granted to the first company that provides information and evidence of the existence of a cartel, if such information and evidence allow the FCA to carry out investigations; and
- type 1B: the FCA already has information relating to the alleged cartel. Conditional benefit of full immunity will then be granted if the following three conditions are met:
  - the company is the first to provide sufficient evidence to allow the FCA to establish the existence of an infringement of article L420-1 of the FCC;
  - at the time of the application, the FCA did not have such sufficient evidence; and
  - no undertaking has received conditional full immunity from the type 1A case for the alleged cartel.

Undertakings that do not satisfy the requirements for full immunity can apply for partial immunity of fines if they nevertheless contribute to establishing the reality of a prohibited practice (type 2 cases) (see question 23).

In order to be eligible for type 1 or 2 proceedings, applicants should not have coerced any other member of the anticompetitive agreement, and must:

- fully cooperate with the FCA at every stage of the procedure;
- terminate their participation to the anticompetitive practice at the latest upon receipt of the notice granting leniency (except if otherwise requested by the FCA); and
- not inform the other parties to the anticompetitive practice of its leniency application.

Undertakings may also benefit from fine reductions in case they choose not to contest the existence of the alleged practices. This procedure is known as the 'negotiated settlement route' (see question 28).

23 Subsequent cooperating parties

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

Undertakings may be granted reductions in fines (up to 50 per cent), even after the first immunity application, where they have 'contributed to establishing the reality of a prohibited practice and to determine its authors by providing elements which the FCA or the administration were previously unaware of'.

To qualify for such reduction, a company must provide the FCA with evidence of the existence of the alleged cartel that represents significant added value compared to the evidence already available to the FCA. In particular, the FCA considers that:

- contemporary written evidence of the alleged cartel has a greater value than evidence subsequently established;
- evidence relating directly to the facts in question has a higher value than indirectly related evidence; and
- indisputable evidence has a higher value than evidence which must be substantiated if challenged.

To determine the level of reduction of fines which a company may claim, the FCA will take into consideration: (i) the rank of the request; (ii) when it was presented; and (iii) the degree of significant value that the evidence provided by this company has brought.

24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Under French law there is a no 'immunity plus', or 'amnesty plus'. However, being the second or the third to cooperate with the FCA may have a significant impact on the reduction of the fine, since the Procedural Notice includes a predetermined range of fine reduction according to the rank: (i) between 25 per cent and 50 per cent for the first company providing significant added value to the investigation; (ii) between 15 per cent and 40 per cent for the second; and (iii) no more than 25 per cent for the third.

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25 Approaching the authorities

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 initiating or completing an application for immunity. However, the FCA takes into consideration the rank of each application (see question 24).

The Procedural Notice details the grant of a marker to applicants allowing them to know their rank and thus the amount of fine reduction they may be entitled to. If necessary, the *rapporteur général* gives the applicant a deadline allowing it to gather information and evidence relating to the alleged cartel that is required for the consideration of its application without causing it to lose its rank. If the company meets the deadline fixed by the *rapporteur*, the information and evidence provided will be deemed to have been disclosed at the date of receipt of the application.

26 Cooperation

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?

All leniency applicants must cooperate with the FCA in a true, complete, swift and lasting manner from their application date until the end of the investigation and adjudication procedure. Applicants must provide all and any element relating to the practice which already is, or would come to be, in their possession, be ready to answer any question by the FCA, make their current (and, to the extent possible, past) representatives and employees available for questioning by the FCA, refrain from destroying, altering or dissimulating evidence, and refrain from disclosing the existence of their leniency application.

Additionally, in order to be eligible for type 1A proceedings (see question 22), applicants must at least provide:

- the name and address of the legal entity seeking total exemption (the applicant must indicate the specific entities covered by the request);
- the name and address of the other participants in the alleged cartel;
- a detailed description of the alleged cartel, which shall specify the nature and use of the products concerned, the territories over which the practices in question may produce effects, the nature of these practices, and an estimate of their implementation duration;
- information on any leniency application relating to the alleged agreement which it addressed or intends to address other competition authorities, and
- the documentary evidence or any other kind of information in their possession or available to it at the time of its application, which may, for instance, be the locations, dates and purpose of contacts or meetings between the participants in the alleged cartel.

27 Confidentiality

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?

Aware that companies may want their cooperation to be confidential, the FCA maintains, within the limits of its national and EU requirements, the confidentiality of the identity of the leniency applicant for the duration of the procedure and until sending the SO to the concerned parties. The level of confidentiality is the same for all cooperating parties.

With respect to actions for damages before national courts, disclosure to the plaintiff of certain documents detained by the FCA may be ordered, to the extent that is strictly necessary for this plaintiff to exercise its rights of defence. However, Directive 2014/104/EU of 2014 prohibits national courts from disclosing leniency statements, in order to preserve the attractiveness of leniency programmes.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Settlement procedure

Pursuant to article L464-2 III of the FCC, undertakings may benefit from fine reductions if they do not contest the existence of the alleged practices.

Since the Macron Law of 2015, the *rapporteur général* submits to the company a proposed settlement (transaction) 'setting out the minimum and maximum amount of penalty.' If this proposal is accepted, the *rapporteur* refers it to the *collège* of the FCA, which will impose a penalty included in the range set out in the transaction.

Under the previous settlement regime, undertakings which did not contest allegations of anticompetitive practices were entitled to a reduction of a given percentage in the amount of the fine that would otherwise have been imposed. However, given the lack of visibility on such amount, it was difficult for undertakings to anticipate the final amount of fine that they would be imposed.

The current settlement regime allows undertakings to have more visibility on the fine that they incur, since the settlement offer lays down the precise range in which the final amount of the fine will be included.

To this date, this new settlement procedure has not been applied to cartel proceedings. It has only been implemented in the context of a decision pertaining to exclusive distribution in French overseas territories (Decision 16-D-15 of 6 July 2016).

Settlement and leniency proceedings (and, thus, the fine reduction to which the undertaking is entitled) may be cumulated. For instance, in Decision 15-D-19 of 15 December 2015, pertaining to a cartel in the delivery service (transporting parcels) sector, the FCA cumulated leniency and settlement (under the former regime) and applied a greater percentage of reduction to the fine than it would have if only either of these proceedings had been applied.

Commitments procedure

Under article L464-2 I of the FCC, the FCA may accept from undertakings commitments that they will modify their behaviour in the future, and put an end to a practice which is being investigated by the FCA as a potential infringement of competition rules. If such commitments are accepted by the FCA, the latter will terminate the investigation and will not impose sanctions.

The Procedural Notice on Commitments published on 2 March 2009 provides general advice to undertakings on how to use the commitments mechanism.

This notice, however, explicitly states that this procedure cannot be applied to particularly serious agreements which have a particularly negative impact on the public economic order, such as cartels. Although commitments may be offered to the FCA in the context of a cartel as part of a settlement proceeding, in which case the FCA may take this into consideration when deciding the level of fine reduction that will be granted to the leniency applicant, this is distinct from the 'commitments procedure' described above, where no sanction is imposed at all.

29 Corporate defendant and employees

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

Under article L462-6 section 2 of the FCC, the FCA may, where facts appear to justify the application of criminal proceedings, refer the case to the Public Prosecutor (*procureur général*) (see question 15). In this case, employees face criminal sanctions if they have fraudulently taken a 'personal and decisive' part in the design, organisation and implementation of practices referred to in article L420-1 of the FCC.

However, the FCA's Procedural Notice on leniency indicates that leniency constitutes a 'legitimate reason' for not referring a case to the Prosecutor. Indeed, individuals would be deterred from applying for leniency (and, thus, exposing cartels) if they were concerned that this might expose them to criminal sanctions.

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30 Dealing with the enforcement agency

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

Application for leniency must be addressed to the FCA's *rapporteur général* or, where applicable, the general director of the DGCCRF. The *rapporteur général* appoints a *rapporteur* to the case, and sets out a deadline by which the applicant must provide all elements of evidence in its possession, on the basis of which the *rapporteur* will prepare a report considering whether the conditions for leniency are met. This report is sent to the applicant and the government, following which a private hearing is held during which the applicant sets out its views. The FCA then addresses a notice to the applicant: (i) granting conditional, full or partial immunity from fines; and stating the conditions under which such immunity is granted; or (ii) refusing to grant immunity. Finally, after the case has been examined by the *collège* of the FCA, the latter formally grants leniency as set out in the notice initially circulated to the applicant if it considers that the conditions set out in this notice are fulfilled.

The FCA has appointed a leniency officer to liaise with undertakings. Potential applicants can freely and anonymously, by mail or orally, contact the FCA's leniency officer to obtain information about the leniency programme; before formally applying for leniency.

The leniency officer attends meetings between the leniency applicant and the *rapporteur*, provides technical support to the latter, and cooperates with other competition authorities involved in multiple applications.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or anticipated assessments or review of the current immunity/leniency regime in France. The regime has already recently been modified, with the 2015 Procedural Notice on French Leniency Proceedings described above.

Defending a case

32 Disclosure

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

The procedure before the FCA and national courts is contradictory, which implies that defendants should have access to the documents on which the FCA or the courts intend to base themselves to characterise the existence of a cartel, to the extent which would be necessary to guarantee their rights of defence.

Article L463-4 of the FCC provides that the FCA may refuse to grant the parties access to documents containing business secrets. If access to such documents is necessary to protect the rights of defence, the defendant shall have access to a non-confidential version.

33 Representing employees

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

A counsel may be allowed to represent employees under investigation in addition to the corporation that employs them, except in situations where this would lead to a conflict of interests, ie, when the interests of the employee and those of the corporation are not aligned (ie, in a case of 'whistleblowing' where an employee would be denouncing its employer's practices).

A present or past employee should seek independent legal advice as soon as they become the individual object of a prosecution under article L420-6 of the FCC, or more generally when they are an interested party to the case with different interests from their corporation.

Update and trends

Recently, there have been few changes to the French regime regarding anticompetitive practices.

The Macron Law of 6 August 2015 strengthens the powers of the FCA within the ordinary investigation provided for in article L450-3 of the FCC (see question 9). This Law also established a settlement procedure in front of the FCA, which allows undertakings that do not contest the allegations of anticompetitive practices to be proposed a settlement laying down minimum and maximum amounts of penalty (see question 28). The Hamon Law of 17 March 2014 introduces a 'class action': consumers who consider themselves to be the victims of anticompetitive practices condemned as such by a final decision of a competition authority can be represented in court by a group action brought by a consumer association (see question 21).

Directive 2014/104/EU of 26 November 2014 provides for solutions allowing the victims of anticompetitive practices to be fully compensated. It also aims at increasing the effectiveness of leniency programmes. The directive is currently being transposed in France. Such transposition should take place before 27 December 2016.

34 Multiple corporate defendants

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

A counsel may represent several co-defendants in the same proceedings, unless this would give rise to a conflict of interest. For instance, a counsel could not advise a candidate to leniency proceedings and other corporations which would allegedly be part of the cartel.

35 Payment of penalties and legal costs

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

Article L470-1 of the FCC provides that a court may jointly sentence the corporation to pay the fines ordered against its officers.

36 Taxes

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

Article 39, section 2 of the French General Tax Code provides that financial sanctions are not tax-deductible. In a ruling issued in 2004, the French Administrative Supreme Court held that this applied to fines imposed by the FCA for a breach of competition rules.

Private damages imposed by national courts, on the other hand, are tax-deductible.

37 International double jeopardy

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 application of the non bis in idem principle provided for under EU law, the FCA may not bring proceedings against, or impose a fine on, individuals for practices which have already been prosecuted or penalised, to the extent that: (i) the facts; (ii) the individual concerned; and (iii) the legal interest protected would strictly be the same.

This principle also applies to overlapping damage claims. However, in this case, it is unlikely that conditions (i) to (iii) above will be fulfilled since, if a claimant is seeking damages in various jurisdictions, the markets in question before each of these jurisdictions (and, hence, the practice condemned) will likely not be identical.

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38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The most efficient way to avoid or keep a fine down is to apply for leniency, or cooperate with the FCA in the context of settlement proceedings (or commitments, for practices other than cartels).

The existence of a compliance programme at the corporation level, either before or after commencement of the investigation, will likely not influence the level of the fine, as per a communication from the FCA dated 2012 indicating that such programmes would not count as a 'mitigating circumstance' for the purpose of setting fines.

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Germany

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Since 1958, the rules on cartels have been an essential part of the Act Against Restraints of Competition (GWB) in Germany.

The GWB was last amended in 2013 (the eighth amendment to the GWB). The seventh amendment (2005) almost fully harmonised the German rules on cartels with those of the EU. The basic prohibition of cartels (section 1 of the GWB) covers the same anticompetitive conduct (horizontal and vertical restraints of competition) as its EU counterpart in article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Section 2 of the GWB contains an exemption to the prohibition on cartels that resembles article 101(3) TFEU.

Under EU Council Regulation No. 1/2003 on the implementation of articles 101 and 102 TFEU, these articles must be applied by the national competition authorities and the national courts adjudicating competition matters in addition to national law where the relevant conduct may affect trade between member states. In respect of cartels, the German and the EU rules differ merely insofar as the EU rules apply only to conduct that may affect trade between member states. In practice, it is no longer necessary to establish whether a cartel is cross-border in scope (and is therefore subject to the EU rules) or regional in scale (and thus subject only to national law).

As a result of the harmonisation of the rules on cartels, materially the same standards apply to cartels having an effect within Germany.

2 Relevant institutions

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

Investigation and enforcement of cartel matters primarily lies with the Federal Cartel Office (FCO), an independent federal authority with its seat in Bonn. The decisions of the FCO are rendered by Decision Divisions, which decide in bodies composed of a chair and two associate members. The state cartel offices have additional responsibilities, albeit of limited relevance in practice (see question 12). If a decision by which the FCO imposes administrative fines is challenged before the courts (ie, the Higher Regional Court of Düsseldorf), the power to prosecute is transferred to the competent Attorney General (criminal prosecutors also have investigative powers if the cartel infringement relates to a criminal case as well, eg, in case of bid rigging (see question 9)).

3 Changes

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

Following the eighth amendment to the GWB, which took place on 30 June 2013 and, inter alia, introduced the obligation of corporations to provide the information necessary to determine the amount of fines (section 81a GWB) as well as a strengthening of private enforcement, there will now be another amendment to the law. The ninth amendment to the GWB will come into force (early) in 2017. It will primarily serve to implement the new 'European Cartel Damages Directive' (Directive 2014/104/EU), but also contain certain additional changes. Currently, a draft amendment has been made public by the Federal Ministry for Economic Affairs and Energy. The law actually entering into force can be expected to be more or less identical with the draft that proposes inter alia the following changes to the legal regime:

- privileged treatment of certain agreements between newspaper or magazine publishers that would otherwise fall under the ambit of section 1 GWB (section 30 (2b) GWB);
- severely increased liability for administrative fines based on transposing the 'single economic entity' principle developed in European competition law; as part of this amendment:
  - a parent company with the ability to exercise control over subsidiaries within the corporate group could be held liable for competition law infringements committed by such subsidiaries (section 81 (3a) GWB);
  - the universal legal successor of a corporation involved in an administrative cartel offence could be held liable for that offence in a broader manner than currently is the case (section 81 (3b) GWB);
  - the (mere) economic successor of a corporation involved in an administrative cartel offence could be held liable for that offence, resulting in liability risks even for mere asset deals (section 81 (3c) GWB); and
- several changes caused by the implementation of the 'European Cartel Damages Directive' (Directive 2014/104/EU) which seek to strengthen and ensure private enforcement, including new rules for the litigation procedure such as: a rebuttable presumption that a cartel caused damage (section 33a (2) GWB) and the obligation to disclose certain evidence (section 33g GWB) as well as specific substantive rules regarding, in particular, the passing-on defence (section 33c GWB) and certain rules on joint and several liability (section 33d GWB).

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The principal national rules on cartels are found in sections 1 and 2 of the GWB. These rules basically reproduce articles 101(1) and 101(3) TFEU on a national level.

Section 1 of the GWB prohibits all agreements between competing corporations, decisions by associations of corporations and concerted practices that have as their object or effect the prevention, restriction or distortion of competition. This provision covers a broad range of restrictive agreements and concerted practices (a collusive meeting of minds without reaching an agreement for lack of will to create mutual obligations), including agreements directly or indirectly fixing prices or other terms and conditions, bid rigging, group boycotts, agreements providing for the control of production or distribution, the allocation of quotas, territories or customers, or the exchange of market data. Further, agreements providing for the establishment and operation of joint selling or purchasing organisations, or the creation of barriers to market entry are, in principle, covered by section 1 of the GWB. Vertical restraints of competition are also covered, such as exclusive dealing and exclusive supply agreements, distribution agreements containing

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territorial exclusivity and selective distribution agreements. Section 21 GWB contains specific rules relating to boycotts.

Agreements restricting competition are prohibited by section 1 of the GWB only if they have an appreciable effect on competition. In respect of agreements (and concerted practices) that may affect trade between member states, the application of German law must not lead to the prohibition of agreements that are legal under article 101 TFEU, so the Commission's de minimis notice is likely to be applied in Germany although there is no legal obligation to do so. On 13 March 2007, the FCO issued a de minimis notice that was similar (but not identical) to the Commission's de minimis notice. The FCO's de minimis notice sets out in which cases the FCO would, in principle, not initiate proceedings. In contrast, the notice provides no binding interpretation of the appreciability criteria. Agreements concluded between corporations belonging to the same group of corporations are not subject to section 1 of the GWB.

Agreements (and concerted practices) that fall within the scope of section 1 of the GWB are exempted from the prohibition contained therein if they meet the requirements under section 2 of the GWB. Section 2 exempts cartels from section 1 under the same standards as provided by article 101(3) TFEU. The regulations for the application of article 101(3), which substantiate the requirements for exemption (the Block Exemption Regulations), apply accordingly under section 2 of the GWB. With a few exceptions (see question 5), all specific exemptions from the prohibition on cartels were abolished. There is no system for notifying cartels for exemption by regulatory decision. As under EU rules, cartels are exempted from the prohibition by law if they meet the statutory requirements. Moreover, the distinction of restraints by object and by effect is known in Germany as well. It remains to be seen, however, how recent decisions of the ECJ regarding restraints by object will be endorsed by the FCO and courts in Germany.

All agreements (and concerted practices) prohibited by section 1 and not exempted by section 2 of the GWB are null and void. The cartel authorities may impose administrative fines on individuals and corporations violating section 1 or impose other sanctions to bring the infringement to an end (see question 16).

According to EU Council Regulation No. 1/2003, the FCO is also required to apply article 101 TFEU where an agreement or concerted practice may affect trade between member states. The Regulation prescribes that the parallel application of national competition law, including sections 1 and 2 of the GWB, must not lead to the prohibition of agreements or concerted practices that do not restrict competition within the meaning of article 101(1) TFEU, that fulfil the conditions of article 101(3) or that are covered by the Block Exemption Regulations. The FCO forfeits the competence to apply article 101 TFEU in Germany when the Commission commences proceedings (article 11(6) of EU Council Regulation No. 1/2003). When applying article 101 TFEU, the FCO will apply the German procedural rules of the GWB. Sanctions for violations of European law include all sanctions that may be imposed for a breach of German law.

Finally, bid rigging also constitutes a criminal offence and may be punished by imprisonment of up to five years or the imposition of a pecuniary penalty pursuant to section 298 of the Criminal Code (see question 15).

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

The GWB provides for specific rules as regards certain industries. According to section 28, the agricultural sector is partially exempted from the prohibition on cartels (section 1). Section 30 provides that the ban on resale price maintenance does not apply to the sale of newspapers and magazines. Pursuant to section 30(2a) (enacted in 2013), certain agreements between associations, newspaper and magazine wholesalers are exempted from the restrictions set forth in section 1. Finally, certain agreements by corporations in the field of public water supply are exempted from the prohibitions of section 1 according to sections 31, 31a and 31b GWB.

Further, there is a non-industry-specific exemption for cartels between competing small and medium-sized corporations. Under the specific circumstances set out in section 3 of the GWB, cartels among small and medium-sized corporations are held by law to meet the requirements for exemption under section 2 of the GWB. On 1 March 2007 the FCO issued an information leaflet on the possibilities to cooperate for small and medium-sized corporations. This leaflet provides some guidance regarding the application of section 3.

6 Application of the law

Does the law apply to individuals or corporations or both?

The prohibition set forth in section 1 of the GWB applies to private and public undertakings. The term 'undertaking' is construed broadly. It is generally agreed that all individuals, partnerships, corporations and cooperating parties engaged in business activities relating to the sale of goods or the performance of commercial services constitute undertakings. The legal form of operation is irrelevant. An intention to profit is not required. Professionals such as architects, lawyers, auditors and accountants, as well as scientific, artistic and athletic organisations, constitute undertakings to the extent they are engaged in business activities. Although the law applies to undertakings, individuals acting on behalf of the undertakings (directors, employees) can also be fined.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The GWB applies to all restraints of competition that have effects within Germany (the effects doctrine) (section 130(2) of the GWB). Foreign corporations are, therefore, subject to the GWB to the extent that they participate in restrictive agreements or concerted practices having effects on the German market. The GWB may be applied to foreign corporations even though they have never been directly active in the German market, let alone maintained a German subsidiary, branch or other business establishment. The German authorities cannot execute investigative measures outside Germany and must rely on administrative assistance from foreign authorities in this respect.

Section 1 of the GWB applies if horizontal or vertical restraints on competition are likely to affect the German market. Actual effects are not required.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Investigations by the cartel authorities may be started for various reasons, for example, because of complaints by a third party, whistleblowing by members of a cartel or their employees, reports in the media or because of cartel investigations in other jurisdictions concerning the same industry. Once a case has come to the attention of a cartel authority, it will normally collect further information, either informally or by using its formal powers of investigation, including searches and seizures and the collection of evidence by means of the testimony of witnesses and experts. If the cartel authority reaches the conclusion that there is evidence of an infringement of section 1 of the GWB, it will open formal proceedings. If it does so, it will usually inform the parties and (at a later point in time) serve a statement of objections on the parties. The parties are then allowed access to the file and may respond to the statement of objections, both in writing and orally.

The parties and individuals concerned must be afforded the opportunity to comment prior to a decision being taken.

They will, upon application, be summoned to a hearing. An investigation is completed by the issuance of a decision or the discontinuation of proceedings (the file may be closed without a formal decision).

There is no specific legal limitation on the time frame of an investigation. Rather, the time at the disposal of the cartel authorities depends on the specific circumstances of each individual case. The authorities need to implement certain procedural steps within a certain period in order to avoid the application of the statute of limitation for fines. In complex cases, cartel proceedings usually go on for several years. In a recent ruling, the Higher Regional Court of Düsseldorf reduced the

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fines by 30 per cent due to an undue delay on the part of the authorities of 24 months.

9 Investigative powers of the authorities

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

The cartel authorities – and in criminal cases involving bid rigging, the criminal prosecutor – may in principle conduct any investigation and collect any evidence required to prove a violation of the antitrust laws.

The investigating authority is, upon issuance of a search warrant by a local court, in particular, entitled to visit and search the business premises, cars or private homes of employees (dawn raids) and seize letters and other means of communication (including emails), electronic and non-electronic databases, computer hardware, calculations, documents on travel expenses and diaries, and it may hear witnesses and experts. The FCO is entitled to copy hard drives and pursue electronic searches of those copies at the FCO premises following a dawn raid. Lawyers to corporations under investigation do not have a right to be present when such post-dawn raid searches of IT systems are conducted. Where a prior court order would cause a delay that could jeopardise the investigation, the cartel authorities may issue the warrants for searches and seizures by their own authority. Correspondence documents, such as posted letters, which are subject to the sanctity of the mail, are excluded from seizure by the cartel authority, but not by the criminal prosecutor in cases involving bid rigging. Attorney–client correspondence in the hands of the corporation is exempt from seizure only if it specifically concerns representation in the cartel proceedings at hand. The cartel authorities do not have the authority to carry out wiretapping.

The investigating authority may request a local court to administer the oath to a witness if it considers such an oath to be necessary to obtain evidence through testimony. Persons may refuse to answer questions if they have been accused of a violation of the antitrust laws, or if the answer would expose them or their family to the risk of criminal prosecution or proceedings under the Administrative Offences Act. Further, a person or corporation has certain fundamental rights of defence during an investigation, including the right to legal advice. Professional secrecy for lawyers is guaranteed by law.

According to the recently introduced section 81a GWB, the concerned corporation is required to provide to the cartel authority the information necessary (including the submission of documents) to determine the amount of the fine, if the imposition of a fine appears as a possible outcome of an investigation. This rule does not apply to persons acting for the corporation, to the extent providing the information or documents would expose these persons to prosecution based on criminal or administrative offences.

International cooperation

10 Inter-agency cooperation

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

In Germany, two formal cooperation agreements are in force. The first agreement on cooperation between cartel authorities was concluded in 1976 between Germany and the United States. The agreement provides for an exchange of information between the FCO and the US Department of Justice and Federal Trade Commission including documents, memoranda, judicial pleadings and other documents with regard to restrictive trade practices having effects on trade in the other authority's jurisdiction. This cooperation extends to statements of civil servants of one cartel authority as witnesses in proceedings of the other cartel authority and to sending requests for information of one cartel authority to corporations established within the other's jurisdiction. The cartel authorities will also consult each other in proceedings relating to the same cartel activity having effects in both jurisdictions. It should be noted that the national laws on business secrets will prevail.

In 1984, Germany concluded a second cooperation agreement with France. This agreement provides for cooperation between the cartel authorities of both countries with regard to giving notice of the commencement of proceedings to the other cartel authority, the provision of information on restrictive practices and consultations if an investigation might impair the interests of the other country or if proceedings relate to the same cartel activity. The national cartel authority may refuse to provide information if the provision of such information would be contrary to the national laws on business secrets or the vital interests of the country.

In addition to the cooperation agreements, the European Convention on the Service Abroad of Documents Relating to Administrative Matters of 1977 provides for mutual assistance concerning the service of administrative letters in foreign jurisdictions (the contracting parties are Austria, Belgium, France, Germany, Italy, Luxembourg and Spain). In practice, however, these agreements are not very important.

Of great practical importance, by contrast, is the close cooperation between the FCO and the European Commission. Under EU Council Regulation No. 1/2003, the European Commission and all the competition authorities of the EU member states apply the community competition rules in close cooperation and within the framework of the European Competition Network (ECN). This includes, in particular, the (informal) exchange of information, mutual consultation, coordination of investigations, inspections on behalf of another competition authority and discussing the proposed course of action. When investigating a case under article 101 TFEU, the FCO is required to liaise with the European Commission and the competition authorities in other member states within the ECN. Within this network, the case will be allocated to a competition authority that is best placed to investigate the case. If the European Commission initiates proceedings in the same matter, the FCO loses its competence to apply article 101 TFEU to that case.

11 Interplay between jurisdictions

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

As a matter of principle, if certain cartels are investigated in other jurisdictions this may trigger similar investigations in Germany, provided that the cartel is active or has effects in Germany as well. In that regard, cross-border investigations may often stem from cooperation among European competition authorities, in particular the close cooperation facilitated by the ECN (see also question 10). As investigations by national cartel authorities frequently concern the effects of a cartel within different jurisdictions and markets, the problem of double jeopardy (ne bis in idem) will generally not arise (see also question 35).

With regard to parallel investigations by the German cartel authorities and the European Commission, the FCO can no longer investigate a case if the Commission has initiated its own investigations in that case (see questions 4 and 10). Under EU Council Regulation No. 1/2003, the FCO may no longer prohibit or sanction behaviour pursuant to German law if such behaviour is permissible under article 101 TFEU (see question 4).

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The FCO bears primary responsibility for the administration and enforcement of the GWB. The state cartel offices have only limited responsibilities. In general, the FCO deals with all cartel matters extending beyond the territory of a single state of the Federal Republic of Germany.

The cartel authorities (the FCO and state cartel offices) investigate and adjudicate cartel matters at an administrative level. They have discretion as to whether to open an investigation, commence proceedings, issue orders or impose fines. To the extent the cartel involves criminal aspects (bid rigging) the cartel authorities must refer these aspects to the criminal prosecutor. Furthermore, the cartel matter is also referred to the criminal prosecutor (Attorney General) once a fining decision of the FCO is challenged in court (see question 2).

Private parties may institute separate proceedings in court against corporations that violate section 1 of the GWB (or article 101 TFEU) if they can demonstrate that they are affected by the breach of law (see question 20). The same applies in respect of violations of orders issued by the cartel authorities (section 33 of the GWB).

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13 Burden of proof

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

In proceedings under the Administrative Offences Act (ie, all proceedings that are conducted to impose fines) the burden of proof lies with the cartel authorities as a matter of principle. The same holds true in criminal proceedings. Pursuant to section 261 of the Code of Criminal Procedure, applicable both in criminal and administrative proceedings, the level of proof is that of free judicial conviction. The judge is barred from finding the defendant guilty of a criminal or administrative offence if he or she has reasonable doubts as to the meeting of the statutory requirements (in dubio pro reo).

In other proceedings (such as proceedings conducted to impose behavioural or structural measures), the burden of proof for a violation of section 1 of the GWB is on the cartel authority or the party alleging the infringement, while the corporation must prove that the requirements of an exception to the prohibition under section 2 of the GWB are met.

14 Appeal process

What is the appeal process?

With one exception relating to health insurance, decisions of the cartel authorities may be appealed to the competent Higher Regional Court. Jurisdiction over appeals against decisions of the FCO lies with the Higher Regional Court of Düsseldorf. Rulings of the Higher Regional Court may in turn be appealed to the Federal Court of Justice. In administrative proceedings an appeal to the Federal Court of Justice is only admissible if the Higher Regional Court grants leave to appeal. The refusal to grant leave to appeal may be challenged by way of limited appeal.

Appeals against fines are to be filed within two weeks after the decision has been notified. In all other cases the appeal may be filed within one month after notification. The duration of appeals to the Higher Regional Court varies. The duration of cartel appeal proceedings before the Federal Court of Justice most likely ranges between 12 and 18 months.

Sanctions

15 Criminal sanctions

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

Bid rigging is a criminal offence pursuant to section 298 of the Criminal Code. Apart from specific criminal rules concerning bid rigging, which may be punished by imprisonment for up to five years or the imposition of a pecuniary penalty, there are no criminal sanctions for cartel activities in Germany. Furthermore, cartels concerning single tender actions have recently been successfully tried as fraud pursuant to section 263 of the Criminal Code. Both of these offences are punishable by up to five years of imprisonment or a criminal fine. In case of fraud, the sentence may be even more severe (ie, six months to 10 years of imprisonment), if the court finds the prosecuted individuals guilty of having committed a 'particularly serious case' of fraud. This is the case, for example, if the fraud has been committed in a 'commercial' manner which is to say that the cartel induced fraud is based on repeated conduct aiming to secure a recurring source of income. Within this framework, the sentences actually imposed by the courts vary so that no meaningful indication regarding the overall sentence duration or a comparison between recent and older cases can be provided. In any case, there are no criminal sanctions against the corporations involved; only the responsible individuals would be the subject of criminal sanctions within the aforementioned framework.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Anticompetitive contractual provisions prohibited by section 1 of the GWB and not exempted by section 2 of the GWB are null and void.

The cartel authorities may impose administrative fines for violations of section 1 of the GWB against individuals and corporations. The minimum fine is €5, the maximum fine is €1 million or, in excess of that, up to 10 per cent of the total turnover generated by the corporation and its affiliated corporations (aggregate group turnover) in the business year preceding the decision of the cartel authority. Notably, however, the 10 per cent maximum only pertains to corporations; the fines against individuals must not exceed the amount of €1 million and will be based on the individuals' income. The cartel authorities may also issue orders requiring an infringement of section 1 of the GWB (or article 101 TFEU) to be brought to an end. Since 2013, section 32(2) GWB explicitly states that all necessary and proportionate measures, both behavioural and structural, may be imposed. A structural measure, however, can only be imposed if no equally effective behavioural measure is available, or if the available behavioural measures would interfere to a greater degree with the corporation's interests than the available structural measures. The cartel authorities may also decide to make binding on a corporation the commitments that the corporation offered to bring an infringement to an end. However, the cartel authority may be reluctant to accept commitments where it deems fines appropriate.

Fines are levied very frequently and have, considering all fines levied by the FCO, persistently ranged in the higher triple-digit million range in recent years. In 2014, the FCO even levied fines in the aggregate of more than €1 billion.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

The FCO has revised its guidelines for the setting of fines in cartel administrative offence proceedings on 25 June 2013. The revision was necessary as the Federal Court of Justice held in a judgment in February 2013 that the 10 per cent turnover threshold (see question 16) is, in fact, an upper limit, rather than a cap. According to the revised guidelines, fines are essentially calculated as follows:

The scope for setting a fine in a specific case is determined with due consideration of the potential for gain and for harm on the one hand and the total turnover of the corporation on the other. The FCO assumes a gain and harm potential of 10 per cent of the corporation's turnover achieved from the infringement during the infringement period. The relevant turnover achieved from the infringement is the domestic (ie, German) turnover achieved by the corporation from the sale of the products or services related with the infringement or within duration of the violation. In cases in which the infringement lasted less than 12 months, the FCO bases its calculation on a period of 12 months irrespective of the actual duration of the infringement.

Subsequently, a multiplication factor is applied to the established gain and harm potential to account for the size of the respective corporation. A factor of 2–3 is applied as regards corporations with an annual turnover of less than €100 million; a factor of 3–4 is applied to corporations with a turnover between €100 million and up to €1 billion; a factor of 4–5 is applied with a turnover between €1 billion and 10 billion; a factor of 5–6 is applied to corporations with a turnover of €10 billion up to €100 billion; and a factor greater than 6 is applied to corporations with a turnover of more than €100 billion. The FCO also considers aggravating and mitigating factors.

Furthermore, the FCO reserves the right to skim off the economic benefit even in the fining proceedings or in separate proceedings (section 32 GWB, section 34 GWB).

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not available as a sanction to be imposed directly by the cartel authorities. Based on substantive law (public procurement rules), however, cartel infringements will regularly render a bidding corporation devoid of its eligibility to participate in the procurement procedure. Following an amendment of the law introduced in 2016, cartel infringements are now specifically addressed by the relevant statutory provision as sufficient reason to debar a corporation from procurement measures

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(effectively, this was also the case before, but the new provision that serves to transpose an EU directive is far more clear-cut regarding cartel infringements). The debarment decision will then be made by the public entity responsible for the procurement decision. In this regard, several German federal states keep registers of corporations that have been in conflict with certain types of regulations. These registers may or – in some cases must – be consulted by public contracting authorities before concluding a contract. While the registers of some states are, with respect to competition law, limited to bid rigging, other states' registers also include violations of provisions of the GWB. North Rhine-Westphalia, the most populous federal state of Germany, has the strictest regulation on debarment.

19 Parallel proceedings

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

Criminal, civil and administrative sanctions can be pursued in parallel in respect of the same conduct. As a matter of practical feasibility, however, public prosecutors will often stay their investigations until the FCO has issued a decision of its own.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Third parties that can demonstrate that they are affected by a violation of the prohibition on cartels under German or EU law may institute private suits to obtain injunctive relief or to recover damages. Claims are limited to the actual (single) level of damages and necessary legal expenses. Standing to claim for damages is not limited to the immediate customers (or competitors) of a cartel participant. Other market participants further downstream of the customers of the cartel participants may also successfully claim for damages suffered from the cartel behaviour. With respect to these indirect purchasers, the passing-on defence is permissible under German law. While the plaintiff has to prove that he or she has in fact suffered the damages for which he or she now seeks compensation, the Federal Court of Justice stated in a decision that the defendant who raises the passing-on defence needs to put forward plausible argument that a passing-on may have occurred and that the passing-on did not result in a loss of profits, in particular because the demand has been reduced as a result of higher prices. Hence, it is questionable in many cases whether the passing-on defence can be successfully invoked in practice, albeit that the Federal Court of Justice has recognised that under certain exceptional circumstances the claimant may, to some extent, be obliged to assist the defendant in establishing the passing-on by providing information in this regard. In case an indirect purchaser claims compensation of damages, it is upon the indirect purchaser to prove that any damages have been passed on to him and that these damages were caused by an infringement of competition law.

It should be noted that definitive decisions of cartel authorities on cartel violations may be introduced into civil proceedings as proof of the actual infringement.

As of late, private damages actions have become increasingly frequent. In part, this is due to the activity of professional plaintiffs (see question 21). The claims made are significant in scale (claims reach into the hundreds of millions of euros) and may exceed the fines imposed by the authorities. Further, many cases are settled outside court, the parties often concluding non-disclosure agreements.

German law only provides for single, not double or triple damages.

21 Class actions

Are class actions possible? If yes, 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. However, professional plaintiffs may 'acquire' damages claims against cartel offenders from those affected by the cartel and litigate these claims in court. Furthermore, several plaintiffs with similar claims may jointly sue in accordance with section 59 et seq of the Code of Civil Procedure.

Finally, according to section 34a(1) GWB, certain associations (including, since 2013, consumer protection associations) are entitled to demand that benefits derived from cartel behaviour be surrendered to the federal government.

These rules are, despite a lot of discussion about class actions in recent years, not supposed to change based on the ninth amendment to the GWB (see question 3).

Cooperating parties

22 Immunity

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

The FCO's leniency programme provides that under certain circumstances immunity can be obtained. The FCO will grant immunity from a fine if a cartel participant is the first participant in a cartel to contact the FCO before the FCO has sufficient evidence to obtain a search warrant and by providing the FCO with verbal or written information and, where available, evidence which enables the FCO to obtain a search warrant. Further, the applicant must not have been the only ringleader of the cartel or coerced others to participate in the cartel and must cooperate fully and on a continuous basis with the FCO. Where the FCO was or is in a position to obtain a search warrant, immunity can still be obtained if the applicant is the first to contact the FCO before it has sufficient evidence to prove the offence and provides the FCO with verbal or written information and, where available, evidence which enables the FCO to prove the offence. Further, the applicant must not have been the only ringleader of the cartel or caused others to participate in the cartel. Moreover, the applicant is required to cooperate fully and on a continuous basis with the FCO, provided, however, that no cartel participant has been granted immunity before the FCO was in a position to obtain its search warrant.

23 Subsequent cooperating parties

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

Where immunity is no longer available, the FCO can reduce the fine by up to 50 per cent if the applicant provides the FCO with verbal or written information and, where available, evidence which makes a significant contribution to proving the offence and cooperates fully and on a continuous basis with the FCO. The amount of the reduction shall be based on the value of the contributions to uncovering the illegal agreement and the sequence of the applications.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The leniency programme gives preferential treatment to the first party to cooperate. There are no specific provisions for the second corporation (or subsequent cooperating parties). Rather, the fine may be reduced by up to 50 per cent for any cartel participant that provides substantial evidence of the cartel offence (irrespective of that cartel participant's 'rank' in the leniency programme). In that regard, the specific reduction will depend not only on the order of the applications for leniency but also (and essentially) on the value of the evidence provided. Accordingly, there have been cases in which the FCO has granted a higher reduction to, for example, 'number 3' rather than to 'number 2' stating that 'number 3' provided evidence of higher value. The FCO's leniency guidelines do not provide an 'immunity plus' or 'amnesty plus' option.

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25 Approaching the authorities

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

A corporation that wishes to take advantage of the leniency programme should inform the FCO as early as possible to secure the possibility of non-imposition or reduction of fines. There are no strict deadlines for applying for leniency or immunity. The FCO usually grants a time period of eight weeks for perfecting a marker.

26 Cooperation

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?

The FCO expects the applicant cooperating under its leniency programme to provide verbal or written information and, when available, evidence to the FCO. All leniency applicants are expected to cooperate fully and on a continuous basis.

If the applicant is first in and contacts the FCO before the latter has sufficient evidence to obtain a search warrant, the information or evidence provided by the applicant merely has to be sufficient to enable the FCO to obtain a search warrant. If, by contrast, the applicant is first in but contacts the FCO when it already is in a position to obtain a search warrant, the information or evidence provided by the applicant has to enable the FCO to prove the offence. Cartel participants who are not eligible for immunity, but seek a reduction of their fine, need to provide information or evidence making a significant contribution to proving the offence (see questions 22 and 23).

27 Confidentiality

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

Regarding confidentiality, there is no distinction between the immunity applicant and subsequent cooperating parties. In its leniency programme, the FCO states that it will protect the identity of any leniency applicant and its business secrets up until it serves a statement of objections on a cartel participant. Also, it should be noted that during the administrative proceedings, the defence has access to the file (usually following the statement of objections) and the FCO will not delete any information from documents in its file with regard to this procedural right of the defence. Even though information on the identity of a leniency applicant may be provided to the FCO on an anonymous basis, it may happen that the contents of oral or written statements made by the leniency applicant give a hint as to its identity. In addition, the FCO in its decision against the other members of an illegal cartel may have to rely on the testimony of a leniency applicant and so may have to reveal the identity of the cooperating party. Also, the non-imposition or reduction in the amount of a fine relative to the fines imposed on competitors may indicate that a corporation has cooperated with the FCO. Finally, in the press release following the issuance of the decision the FCO will usually at least disclose the identity of the party that has been granted full immunity. Notably, this pertains only to a situation where the proceedings have been concluded by a formal decision of the FCO. During the proceedings, the FCO has a keen interest in avoiding sensitive information to become public and, in that regard, will adhere to the aforementioned rules.

Further, the FCO will decline applications of third parties to access the file as far as legally possible. This would, in particular, apply to applications by customers or other injured parties that may apply for access to the file pursuant to section 406(e) of the Criminal Procedures Act. Such applications must be declined insofar as there are prevailing interests of the accused. The FCO has taken the position that access needs to be granted to documents seized or taken during a dawn raid, whereas access to the file with respect to the content of leniency applications (and annexes thereto) infringes EU competition law and must be denied. The local court of Bonn did not share this view and requested that the ECJ give a ruling thereon according to article 267 TFEU. In 2011 the ECJ ruled (Case C-360/09 – *Pfleiderer*) that it is for the national courts, on the basis of their national laws, to determine the conditions under which such access must be permitted or refused by weighing both interests protected by EU law. The local court of Bonn has decided that the FCO is entitled to refuse disclosure of leniency statements. In view of these decisions an initial legislative proposal to explicitly limit the access to documents regarding leniency applications (section 81b of the draft eighth amendment to the GWB) was dropped in the legislative proceedings. While the ninth amendment to the GWB (which will probably be implemented early in 2017) will contain certain facilitations of access to the FCO's file for claimants in cartel damages litigation, this amendment will also contain a provision allowing the FCO to deny access to leniency statements.

It should be noted that in cases of bid rigging and fraud, the proceedings against natural persons can be taken over by the criminal prosecutor, who may initiate proceedings against a cooperating person.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The FCO is not obliged to initiate proceedings against a cartel participant, but rather has discretion in that respect. Furthermore, the FCO increasingly conducts settlement-type procedures. As part of that process, cartel participants are usually asked to confirm the facts as perceived by the FCO. In return, the administrative decision imposing the fine will usually only include very basic reasons, thus decreasing the likelihood that the order will be introduced as proof of the alleged infringement in civil proceedings. Moreover, the FCO usually reduces the fine by 10 per cent (see question 30). The settlement – which formally is a short version of a regular decision – may be challenged by the fined party (eg, with regard to the amount of the fine); the right to judicial review cannot be waived. If a corporation challenges a decision after a settlement, the FCO would usually withdraw the decision and issue a new decision without granting the abovementioned reduction of the fine. In practice, however, corporations which have reached a settlement with the authority should rarely have an interest in doing so.

In case of investigations involving a public prosecutor, a plea bargain may be reached. Following a decision by the Federal Constitutional Court, however, such bargain is subject to certain strict requirements.

29 Corporate defendant and employees

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

It is for the immunity or leniency applicant to decide which legal entities and which (current and former) employees are covered by the application. Usually, a corporate defendant will also extend its application to all (current and former) employees involved. In such case, the employees will equally benefit from any immunity or reduction of fines granted (provided the employee immediately and unreservedly cooperates in the corporation's contribution to uncovering the cartel).

30 Dealing with the enforcement agency

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

Corporations wishing to take advantage of the leniency programme should contact the Special Unit for Combating Cartels (SKK) or, in case the FCO is already investigating into the matter, the competent Decision Division within the FCO through a person authorised to represent the corporation. For practical purposes this should be pursued by a lawyer on behalf of the corporation. The first contact can be made (eg, by counsel) on a no-name or 'hypothetical' basis, which gives the corporation the opportunity to discuss important issues, such as confidentiality, before revealing its identity.

It is possible to discuss with the FCO the elements of cooperation (see question 26) with regard to a non-imposition or reduction of a fine

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(eg, the evidence the party can provide, how to obtain further evidence, the behaviour of that party at cartel meetings in the future so as not to reveal that it is cooperating, etc). To secure the highest possible reduction of fines under the leniency programme, the corporation or, preferably, its counsel should contact the head of the SKK or the head of the competent division of the FCO as early as possible to set the marker (see question 25). This could be done over the telephone (in German or in English).

If the FCO does not close the file with regard to the cooperating party pursuant to its leniency programme, the FCO will first issue a statement of objections on which the cooperating party may comment and the party will – in all likelihood – declare that it does not contest the FCO findings. The FCO will then issue a 'non-contested decision' in which it expressly states that the cooperating party does not contest the facts on which the decision is based. The reasons given in the decision will usually be limited to what is required by law as a minimum. In practice, the cooperating party may discuss the likely fine with the FCO and the reduction (in terms of a percentage) will be granted in view of its cooperation. In this regard, application for leniency and reaching a settlement with the authority usually go hand in hand, resulting in the FCO providing a 'discount' of up to 10 per cent if the corporation in question is not being granted immunity anyway (see question 28).

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No, there are not.

Defending a case

32 Disclosure

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

As a general rule, the FCO will disclose information relating to its proceedings only scarcely – also to the defendant. The defendant will usually just be made aware of the fact that the FCO has opened formal proceedings and, later on, the defendant will be confronted with the FCO's statement of objections issued after the authority has, in its own view, sufficiently investigated the case (see also question 8). In the meantime, the defendant will usually receive no information at all and only be able to draw conclusions as to the status of the investigation based on specific requests for information by the FCO. This 'information scarcity' is hardly outweighed by the right of access to file. The FCO can legally deny access to its file to the defendant as long as the cartel proceedings are ongoing. Only the defence counsel in such proceedings will be allowed access to the file (section 147 of the Criminal Procedures Act). However, even the defence counsel will usually gain unfettered access to the file only after the FCO has issued a statement of objections to the defendant (see also question 27). Before that, the FCO will grant only limited access to the file, if any. Such limited access would usually be granted to information that directly concerns the defendant, eg, minutes of oral hearings of the defendant itself. By contrast, minutes of oral hearings of other cartel participants would not be disclosed so as to not jeopardise the investigation.

33 Representing employees

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

It is generally accepted that counsel can represent a corporation under investigation as well as one employee or manager of the corporation whose activities constitute the alleged breach of section 1 of the GWB. Counsel may, however, not represent two or more individuals in the same proceedings. Generally, different members of the same law firm can represent different individuals and the corporation they belong to, respectively. A present or past employee may seek independent legal advice, in particular concerning whether the corporation should pay these legal costs, penalties, or both.

Update and trends

Concerning the substantive law, there is still a rising trend towards prosecution of vertical restraints of competition, particularly resale price maintenance and conduct relating to online distribution. With respect to imposing administrative fines, the intense debate in recent years regarding an amendment of the law will now likely come to an end. As part of the ninth amendment to the GWB, it is envisaged that all so-called liability loopholes with respect to corporations that, for example, as a result of (group-wide) corporate restructuring, either cease to exist as separate legal entities or divest all (or a substantial part of) their assets.

Under the current framework, administrative fines against these corporations or their legal successors were sometimes hard to impose or enforce for the FCO. In that regard, the draft of the ninth amendment to the GWB provides a rather ground-breaking expansion of corporate liability for administrative fines that, at the time of writing this chapter, has already been criticised by scholars and legal practitioners, particularly due to these amendments causing a lot of friction with requirements of German constitutional law and the fundamental principles of German corporate law. Another landmark development caused by the ninth amendment of the GWB will be the implementation of the European 'Cartel Damages Directive' (Directive 2014/104/EU). These legislative changes are likely going to promote the rising trend towards private enforcement as they generally improve the position of cartel damages claimants.

34 Multiple corporate defendants

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

No (the FCO takes the view that this also applies to affiliated corporations). Generally, different members of one single law firm can, however, each represent one corporate defendant.

35 Payment of penalties and legal costs

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

Yes, provided this does not concern future infringements.

36 Taxes

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

For practical purposes, it has to be assumed that fines and other penalties are not tax-deductible. Under German law, fines and other penalties can be tax-deductible to the extent the fines or penalties do not merely sanction the unlawful behaviour committed but recoup economic advantages gained by the unlawful behaviour. However, according to recent decisions of tax courts, fines imposed by the European Commission and the FCO do not contain such element of recoupment (unless the FCO opts to include such element and expressly states this in its fining decision). These decisions have met with criticism in legal literature. Hence, the discussion on this topic is ongoing.

37 International double jeopardy

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

Neither the sentencing criteria set forth in section 81(4) GWB and section 17(3) of the Administrative Offences Act nor the guidelines for the setting of fines in cartel administrative offence proceedings published by the FCO (see question 17) make explicit reference to penalties imposed in other jurisdictions. The fact that a corporation or an individual may have already been punished or fined in another jurisdiction does not prevent the German cartel authorities from conducting an investigation and levying fines. In calculating the amount of the fine, cartel authorities will not necessarily take into account the fine already imposed in another jurisdiction. However, as the setting of the fine is at

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the discretion of the authorities, they are not barred from taking penalties imposed in other jurisdictions into consideration.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The prospect of success of a leniency approach should be analysed as soon as possible. Corporations that do not take advantage of the leniency programme should at least think about the prospect of a settlement approach (see question 28). The existence of a compliance programme may only (and at full discretion of the FCO) affect the level of the fine if it is introduced subsequent to the cartel infringement being uncovered. By contrast, pre-existing compliance programmes are not considered as a mitigating factor when determining the fine, as the authority takes the view that the infringement proves the inefficiency of the compliance programme.

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Free competition in the Greek market is protected by Law 3959/2011, 'Protection of Free Competition' (the Competition Act), which abolished the previous Law 703/77, introduced when Greece was about to become a member of the EEC. Specifically, Law 703/1977 was abolished instead of being amended one more time because the legislator of Law 3959/2011 declared their intention to avoid the risk of conflicting rules and oversights and to produce a coherent statute that is easier to understand and to implement.

The new Competition Act adopted the central structure of the former one, keeping intact, with only minor grammatical and technical changes, its core substantive law provisions; namely, article 1 on restrictive agreements, and article 2 on the abuse of a dominant position (closely drafted to article 101 and 102 of the Treaty on the Functioning of the European Union respectively (TFEU)). The amendments regarding concentrations are also mostly technical in nature, whereby the respective provisions, as well as all the subsequent ones, have undergone extensive renumbering. The new Competition Act introduced, however, other significant amendments concerning, inter alia, the organisation and operation of the Hellenic Competition Commission (HCC), the prioritisation of cases, the administrative and criminal penalties for violations, as well as several procedural rules. The amendments served the following objectives:

- the harmonisation of Greek legislation with European standards and the modernisation of the operations of the HCC;
- the strengthening of the deterrent effect of sanctions;
- the empowerment of the authority to intervene in whole sectors of the economy;
- the institutional strengthening of the HCC; and
- the enhancement of the effectiveness of its actions.

2 Relevant institutions

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 HCC is the authority responsible for the enforcement of the Competition Act, as well as articles 101 and 102 of TFEU. Pursuant to Law 2296/95, the HCC is an independent administrative authority with procedural and decision-making autonomy. Pursuant to Law 2837/2000, the HCC also enjoys financial autonomy. The HCC performs all the enforcement actions of a designated national competition authority (NCA) to apply national and EU competition rules, in accordance with Regulation (EC) 1/2003 (see article 5). It also has consultative powers in the area of identifying and removing regulatory barriers to competition. In particular, the HCC has broad enforcement powers in the area of collusive practices and cartels, abuses of dominance and merger control. In this context, the HCC may:

- take decisions finding an infringement of article 1 of the Competition Act and article 101 of the TFEU (collusive agreements and/or concerted practices between undertakings that have as their object or effect the restriction of competition) and impose administrative fines;
- take decisions finding an infringement of article 2 of the Competition Act and article 102 of the TFEU (abuse of dominance) and impose administrative fines;
- take interim measures in case of suspected infringement of articles 1, 2 and 11 of the Competition Act, as well as of articles 101 and 102 of the TFEU;
- review prior notifications of envisaged mergers and acquisitions (merger control of concentrations), in accordance with articles 5 to 9 of the Competition Act, and impose pertinent measures and sanctions;
- launch investigations and conduct dawn raids for the enforcement of antitrust and merger control rules;
- deliver opinions on competition issues on its own initiative or upon request of the Minister of Development and Competitiveness or of any other competent minister, in accordance with article 23 of the Competition Act; and
- conduct sector inquiries, in accordance with article 40 of the Competition Act.

The HCC cooperates closely with the European Commission (European Commission) and the national competition authorities in all EU member states in order to enforce EU competition rules, primarily in the context of the Regulation (EC) 1/2003. Furthermore, it cooperates closely with other competition authorities in its capacity as a member of the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN).

3 Changes

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

No changes have been made to Law 3959/2011 (Competition Act) in 2015. However, based on specific enabling provisions of the Competition Act, the HCC continued its secondary legislation and soft-law initiatives. To date, there have been no significant legal challenges to the use of investigative measures used by the HCC. To the contrary, all relevant decisions of the Athens Court of Appeals that have been issued so far, acknowledged the wide discretion of the HCC in conducting dawn raids.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

According to the Competition Act, all agreements and concerted practices between undertakings and all decisions by associations of undertakings that have as their object or effect the prevention, restriction or distortion of competition shall be 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;

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- 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 which, by their nature or according to commercial use, have no connection with the subject of such contracts.

The Competition Act does not define the term 'cartel'. However, the term 'prohibited agreements and concerted practices' is used and article 1 of the Competition Act includes specific practices that are considered as anticompetitive agreements between undertakings. Article 1 essentially refers to the same practices prohibited under article 101 of the TFEU. While the Competition Act does not distinguish between hard-core cartels and other types of cartels, the HCC's decisions are in line with the relevant EU case law on this matter. Moreover, the published guidelines on the method of setting fines provide that horizontal price-fixing, market sharing and output limitation agreements are considered as the most serious infringements of competition law. The participation in agreements such as price fixing or market sharing has been treated by the HCC as per se illegal.

The participation in a hard-core cartel is both an administrative and criminal offence according to Greek law (article 35 of the Competition Act). However, it must be noted that under the Competition Act the proceedings within the Greek enforcement system are of an administrative nature only. The HCC does not have the power to impose criminal sanctions, while the latter lies within the competences of the criminal courts.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are no any industry-specific defences or antitrust exemptions from the Competition Act. The latter applies equally to government-sanctioned activity or regulated conduct.

6 Application of the law

Does the law apply to individuals or corporations or both?

Article 1 of the Competition Act and article 101(1) TFEU prohibitions apply to agreements, decisions and concerted practices between undertakings. The term 'undertaking' applies to any entity that performs an economic activity irrespective of its legal status and the way the said entity is being financed. It is settled case law that undertakings include both natural and legal persons. The same approach has been adopted by the HCC regarding the application of merger control.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Article 1 prohibitions are applicable only where the relevant agreement, decision or practice has as its object or effect the elimination, restriction or distortion of competition within the Hellenic Republic. In addition, under article 14, the HCC cooperates with the European Commission and the competition authorities of the other EU member states for the application of EU competition law, pursuant to the relevant provisions of the Competition Act and of Regulation (EC) 1/2003.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The HCC has extensive investigative powers (that mirror the European Commission's investigative powers in all key aspects). In particular, according to article 38 and 39 of the Competition Act, the HCC has the power to conduct inspections of business premises, non-business premises, as well as the homes of directors, managers, and other members of staff of the undertakings and associations of undertakings concerned, under the conditions set by law and to request information from an undertaking and/or association of undertakings or natural person in the context of an investigation. A court warrant is not a prerequisite in order to conduct an inspection of business premises, but it must be obtained if the undertaking subject to the investigation refuses to accept the investigation. Similarly, in all inspections of non-business premises, a judge or public prosecutor should be present. According to article 39 of the Competition Act, the HCC has the power to take sworn or unsworn testimonies, as appropriate, by any representative or member of staff of any undertaking or association of undertakings. The HCC also has the power to conduct interviews or ask questions during inspections of business and/or non-business premises. In addition, the HCC may address compulsory requests for information also to public or other authorities. Public authorities and legal persons governed by public law have a duty of information. In the event of refusal, obstruction or delay in providing the information requested, the HCC may file an official report so that disciplinary action can be taken against civil servants or employees of public-law legal entities for the above infringements, which are a disciplinary offence.

All cases regarding the application of articles 1 and 2 of the Competition Act are assigned to a Commissioner (*rapporteur*) when the investigation is mature. There is no time limit regarding the period between the initiation of proceedings and the assignment of the case to a *rapporteur*.

9 Investigative powers of the authorities

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

In order to establish the existence of an infringement, the HCC conducts a series of investigatory measures, such as:

- inspections of business premises, non-business premises and means of transport of undertakings or associations of undertakings concerned (dawn raids);
- inspections of private premises, including the homes of directors, managers, and other members of staff of the undertakings and associations of undertakings concerned, under the conditions set by law;
- requests for information addressed to undertakings directly or indirectly involved and to market operators;
- examination of books and other records, irrespective of the means on which they are stored, and making of copies, in any form, of extracts of such books or records; and
- testimonies and explanations on the facts or documents relating to the subject-matter and the purpose of the investigation from representatives or members of the staff of the undertaking or the association of undertakings involved.

Upon conclusion of the investigation, a statement of objections (SO) is drafted and submitted to the HCC's Competition Commission to decide whether the alleged infringement has been substantiated or not. The decision of the Competition Commission is issued within 30 days from the last session in which the examination of the case was concluded.

International cooperation

10 Inter-agency cooperation

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

The HCC, as the NCA, is responsible for cooperation:

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

If an undertaking that has its seat or exercises its activity in Greece refuses to allow the inspection provided for under EU law, the Competition Commission and its empowered body, acting ex officio or following a relevant request from the bodies designated by the European Commission, shall ensure overall proper conduct of the investigation, in particular by providing necessary assistance, implementing in this instance the provisions of article 38 of Law 3959/2011.

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Therefore, the HCC, according to national legislation, cooperates closely with the European Commission and the national competition authorities in all EU member states in order to enforce the EU competition rules, primarily in the context of Regulation (EC) 1/2003. Furthermore, it cooperates closely with other competition authorities (ie, mutual legal assistance treaties, MOUs, cooperation agreements, etc), in its capacity as a member of the OECD and the ICN.

11 Interplay between jurisdictions

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 HCC has often cited, in its reasoning, relevant decisions of the European Commission and other national competition authorities. Apart from this aspect, there is no significant interplay with other jurisdictions.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Investigations in cartel cases may be launched: (i) after the HCC's ex officio initiation of proceedings; (ii) following a complaint filed with the HCC; or (iii) upon a leniency application. There are no particular legal requirements for lodging a complaint against a cartel. Unlike the proceedings before the European Commission, complainants are not required to demonstrate a legitimate interest for lodging the complaint.

13 Burden of proof

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

Each party shall bear the burden of proof of their claims during proceedings before the HCC for the purposes of articles 1 and 2 of the Competition Act.

14 Appeal process

What is the appeal process?

According to article 30, paragraph 1 of the Competition Act, the decisions of the HCC are subject to an appeal before the Athens Administrative Court of Appeals within a time limit of 60 days following notification of the HCC's decision. In addition, (article 32, Competition Act), an appeal before the Council State against the decision of the Athens Administrative Court of Appeal can be filed within 60 days following the issuance of the decision of the Athens Administrative Court of Appeal.

Sanctions

15 Criminal sanctions

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

The participation in a cartel is both an administrative and a criminal offence. Specifically, when the HCC finds that the provisions of article 1 (ie, cartel activity) have been infringed, it shall report the infringement to the competent prosecution authority within no more than 10 days of issuing its decision. According to article 44, any person who executes an agreement, takes a decision or applies a concerted practice in breach of article 1 or article 101 of the TFEU shall be punished by a fine between €15,000 and €150,000. If the act referred to in the first sentence 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.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

According to the Competition Act, the HCC can impose procedural sanctions and fines on undertakings, associations of undertakings or persons who obstruct or hamper, in any manner, investigations carried out under the provisions of this article (dawn raids). The HCC can also impose procedural sanctions and fines on undertakings, associations of undertakings or persons who refuse to submit to relevant inspections, produce books, records and other documents requested and provide copies or extracts of them. The legislation also provides for penal sanctions imposed by national courts.

The administrative fine imposed for infringement of article 1 of the Competition Act and article 101 of the TFEU (collusive agreements and/or concerted practices between undertakings) and article 2 and article 102 of the TFEU (abuse of dominance) may be up to 10 per cent of the total turnover of the undertaking for the financial year in which the infringement ceased or, if it continues until issuing of the decision, the year preceding the issuing of the decision. In the case of a group of companies, calculation of the fine shall take account of the total turnover of the group. In determining the level of the fine, account must be taken of the gravity, duration and geographical scope of the infringement; the duration and nature of participation in the infringement by the undertaking concerned and also its economic benefit derived therefrom.

According to article 25 of the Competition Act the persons obliged to comply with the provisions of the Competition Act and articles 101 and 102 of the TFEU are:

- in the case of individual undertakings, the owners;
- in the case of civil and commercial companies and joint ventures, their managers and all the general partners; and
- in the specific case of public limited companies, the members of the board of directors and those persons responsible for implementing the relevant decisions.

Regarding decisions of collective bodies of the undertaking taken by majority, only those voting in favour shall be liable. The HCC may also impose on the above natural persons, following their hearing, a separate fine from €200,000 to €2 million, where they demonstrably participated in preparatory acts, the organisation or implementation of the unlawful behaviour of the undertaking.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

The HCC has published Guidelines on the method of setting fines (available only in Greek at www.epant.gr/img/x2/categories/ctg253_3_1193315361.pdf). In general terms, 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 also its economic benefit derived therefrom. Where it is possible to calculate the level of economic benefit to the undertaking from the infringement, the fine shall be no less than that.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

The Competition Act does not provide for debarment from public procurement procedures for cartel infringements.

19 Parallel proceedings

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

Criminal, civil and administrative sanctions can be pursued in parallel in respect of the same conduct. As a matter of legal certainty, however, public prosecutors will often stay their investigations until the HCC has issued a decision of its own.

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Private rights of action

20 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Private damages claims are not mentioned specifically under the Competition Act. It must be noted though that any person affected by infringements of article 1 may file a lawsuit before the civil courts. However, according to the Directive 2014/104/EU on Antitrust Damages Actions, following US practice, from 27 December 2016, third parties (and in certain circumstances, even parties involved in the infringement) that have suffered loss as a result of cartel behaviour can sue for damages before the national courts. According to this directive, which must be encapsulated in national legislation, national courts can order companies to disclose evidence when victims claim compensation, while a final decision of HCC finding an infringement will automatically constitute proof of the infringement. Furthermore, if an infringement has caused a price increase and it has been passed on along the distribution claim, those who suffered harm at the end (consumers) can claim compensation. The directive clarifies that victims are entitled to full compensation for the harm suffered, which covers compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until compensation is paid. Any participant in an infringement will be responsible towards the victims for the whole harm caused by the infringement (joint and several liability), with the possibility of obtaining a contribution from other infringers for their share of responsibility. However, to safeguard the effectiveness of leniency programmes, this will not apply to infringers who obtained immunity from fines in return for their voluntary cooperation with a competition authority during an investigation; these immunity recipients will normally be obliged to compensate only their (direct and indirect) customers.

21 Class actions

Are class actions possible? If yes, 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 provided in the Competition Act, but can be filed before civil courts.

Cooperating parties

22 Immunity

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

Undertakings that assist in the investigation of infringements of competition rules (other than the rule on abuse of a dominant position) by giving information or evidence about the existence and operation of a cartel of which they were members, may ask to be granted immunity from a fine and/or a reduction of the fine. Leniency programmes implemented by the European Commission and the national competition authorities play a crucial role in the enforcement against cartels, as they offer incentives to cartel members to file a complaint and put an end to such illegal behaviour, thereby strengthening efforts at detection, rendering and prevention of cartels.

In particular, according to the leniency programme first introduced in 2005 and revised in 2011, the HCC will grant immunity from fines that would have otherwise been imposed on a company disclosing its participation in an alleged cartel only if that company: (i) is the first to submit information and evidence that in the HCC's view will enable it to either launch a targeted investigation with regard to the alleged violation of article 1 of the Competition Act (and article 101, TFEU), or find an infringement of article 1 of the Competition Act (and article 101, TFEU); (ii) cooperates genuinely, fully, continuously and expeditiously from the time it submits its application throughout the HCC's administrative procedure; (iv) stopped its involvement in the alleged cartel immediately following the submission of its application or evidence; (v) has not induced other companies to participate in the alleged cartel; and (vi) has treated its application for leniency as confidential until the issuance of the SO by the Directorate General.

The decisive conditions for immunity or reduction in fines are the timing of the application, the degree to which the leniency application entails or enhances the HCC's capability to establish proof of the infringement, the significance and completeness of the evidence and/or information submitted by the participant, which must, in any case, have additional probative value in relation to the evidence already in the HCC's possession.

23 Subsequent cooperating parties

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

As mentioned above both full and partial leniency are provided by the leniency programme. In order to qualify for a reduction of fine, an undertaking which is not the first to submit information, it must provide the HCC with evidence which has an added value with respect to the evidence already possessed by the HCC. Also, it has to stop its involvement in the alleged cartel at the latest time it makes its leniency application.

24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

For the second undertaking to meet the aforementioned criterion, a reduction of 20 per cent to 30 per cent is applied. Finally, for the subsequent undertakings that meet aforementioned criterion, a reduction of up to 20 per cent is granted.

25 Approaching the authorities

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 initiating or completing an application for immunity or partial leniency. Under the revised leniency programme regime, the applicant may request a 'marker', which protects the applicant's place in the queue for a given period of time. According to the leniency programme, the undertaking (or the natural person) wishing to benefit from the 'marker' system has to submit to the HCC a minimum set of information and may withhold its priority, provided that it submits the evidentiary material required within the deadline set by the HCC. The set of information required to obtain a 'marker' includes the identification of the alleged cartel members, the affected geographic and product markets, and the cartel's duration, nature and operation, as well as potential leniency applications submitted to other NCAs.

26 Cooperation

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?

See questions 21 to 24.

27 Confidentiality

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 the context of the general obligation of the officials of the Directorate General (DG) and the members of the HCC to treat in a confidential way any material gathered during the examination of any case the agency is required to keep the identity of the beneficiary confidential. The Competition Act also provides that any information gathered in

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the context of the examination of any case, may be used only in relation to the particular case for which the information has been gathered. If the officials of the DG infringe the above provisions, they may be imprisoned for at least three months, in accordance with article 252 of the Penal Code, and pay a sanction of at least €1,000, but not exceeding €10,000. They may also be disciplinarily prosecuted for breaching their obligation of confidentiality. If, on the other hand, the provisions of article 41 of the Competition Act are infringed by the President or the members of the HCC, they may be punished pursuant to article 252 of the Penal Code, as well as with a pecuniary sanction of at €1,500, but not exceeding €15,000, and by the same decision they are disqualified from their position as a member of the HCC.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

In May 2016, the HCC adopted a new settlement procedure concerning cases where undertakings or associations of undertakings make a clear and unequivocal acknowledgement of participation and liability in relation to their participation in horizontal agreements (cartels) and the subsequent breach of competition law. As a result, they can obtain a reduction of the imposed fine by 15 per cent, provided that certain conditions are fulfilled. The reduction of the fine amounting to 15 per cent due to settlement will be deducted from the fine that a company would normally have to pay according to the provisions of the current HCC's guidelines on fines.

The new settlement procedure, which is essentially modelled after the EU-equivalent procedure, aims at simplifying and speeding up the handling of pending cases. It would allow the HCC to achieve efficiencies through a streamlined administrative process, resulting in the increased expeditious adoption of infringement decisions regarding article 1 of the Competition Act and/or article 101 of the TFEU. In addition, the settlement procedure provides scope for a reduction in the number of appeals against the HCC's decisions before the administrative courts. In turn, this would allow a better allocation of resources, in order to deal with more cases, thereby increasing the deterrence effect of the HCC's enforcement action, while simultaneously increasing citizens' awareness in the effective and timely punishment of undertakings infringing competition law.

Settlement discussions may commence on the parties' initiative at any stage of the investigation. However, procedural efficiencies are less likely to accrue if a statement of objections has been already addressed to the parties concerned. In any case, the deadline for the filing of a request for settlement is 35 days before the hearing. The HCC will not bargain about evidence or its objections or the finding of an infringement. However, each business will also be heard effectively in the framework of the settlement procedure and parties will therefore have the opportunity to influence the HCC's objections through argument. The HCC issues a simplified decision accepting the settlement.

29 Corporate defendant and employees

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

There is no express provision in either the Competition Act or in the leniency programme regarding how current or former employees will be treated in the event immunity or leniency is granted to a corporate defendant.

30 Dealing with the enforcement agency

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

According to the leniency programme, the undertaking must cooperate fully, actively and on a continuous basis throughout the procedure and expeditiously provide all information and evidence that is available to it, or comes into its possession at a later stage, relating to the suspected infringement. In particular, it remains at the DGC and at the HCC's discretion to answer swiftly any question or request that may contribute to the establishment of the facts concerned. Furthermore, the undertaking must end its involvement in the suspected infringement no later than the time at which it submits evidence and must not have urged other undertakings to participate in the infringement. Moreover, the undertaking must keep confidential vis-à-vis any third party the fact that it has submitted a leniency application until the conclusion of the SO for the case by the DGC. Finally, the undertaking must not have participated in the past in a prohibited collusive practice for which a decision by a NCA or the European Commission has been issued.

An undertaking wishing to apply for immunity from fines should contact the Head of the Directorate of Legal Services of the DGC, who immediately informs the Director General of the HCC. Should the Directorate of Legal Services, in collaboration with the competent Operational Directorate, deem that the requirements set out in paragraphs 1 to 3 are not met, it so reports to the Director General. In this case, the President of the HCC, upon proposal of the Director General, immediately informs the undertaking that immunity from fines is not possible for the suspected infringement.

Update and trends

In May 2016, the HCC adopted a new settlement procedure concerning the cases where undertakings or associations of undertakings make a clear and unequivocal acknowledgement of participation and liability in relation to their participation in cartels and the subsequent breach of competition law.

During 2015, the HCC adopted infringement decisions in article 101 and 102 TFEU cases and imposed considerable fines, notwithstanding the ongoing financial crisis in Greece. This year was marked by two significant developments that consolidated the Authority's practice in a broader sense: (i) the streamlining of the HCC's internal prioritisation system for the investigation of cases, which led to a surge in rejections of complaints on both priority and substantive grounds, thus clearing to a large extent the backlog of pending cases; and (ii) the implementation of the HCC's Notice on Commitments, which streamlined the procedure to be followed in such cases and resulted in a record number of commitment decisions taken by the Authority in the course of 2016.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or anticipated assessments or reviews of the immunity/leniency regime at present, since the HCC amended it in 2011.

Defending a case

32 Disclosure

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

Assessment of the confidential nature of information requires balancing the requirements for due exercise of the right of defence against the need to safeguard the confidentiality of certain information, as well as any legal interests prohibiting their disclosure. Efficient and consistent application of national and EU rules on competition requires that the disclosure of evidence does not unjustifiably restrict the efficient enforcement of competition law by competition authorities. Moreover, the qualification of information as confidential does not prevent the HCC from disclosing and using information necessary to prove an infringement of articles 1 and 2 of the Competition Act or articles 101 and 102 of the TFEU. Where business secrets and confidential information are necessary to prove an infringement or for the purpose of applying competition rules in general, the HCC must assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.

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33 Representing employees

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

There is no explicit provision prohibiting counsel from representing multiple corporate defendants. However, this should be evaluated from the outset whether a conflict of interests could arise, whereby independent legal advice must be sought.

34 Multiple corporate defendants

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

There is no explicit provision prohibiting counsel from representing multiple corporate defendants. However, this should be evaluated from the outset whether a conflict of interests could arise, whereby independent legal advice must be sought.

35 Payment of penalties and legal costs

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

There is no provision in the Competition Act prohibiting the payment by a corporation of the legal penalties and legal costs imposed on its employees.

36 Taxes

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

There are no tax deductions regarding fines or private damages.

37 International double jeopardy

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

As in many EU jurisdictions (ie, Cyprus and Germany), there are no explicit rules preventing international double jeopardy for cartel enforcement. However, the HCC may take into account fines and other sanctions imposed by the European Commission or other national competition authorities of the ECN before deciding on the level of the administrative fine.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

As noted in question 16, guidelines on the method of setting fines apply by taking into account the gravity, duration and geographical scope of the infringement, the duration and nature of participation in the infringement by the undertaking concerned, and also its economic benefit. However, undertakings are encouraged to cooperate with the HCC and these actions may lead to a reduction of the fine.

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Hong Kong

Natalie Yeung
Slaughter and May

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Section 6 of the Competition Ordinance 2012 (cap 619 of the Laws of Hong Kong) (the Ordinance) prohibits cartel conduct in Hong Kong. The substantive provisions came into effect on 14 December 2015.

The Competition Commission (the Commission) and the Communications Authority (CA) issued six guidelines under the Ordinance on 27 July 2015 (the Guidelines). The Guidelines provide guidance on how the Commission and the CA intend to interpret and apply the provisions of the Ordinance. In addition, the Commission published two policy documents on enforcement and leniency, as well as other guidance (including on the investigation powers of the Commission and legal professional privilege).

2 Relevant institutions

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

The Ordinance established two bodies for enforcement roles:

- the Competition Commission, whose role is to investigate and prosecute suspected offenders; and
- the Competition Tribunal (the Tribunal), comprising judges of the Hong Kong Court of First Instance (CFI).

The Commission has a full range of powers to investigate suspected cartels, including powers to require production of documents and information, to require individuals to attend interviews before the Commission and, if armed with a court warrant, to enter and search premises.

The most recent round of appointments to the Commission were announced in April 2016, including the reappointment of Anna Wu as chairperson and the (re)appointment of 15 other members representing sectors such as law, economics, consumer protection, financial services, commerce and industry. The Competition Commission appointed Ms Rose Webb as chief executive officer in March 2016.

The Tribunal acts as the adjudicative body for applications by the Commission on alleged infringements of the competition rules and private actions in respect of such infringements.

Mr Justice Godfrey Lam and Madam Justice Queeny Au-Yeung have been reappointed for three-year terms as the president and deputy president respectively of the Tribunal with effect from 1 August 2016. Every judge of the CFI is also, by virtue of his or her appointment as such, a member of the Tribunal.

While the Commission is the principal competition authority responsible for enforcing the Ordinance, the CA has concurrent jurisdiction with the Commission in respect of undertakings licensed in the telecommunications and broadcasting sectors.

3 Changes

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

Since the Ordinance has only been in effect since December 2015, there are currently no proposed changes to the regime.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Section 6 of the Ordinance states than an undertaking must not:

- make or give effect to an agreement;
- engage in a concerted practice; or
- as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong (the First Conduct Rule).

Section 2 of the Ordinance defines serious anticompetitive conduct as any conduct that consists of price fixing, market sharing, output restriction and bid rigging. Such conduct shall be subject to stricter enforcement action (for example, the de minimis exclusion in paragraph 5 of Schedule 1 to the Ordinance is not available for serious anticompetitive conduct).

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

At present, there are no industry-specific infringements, defences or exemptions under the Ordinance in respect of cartels.

There is no specific defence or exemption for government-sanctioned activity or regulated conduct, as such. However, there are two exclusions in paragraphs 2 and 3 of Schedule 1 to the Ordinance which may be relevant in this context, namely that the conduct rules do not apply if:

- the relevant conduct is required by a 'legal requirement', which is defined as a requirement imposed by or under any enactment in force in Hong Kong or imposed by any national law applying in Hong Kong (paragraph 2 of Schedule 1 to the Ordinance); or
- the undertaking has been entrusted by the government with the operation of services of a general economic interest in so far as the conduct rule would obstruct the performance, in law or in fact, of the particular tasks assigned to it (which is modelled on article 106(2) of the Treaty on the Functioning of the European Union).

The Guidelines indicate that these exclusions will be narrowly construed by the Commission.

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6 Application of the law

Does the law apply to individuals or corporations or both?

The law applies to both individuals and corporations. The First Conduct Rule applies to 'undertakings'. An undertaking is defined under section 2 of the Ordinance as 'any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity', and includes a natural person engaged in economic activity.

Individuals may also be liable for infringements of the First Conduct Rule. In particular, Part 6 of the Ordinance envisages that a 'person' (the definition of which appears to cover natural persons) who was 'involved' in the contravention of the First Conduct Rule (eg, by being knowingly concerned in or party to the contravention, or by aiding, abetting, counselling or procuring any other person to contravene the rule) may also be subject to a pecuniary penalty or other order imposed by the Tribunal.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Section 8 of the Ordinance states that the First Conduct Rule applies if the agreement, concerted practice or decision has the object or effect of preventing, restricting or distorting competition in Hong Kong, even if:

- the agreement or decision is made or given effect to outside Hong Kong;
- the concerted practice is engaged in outside Hong Kong;
- any party to the agreement or concerted practice is outside Hong Kong; or
- any undertaking or association of undertakings giving effect to a decision is outside Hong Kong.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Section 39 of the Ordinance states that the Commission may commence a cartel investigation:

- of its own volition;
- where it has received a complaint;
- where the court or the Tribunal has referred any conduct to it; or
- where the government has referred any conduct to it.

Section 40 of the Ordinance requires the Commission to issue guidelines on the procedures it will follow both in deciding whether to conduct an investigation and in conducting the investigation itself. The Commission's Guideline on Investigations as published on 27 July 2015 refers to a two-phase investigation process composed of:

(i) an initial assessment phase during which the Commission (relying solely on public information or information provided on a voluntary basis) considers whether it is reasonable to conduct an investigation and whether there is sufficient evidence for it to establish a reasonable cause to suspect that a contravention of the competition rules has occurred; and

(ii) if the Commission has reasonable cause to suspect a contravention of the competition rules, an investigation phase during which the Commission may use its compulsory document and information gathering powers.

9 Investigative powers of the authorities

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

Under Divisions II and III of Part 3 of the Ordinance, the Commission is granted a full range of investigative powers, including powers to require production of documents and information which it reasonably believes to be relevant to the investigation, to require individuals to attend interviews before the Commission and, if armed with a court warrant granted by a judge of the CFI, to enter and search premises (ie, conduct a dawn raid) and use reasonable force for gaining entry, to take possession of documents or computers found on the premises that are reasonably believed to contain relevant information for establishing a contravention of a competition rule. It remains to be seen how the Commission will exercise the extent of its powers in practice.

As mentioned above, the Commission issued a guideline on 27 July 2015 on the procedures it will follow when conducting an investigation.

International cooperation

10 Inter-agency cooperation

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

The Ordinance does not contain express provisions on cooperation with regulatory authorities in other jurisdictions. It remains to be seen how the Commission will approach the question of inter-agency cooperation. As required by section 161 of the Ordinance, the Commission and the CA signed a memorandum of understanding on how the two bodies will cooperate and pursue enforcement actions, which envisages that they will, where necessary, exchange information (including confidential information) with a view to adopting a harmonised approach under the Ordinance.

11 Interplay between jurisdictions

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

The Commission has indicated that it will look to other jurisdictions for precedents, especially in the early days of enforcement. Furthermore, given the proximity of Hong Kong to China, we would expect the Ordinance to apply to Chinese companies in a significant way, but it is not yet clear to what extent the Commission will coordinate with the relevant Chinese competition authorities. There has been some high-level dialogue and communication between the Commission and the Chinese competition authorities since the Ordinance came into effect.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The Tribunal acts as the adjudicative body for applications by the Commission on alleged infringements of the First Conduct Rule and private actions in respect of such infringements. It is therefore the Tribunal that determines whether an infringement of the Ordinance has occurred.

Section 92 of the Ordinance allows the Commission to initiate enforcement action, if it considers it appropriate to do so, and apply to the Tribunal for a pecuniary penalty to be imposed on any person that it has reasonable cause to believe has infringed the First Conduct Rule or been involved in such an infringement.

13 Burden of proof

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

The Ordinance does not specifically deal with the burden of proof. However, given that the Tribunal will adjudicate First Conduct Rule cases, we expect the onus of proof in establishing an infringement of the First Conduct Rule will lie with the Commission according to the normal civil standard (balance of probabilities).

14 Appeal process

What is the appeal process?

Certain decisions made by the Commission may be reviewable by the Tribunal (section 84 of the Ordinance). This includes decisions or rescission of decisions by the Commission as to whether certain conduct is exempt from application of the First Conduct Rule (eg, block exemption order or an individual exemption decision), as well as decisions varying or releasing commitments relating to any competition rule. A person may apply to the Tribunal for leave to review a reviewable determination.

Appeals can be made as of right to the Court of Appeal against any decisions, determinations or orders by the Tribunal on issues such as

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the amount of any compensatory sanction or pecuniary penalty (section 154 of the Ordinance).

In respect of appeals against an interlocutory decision, determination or order by the Tribunal, leave of the Court of Appeal or the Tribunal will be required, unless any rules of the Tribunal specify that an appeal lies as of right against such decisions or orders (section 155 of the Ordinance).

Section 158 of the Ordinance envisages that the chief judge may make Tribunal rules to regulate and prescribe the practice and procedure (and any incidental matters) to be followed by the Tribunal. These rules were brought into full effect on 14 December 2015.

Sanctions

15 Criminal sanctions

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

There are no criminal sanctions in Hong Kong in respect of cartel infringements.

However, providing false or misleading information or obstruction of the Commission's investigations, such as failure to comply with a Commission requirement or destruction of evidence, may expose individuals or businesses to criminal sanctions under the Ordinance (sections 51–55 of the Ordinance).

Criminal offences may also be committed by a person who causes their employee to suffer certain conduct or damage (eg, discriminates against the employee or terminates the employment contract) because the employee had assisted the Commission in its investigation or proceedings (section 173 of the Ordinance).

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Ordinance gives the Tribunal the power to apply a full range of civil remedies for an infringement of the First Conduct Rule, including (among others):

- a declaration that a person has contravened a competition rule;
- financial penalties of up to 10 per cent of Hong Kong turnover for a maximum of three years of infringement (at present, it is unclear whether this extends to group turnover);
- disgorgement orders (ie, to pay back the illegal profits made from the infringement);
- injunctions; and
- disqualification orders against directors.

A full list of orders that may be made by the Tribunal is set out in Schedule 3 to the Ordinance.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

There are no formal sentencing guidelines yet.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

There is no such reference in the Ordinance.

19 Parallel proceedings

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

Not applicable, as there are no criminal sanctions in Hong Kong for cartel activity.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

'Follow-on' private actions for damages are provided for by the Ordinance. A person who has suffered loss or damage as a result of any act that has been determined to be a contravention of a conduct rule has a right of action under the Ordinance (subject to appeal periods during which such follow-on actions may not be brought). It remains to be seen how the Tribunal will deal with pass on and double recovery issues.

Private enforcement actions may be brought before the Tribunal based on:

- a determination by the Tribunal, the CFI or the higher courts that a conduct rule has been infringed; or
- an admission of an infringement in a commitment offered to the Commission (sections 110 and 111 of the Ordinance).

At present, 'stand-alone' private enforcement actions are not permitted. This does not prevent a party from arguing in a private legal action that a conduct rule has been infringed, as long as the alleged infringement is not the basis for a cause of action.

21 Class actions

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

At present, there is no class action procedure for competition claims or more generally in Hong Kong.

On 28 May 2012, the Law Reform Commission published a report proposing that a mechanism for class actions should be adopted in Hong Kong, with a view to expanding access to judicial relief. The report recommends that class actions be introduced on an incremental basis and initially be permitted only in relation to consumer cases, though the expectation is that class actions will eventually apply to all claims. The recommendation is still at a preliminary stage with no time frame for implementation.

Cooperating parties

22 Immunity

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

Part IV of the Ordinance allows the Commission to make an agreement, on terms it considers appropriate, that it will not bring or continue proceedings for a pecuniary penalty in exchange for a person's cooperation in an investigation or in proceedings. While a leniency agreement is in force, the Commission must not bring or continue proceedings for a pecuniary penalty in breach of that leniency agreement, notwithstanding certain circumstances in which the Commission may terminate a leniency agreement.

Under the Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct (the Leniency Policy), published pursuant to section 80 of the Ordinance, the key elements of the programme are as follows:

- leniency is available only in respect of cartel conduct contravening the First Conduct Rule;
- only an undertaking (the definition of which is described in question 6) may apply for leniency under the policy;
- leniency is available only for the first undertaking that reports the cartel conduct to the Commission and meets all the requirements for leniency;
- if the undertaking meets the conditions for leniency, the Commission will enter into an agreement with the undertaking not to take proceedings against it for a pecuniary penalty in exchange for cooperation in the investigation of the cartel conduct;
- leniency ordinarily extends to any current officer or employee of the undertaking cooperating with the Commission, as well any former officer or employee and any current or former agents of the undertaking specifically named in the leniency agreement; and

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- the undertaking receiving leniency will, to the satisfaction of the Commission, agree to and sign a statement of agreed facts admitting to its participation in the cartel on the basis of which the Tribunal may be asked jointly by the Commission and the applicant under rule 39 of the Competition Tribunal Rules (cap 619D) (CTR) to make an order under section 94 of the Ordinance declaring that the applicant has contravened the First Conduct Rule by engaging in the cartel.

Under the Commission's Leniency Policy, leniency is available only for the first cartel member who reports the cartel conduct to the Commission and meets all the requirements for receiving leniency. There is therefore a strong incentive for a cartel member to be the first undertaking to apply for leniency and the Commission uses a marker system to establish a queue in order of the date and time the Commission is contacted with respect to the cartel conduct for which leniency is sought.

23 Subsequent cooperating parties

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

The Leniency Policy applies only to the first undertaking reporting the cartel. However, it explicitly states that this does not preclude the Commission from entering into a leniency agreement with an undertaking with respect to an alleged contravention of a conduct rule which is not covered by the Leniency Policy. As such, the Commission may exercise its discretion with subsequent cooperating parties. In particular, the Leniency Policy states that the Commission will consider a lower level of enforcement action, including recommending to the Tribunal a reduced pecuniary penalty or the making of an appropriate order under Schedule 3 to the Ordinance. When seeking a pecuniary penalty or other order in relation to cartel conduct, the Commission may consider making joint submissions to the Tribunal with the cooperating undertaking.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Neither the Ordinance, nor the Leniency Policy, envisages a specific option addressing these issues, other than as set out at the response to question 23 above.

25 Approaching the authorities

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

Neither the Ordinance, nor the Leniency Policy, envisages a specific deadline for applying for immunity. However, the Commission uses a marker system to establish a queue in order of the date and time the Commission is contacted with respect to the cartel conduct for which leniency is sought.

A potential applicant for leniency, or their legal representative, may contact the Commission to ascertain if a marker is available for particular cartel conduct. Such enquiries may be made on an anonymous basis, although a marker will not be granted on the basis of anonymous enquiries. To obtain a marker and thereby preserve the undertaking's place in the queue, a caller must provide sufficient information to identify the conduct for which leniency is sought in order to enable the Commission to assess the applicant's place in the queue in relation to that specific cartel. This includes, at a minimum, providing the Commission with the identity of the undertaking applying for the marker, information on the nature of the cartel (such as the products and services involved), the main participants in the cartel conduct and the caller's contact details. The Commission is willing to grant the marker on the basis of an oral discussion.

26 Cooperation

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?

If a leniency applicant with the marker is invited by the Commission to apply for leniency, it will be asked to provide a detailed description of the cartel, the entities involved, the role of the applicant, a timeline of the conduct and evidence in respect of the cartel conduct (a 'proffer'). The Commission will invite the undertaking to submit its application by completing its proffer within a specified period, ordinarily within 30 calendar days. A proffer may be made orally or in writing. Should the undertaking fail to complete its proffer within this time frame, or any extension to it as might be agreed by the Commission, the undertaking's marker will automatically lapse. In that circumstance the next undertaking in the marker queue will be invited by the Commission to make an application for leniency.

Undertakings in the marker queue who are not invited to apply for leniency will be informed that they are not currently eligible to apply for leniency under the Leniency Policy. Such undertakings may, however, consider cooperating with the Commission as mentioned question 23.

27 Confidentiality

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

Section 125 of the Ordinance imposes a general obligation on the Commission to preserve the confidentiality of any confidential information provided to the Commission and section 126 of the Ordinance lists the exceptions to this obligation where the Commission may disclose confidential information with lawful authority, such as where the disclosure is: in accordance with an order of the Tribunal or any other court or in accordance with a law; or in connection with judicial proceedings arising under the Ordinance. Further detail regarding the confidentiality of information and documents obtained in a Commission investigation is contained in the Commission's Guideline on Investigations. This states, among other things, that in deciding whether or not to disclose confidential information, the Commission will consider and have regard to the extent to which the disclosure is necessary for the purpose sought to be achieved and where the Commission may be required to produce confidential information in accordance with a court order, law or legal requirement, the Commission will endeavour to notify and consult the person who provided the confidential information prior to making such a disclosure.

Specifically, in the context of a leniency application and as set out in the Leniency Policy, the Commission will use its best endeavours to protect as appropriate:

- any confidential information provided to the Commission by a leniency applicant for the purpose of making a leniency application or pursuant to a leniency agreement; and
- the Commission's records of the leniency application process, including the leniency agreement (collectively, leniency material).

It is the Commission's stated policy not to release leniency material (whether or not it is confidential information under section 123 of the Ordinance) and to firmly resist, on public interest or other applicable grounds, requests for leniency material, including the fact that leniency has been sought or is being sought, where such requests are made.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The Commission has the discretion to accept a party's commitment to take, or refrain from taking, any action that the Commission considers appropriate to address its concerns about a possible infringement of the First Conduct Rule. If the Commission accepts the commitment, it may

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not commence or continue an investigation or bring proceedings in the Tribunal, in relation to any alleged contravention, if such an investigation or proceedings relate to matters addressed by the commitment. Any admission contained in the commitment can form the basis of a follow-on action (see the response to question 20).

Further, in relation to cartel activity, the Commission has the discretion to issue an 'infringement notice' instead of bringing proceedings in the Tribunal, provided the undertaking makes a commitment to comply with the requirements of the notice. These requirements may include:

- refraining from specified conduct, or to take any specified action that the Commission considers appropriate; and
- admitting to an infringement of the conduct rule.

The original intention was to allow the Commission to impose a financial penalty with the infringement notice; however, this was subsequently removed from the Ordinance as a result of feedback from small and medium enterprises that this could potentially be an unreasonable burden on them.

29 Corporate defendant and employees

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

Section 80 of the Ordinance provides that leniency can be granted to an individual (as well as to corporations or partnerships) in return for that individual's cooperation with the Commission's investigation or proceedings under the Ordinance.

In particular, leniency granted to a corporate defendant will also cover any director, manager, company secretary (or governing body of the undertaking), employee or agent.

30 Dealing with the enforcement agency

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

Not yet applicable.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No.

Defending a case

32 Disclosure

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

According to the Commission's Guideline on Investigations, prior to commencing proceedings in the Tribunal, in circumstances where a Warning Notice has not already been issued, the Commission will usually contact relevant parties to advise them of its concerns and to provide the parties with an opportunity to address those concerns. In addition, if proceedings are commenced in the Tribunal, the Commission will issue a press release as soon as practicable after commencing proceedings.

The Commission would also be expected to makes its case to the Tribunal in a notice of application, which would be published by the registrar of the Tribunal and would state, among other things: the nature of the application; the determination to which the application relates; the particulars of the relief sought; and the grounds for the application. In terms of further discovery, under rule 4 of the CTR, where the Ordinance and the CTR make no provision for a matter, the Rules of the High Court (cap 4 sub leg A) (RHC) apply to all proceedings, so far as they may be applicable to that matter (notwithstanding that the Tribunal may dispense with the application of the RHC in certain circumstances). As such, a defendant in a case before the Tribunal should generally expect to have recourse to discovery, disclosure and inspection of documents under the normal rules on judicial proceedings applicable in Hong Kong.

Update and trends

There have been no publicised instances of cartel enforcement to date. However, the Commission has publicly disclosed that it has exercised its dawn raid powers under the Ordinance and conducted a number of searches of premises. No details were given on the sectors or companies involved, but is possible that these investigations were prompted by leniency applications, which the Commission has also confirmed that it has received. At this nascent stage of enforcement, the Commission appears to be focusing on bid-rigging cases, which is in line with its enforcement policy.

33 Representing employees

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

In the absence of a conflict of interest, there is no absolute legal restriction preventing a law firm from representing both employees and the undertaking under investigation, provided that this is compatible with the law firm's own professional conduct obligations. In practice, however, it is possible that the undertaking may wish to distance itself from the conduct of individual employees and to argue that the employee was acting without authority.

34 Multiple corporate defendants

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

Again, there is no legal restriction on counsel representing more than one member of the alleged cartel provided this is compatible with counsel's own professional conduct obligations. In practice, depending on the circumstances, single representation of multiple corporate defendants may not be advisable where conflicts of interest may be anticipated.

35 Payment of penalties and legal costs

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

Section 168 of the Ordinance prohibits a corporation from indemnifying its officers, employees or agents against liability for paying:

- a pecuniary penalty imposed under the Ordinance; or
- costs incurred in defending an action in which the person is convicted of contempt, convicted of an offence under the Ordinance or ordered to pay a pecuniary penalty.

However, according to section 170, section 168 does not prohibit a corporation from providing funds to an officer, employee or agent to meet expenditure incurred or to be incurred in defending proceedings for a pecuniary penalty if it is done on the following terms:

- the funds are to be repaid in the event of the person being ordered by the Tribunal to pay the pecuniary penalty; and
- they are to be repaid not later than the date when the decision of the Tribunal becomes final (this means either the decision is not appealed against or when the appeal is finally disposed of).

36 Taxes

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

Not yet applicable in the absence of any fines (and the Ordinance is silent on this issue).

37 International double jeopardy

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

Not yet applicable.

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38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

In the early days of the enforcement regime, the Commission may be willing to take into account steps taken by the undertaking to conduct a detailed internal audit throughout its businesses and to introduce compliance training programmes. The Commission's enforcement policy notes that it will take into consideration (in assessing the appropriate enforcement response) the compliance efforts persons under investigation where they can demonstrate they have made a genuine effort to comply with the Ordinance. However, the Ordinance and the Guidelines are silent on whether the existence of a compliance programme affects the level of the fine.

As soon as the undertaking becomes aware of possible participation in cartel activity, it should conduct an immediate and thorough internal investigation to establish the full extent of its participation in the cartel and of its exposure. This should involve the collection of all relevant documents and, to the extent possible, the gathering of witness statements from all employees with first-hand knowledge of the cartel's operation. This should place the undertaking in a position to fully assess its exposure, not only in the Hong Kong but in all jurisdictions in which the cartel is operating.

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India

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation is the Competition Act 2002, as amended (the Competition Act).

2 Relevant institutions

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), established under the provisions of the Competition Act, is the regulatory body and is responsible for investigating and adjudicating matters under the Competition Act, including on matters relating to cartels.

3 Changes

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

The government notified section 3 of the Competition Act, which prohibits anticompetitive agreements (including cartels) and other related provisions of the Competition Act vide a notification dated 15 May 2009, thereby making the CCI functional with effect from 20 May 2009. As of now, there are no proposals for change in the regime.

Prior to enforcement of section 3 of the Competition Act, the Monopolies and Restrictive Trade Practices Act 1969 (the MRTP Act) was the applicable legislation with regard to restrictive trade practices, including cartels, and the Monopolies and Restrictive Trade Practices Commission (the MRTP Commission) was the appropriate authority. The Competition (Amendment) Ordinance 2009 (the Ordinance) was promulgated by the president on 14 October 2009, amending section 66 of the Competition Act, which provided for the MRTP Commission to exercise jurisdiction under the provisions of the MRTP Act for a period of two years in respect of cases or proceedings filed before the commencement of the Competition Act. With effect from the promulgation of the Ordinance, all cases pending before the MRTP Commission were transferred to the Competition Appellate Tribunal (CompAT) with immediate effect. The Ordinance was subsequently passed by the Parliament of India as the Competition (Amendment) Act, 2009.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Competition Act is the substantive legislation on cartels in India. Under the Competition Act, the following cartels and agreements or arrangements between enterprises, persons or associations are presumed to have an adverse effect on competition in the relevant market and would therefore be considered anticompetitive agreements, unless proven otherwise:

- those that directly or indirectly determine purchase or sale prices;
- those that limit or control production, supply, markets, technical development, investment or provision of services;
- those that share the market or source of production or provision of services by way of allocation of geographical area of market, type of goods or services, number of customers in the market, or any other similar way; and
- those that directly or indirectly result in bid rigging or collusive bidding.

Any agreement between enterprises or persons at different stages or levels of the production chain, including tie-in arrangements, exclusive supply or distribution agreements, or resale price maintenance, having or likely to have an appreciable adverse effect on competition in India will be anticompetitive agreements and will be dealt with in accordance with the provisions of the Competition Act. The substantive test is appreciable adverse effect on competition in the relevant market in India.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are no industry-specific offences and defences provided for under the Competition Act. However, the CCI is required to have due regard to factors such as the creation of barriers to new entrants in the market, driving existing competitors out of the market and the accrual of benefits to consumers while determining whether an agreement has an appreciable adverse effect on competition. Further, the Competition Act excludes joint ventures if such joint ventures result in an increase of efficiency in production, supply, distribution, storage, acquisition or control of goods or provisions of services. The Competition Act exempts any reasonable restrictions or conditions imposed for protecting intellectual property rights and the right of a person to export goods to the extent the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export. Also, sovereign functions of the government including all activities carried on by the departments of the central government dealing with atomic energy, currency, defence and space do not fall within the purview of the definition of enterprise and are therefore exempt. In addition to the above exemptions, the central government is vested with the power to exempt any practice or agreement in accordance with any obligation assumed under any treaty, agreement or convention between India and any other country, any class of enterprise in the interest of security of the nation or public interest, any enterprise or class of enterprise in the interest of security of the nation or public interest or which performs a sovereign function on behalf of the government (subject to the restriction that the exemption should only be in respect of activity relatable to the sovereign functions).

6 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Act applies to individuals and other persons, including companies, partnership firms, corporations established under

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central or state legislation, cooperative societies, and also to associations of individuals and other type of persons or entities.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Competition Act empowers the CCI to inquire into and pass appropriate orders on anticompetitive agreements entered into outside India or any party to such agreement being outside India. However, there has to be a territorial nexus. Thus, such an anticompetitive agreement should have or be likely to have an appreciable adverse effect on competition within India.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The CCI can inquire into an alleged contravention of the provisions of the Competition Act by a cartel either on its own motion, on receipt of information from any person, consumer, or trade or other association, or by recommendation made by the central or state government or a statutory authority. Information from any person, consumer, or trade or other association is required to be accompanied by the prescribed fees. The Competition Commission of India (General) Regulations 2009 (the General Regulations) provide that the reference or information given to the CCI should specify the name, address, contact details, manner of service of notice or other documents, etc, and should be signed by an authorised person. The CCI will hold its first ordinary meeting within 15 days of the date of placement of the matter, and form an opinion on the existence of a prima facie case within a maximum period of 60 days. The CCI may call for a preliminary conference to form a prima facie opinion, and may also invite the complainant and such other person as is necessary for the preliminary conference.

Where the CCI is of the opinion that no prima facie case exists, it can close the matter and pass orders regarding closure. If the CCI concludes that a prima facie case exists, it may direct the Director General (DG) to investigate the matter and furnish a report to the CCI by the specified date.

9 Investigative powers of the authorities

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

In discharging of its function, the CCI is guided by the principles of natural justice. It has the power to regulate its own procedure. While discharging its functions, the CCI has the powers of a civil court in relation to matters such as summoning and enforcing the attendance of any person, discovery and production of documents, receiving evidence on affidavit, and issuing commissions for examination of witnesses and documents requisitioning any public record or document. The CCI also has the power to call experts from the fields of economics, commerce, accountancy, international trade, etc, to assist in the conduct of the inquiry. The CCI has the power to direct a person to produce books or other documents that may be in the custody or control of such person, or to provide any information that may be in the possession of a person in relation to the trade carried on by such person. The DG has the power to determine the manner in which evidence may be adduced, admit evidence adduced as material evidence, admit on-record documents, admit the entries in the books of account and admit the opinion of experts, etc. The power of conducting search and seizure raids is accorded to the DG after obtaining a warrant from the Chief Metropolitan Magistrate, Delhi.

International cooperation

10 Inter-agency cooperation

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

Under the Competition Act, the CCI is empowered to enter into a memorandum or arrangement with agencies of foreign countries for the discharge of its duties or performance of its functions. Such memorandum or arrangement can be entered into by the CCI only with the prior approval of the central government. The CCI has cooperation arrangements in place with competition regulators of other jurisdictions.

11 Interplay between jurisdictions

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 CCI has entered into memoranda and arrangements with agencies of a number of foreign jurisdictions in this regard.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The investigation report of the DG is placed before the CCI, and copies of the report are forwarded to the central or state government or the statutory authority. The CCI may also forward a copy of the report to the parties concerned. If the DG has concluded in its report that there is no contravention of the provisions of the Competition Act by the cartel, the CCI may invite objections, recommendations or suggestions from the central or state government or the statutory authority, or from the parties concerned. If, after considering the objections or suggestions received, the CCI agrees with the findings of the DG, it may close the investigation. If, after considering the objections, recommendations and suggestions, the CCI is of the opinion that further inquiries are called for, it may direct such inquiries into the matter by the DG or by an officer or expert of the CCI, or itself proceed with further inquiries in accordance with the provisions of the Competition Act.

Under the General Regulations, the parties are not entitled to produce additional evidence, either oral or documentary, that was previously in the possession or knowledge of the party but was not produced before the DG during the investigation. The CCI may require any of the parties or any other person to produce such documents or other material objects as evidence as it may consider necessary. The CCI, after considering the pleadings and evidence, examining witnesses, etc, may pass such appropriate orders as it deems fit. In cases where the CCI has passed interim orders temporarily restraining any party, it is required to hear the party as soon as possible. The CCI also has the power to combine any number of persons or enterprises, jointly and severally, as parties in the same proceedings.

13 Burden of proof

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

The provisions under the Competition Act relating to anticompetitive agreements do not specify the party on whom the burden of proof rests. As such, in normal cases the burden would lie on the complainant. However, horizontal cartels that directly or indirectly determine purchase or sale prices or limit or control production, supply, markets, technical development, investment or provision of services or shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way or directly or indirectly result in bid rigging or collusive bidding, are presumed to have an appreciable adverse effect on competition and in such cases the burden of proof shifts on the other party (ie, on the defendants).

Even though the Competition Act does not specify the level of proof required, the general legal principles regarding level of proof would be followed by the CCI as well as by the CompAT. Hence, both the CCI and the CompAT would apply the principles of preponderance of evidence, or clear and convincing evidence based on the nature of the contravention and the gravity of the cartel activity. Normally, the standard of proof beyond reasonable doubt has been applied in India only in criminal or quasi-criminal cases. However, since proceedings under the Competition Act are neither criminal nor quasi-criminal, it is unlikely that the CCI or the CompAT would apply such standard of proof.

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14 Appeal process

What is the appeal process?

Appeals from the CCI lie with the CompAT. The CompAT has jurisdiction under the Competition Act to hear and dispose of appeals against any direction issued, decision made or order passed by the CCI, inter alia, on the non-existence of a prima facie case; on the closure of cases by the CCI on the recommendation of the DG based on its findings; any sanction of the CCI after concluding the existence of a cartel in contravention of the provisions of the Competition Act; on orders in matters taking place outside India but having an effect on competition in India; on any interim orders; on matters for rectification of orders; on execution of orders imposing a monetary penalty; on matters relating to a penalty imposed by the CCI for non-compliance with directions issued by it or by the DG, or for making false statements, omitting to furnish any material information or furnishing false information; or on a matter of the imposition of a lesser penalty by the CCI.

The CompAT is guided by the principles of natural justice and has the power to regulate its own procedure. It has the same powers as those vested in a civil court for the purposes of discharging its function. The CompAT may execute its order or may send it to a civil court having local jurisdiction for execution.

The form and fee for appeal is prescribed under the Competition Appellate Tribunal (Form and fee for filing an appeal and fee for filing compensation applications) Rules, 2009. The amount of fee prescribed for appeals with respect to the imposition of a penalty by the CCI is 1,000 rupees for every 100,000 rupees of penalty imposed, subject to a maximum fee of 300,000 rupees. The amount of fee payable in respect of any other appeal against a direction, decision or order of the CCI is 10,000 rupees.

Appeals must be filed within 60 days from the date on which a copy of the direction, decision or order made by the CCI is received. The CompAT may condone a delay in filing an appeal if it is satisfied that there was sufficient cause for it not being filed within this 60-day period. Appeals from the CompAT lie with the Supreme Court of India within 60 days from the date of communication of the decision or order.

Every appeal, together with an affidavit in support and a certified copy of the impugned order, is required to be submitted to the registrar of the CompAT who, after verification, will register such an appeal. Registered appeals are put forward to the CompAT for hearing with a notice to the appellant. After the hearing, the CompAT may either admit the appeal or dismiss it summarily. On acceptance of an appeal, the CompAT may direct a notice to be issued to concerned parties.

Sanctions

15 Criminal sanctions

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

The sanctions imposed under the Competition Act are civil in nature, and the proceedings are civil proceedings. The Competition Act prescribes imprisonment and payment of fine in cases of the contravention of orders of the CCI, the furnishing of false evidence or documents, or the non-furnishing of details, etc. No imprisonment is provided for under the Competition Act for cartel conduct. The Competition Act does not prescribe any criminal sanctions for violations of its provisions.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

If, after an inquiry, the CCI concludes that a cartel is in contravention of the provisions of the Competition Act, it may pass such orders or issue such directions as it may deem fit, including for discontinuance of the cartel agreement, a bar on re-entering into such agreements or for modification of the cartel agreement. In addition, the CCI may also impose a penalty upon each producer, seller, distributor, trader or service provider involved in such cartel of up to three times the profit for each year of the duration of such agreement or 10 per cent of the turnover for each year of its duration, whichever is higher. The CCI also has the power to impose lesser penalties on cartel members in accordance with the regulations framed thereunder. Fines are levied as and when there is contravention of provisions relating to cartels. The CCI has been dealing with cartels very strictly and imposes heavy penalties in cases of contravention of the Competition Act.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

The penalty is calculated by the CCI on a case-by-case basis depending upon the facts and circumstances of each case. The Competition Act requires the CCI to follow the principles of natural justice. The General Regulations require the CCI to order imposition of a penalty only after a show cause notice has been issued and reasonable opportunity to represent the case has been given to the person against whom such penalty is to be levied. The Competition Act and the regulations are binding on the CCI.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

The Competition Act does not provide for debarment from government procurement procedures as a sanction for contravention. However, the CCI has the power to pass any order as it may deem fit in the interest of justice. Qualifying conditions for tender process may also make restrictions.

19 Parallel proceedings

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

The sanctions are civil in nature, and the CCI has been granted powers to pass any or all orders and directions as it may deem fit in the interests of justice.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

The CompAT has the power to adjudicate compensation claims that may arise from the findings of the CCI or the orders of the CompAT or for any loss or damage shown to have been suffered by any person due to non-compliance with the orders of the CCI or of the CompAT by such cartels or their members. The Competition Act does not provide for the level of damages. The eligibility and quantum of damage is to be determined by the CompAT.

21 Class actions

Are class actions possible? If yes, 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?

Yes, class actions are possible. Upon obtaining the permission of the CompAT, a person may make an application on behalf of all the persons who have suffered damage. On grant of such permission, the CompAT is required to issue a notice by personal service or public advertisement, and interested persons may apply to join as parties. No abandonment, withdrawal of such application or any agreement or compromise is allowed except with the specific approval of the CompAT. An order passed by the CompAT will be binding on all persons concerned.

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Update and trends

In Re: Alleged Cartelization of cement manufacturers v Shree Cement Ltd & Ors

The instant matter was transferred to the CCI from the former MRTP Commission. The MRTP Commission had taken suo motu cognisance of the matter, on the basis of newspaper reports on the surge in cement prices. Subsequently, a complaint was received stating that the cement prices that were constant between 2003 and 2005 (125 rupees to 145 rupees per bag) shot up in late 2005. However, there was no noticeable increase in the prices of components that were integral to the production of cement. Irked by the rocketing prices of cement, the Builders Association of India (BAI) made a complaint to the Secretary, Industrial Policy and Promotion (IPP), who implored the members of Cement Manufacturers Association (CMA) to bring down their prices to a pragmatic valuation, but to no avail. It was alleged in the complaint that the cement industry had been resorting to unfair trade practices either by way of 'under production route' or 'choking-up of the supplies route', which led to the surge in prices of cement.

The CCI, after perusing the report of the DG, passed an order on 31 August 2016, observing, inter alia, that the CMA used to gather information regarding prices incurred on production and transmission of cement and other ancillary activities, which was thereafter conveyed to the cement companies. Apart from this, the CMA held regular meetings from January 2010 to March 2011, after which, the price of cement started to shoot up. On the basis of this nexus between CMA meetings and the rise in price of cement, the CCI opined that the CMA was used as a platform for disclosing and disbursing decisive pricing information among cement companies. The cement companies were acting in concert, sheltered by the umbrella of the CMA; the latter being a facilitator of such anticompetitive conduct. The cement companies defended the increase in cement by citing market factors, one of which was the rise in excise duty. This contention by the cement companies was rejected by the CCI. The CCI also observed that the cement companies had been controlling the supply of cement before the period of peak demand so as to create 'artificial scarcity' in the market, which would aid them in selling cement at higher prices.

The CCI held that the cement companies were liable for acting in a concerted manner to determine the price of cement. Such practices by the cement companies were anticompetitive in nature. Additionally, it posed a predicament for the cement consumers in the market as the prices of cement sailed upwards due to such conduct of the cement companies. The companies were directed to cease and desist from anticompetitive practices and penalties to the tune of 0.5 times of the net profits of the companies for the years 2009/10 and 2010/11 amounting to 66 billion rupees were imposed upon 10 cement manufacturers. Further, the CMA was charged with a penalty amounting to 10 per cent of its total receipts for the aforementioned time period amounting to 7.3 million rupees.

Cooperating parties

22 Immunity

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

The Competition Act provides the CCI with the power to impose lesser penalties. If the CCI is satisfied that any member of a cartel has contravened the provisions of the Competition Act, but has made full and true disclosures in respect of the alleged contraventions and such disclosures are vital, the CCI may impose a lesser penalty. The Competition Commission (Lesser Penalty) Regulations 2009 (the Lesser Penalty Regulations), which were notified by the government on 13 August 2009, contain guidelines for imposing full or partial leniency. Applicant making first disclosures is eligible for full leniency (ie, up to 100 per cent) provided that disclosures are made prior to the CCI having gathered sufficient evidence to enable it to form a prima facie opinion or the evidence disclosed helps CCI or the DG to establish a contravention of section 3 of the Competition Act.

23 Subsequent cooperating parties

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

Partial leniency may be granted to members who have not been granted full leniency but make a disclosure to establish a contravention of the provisions of the Competition Act. Such disclosure is required to have significant added value with respect to the evidence already in the possession of the CCI. For the second and third applicant in the priority status, the Lesser Penalty Regulations prescribe a reduction of up to 50 per cent and 30 per cent respectively of the penalty that may be levied.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Partial leniency may be granted to members who have not been granted full leniency but make a disclosure to establish a contravention of the provisions of the Competition Act. Such disclosure is required to have significant added value with respect to the evidence already in the possession of the CCI. For the applicant marked as second in the priority status, the Lesser Penalty Regulations prescribe a reduction of up to 50 per cent of the full penalty leviable.

25 Approaching the authorities

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 lesser penalty can only be imposed by the CCI in cases where the report of investigation by the DG has not been received before such disclosure is made and the disclosures have sufficient evidence to enable the CCI to form a prima facie opinion or enable the CCI or the DG to establish a contravention of section 3 of the Competition Act. Thus, the application for leniency should be made accordingly. The benefit of a reduction in the penalty up to or equal to 100 per cent will only be considered if no other applicant has been granted such benefit by the CCI. Markers are available subject to filing a detailed application within 15 days from the time of the first contact with the CCI seeking marker.

26 Cooperation

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?

Benefit of a reduction in the penalty up to or equal to 100 per cent may be granted by the CCI only where a member of a cartel is the first to make a vital disclosure by submitting evidence of a cartel, enabling the CCI to form a prima facie opinion or the applicant is the first to make a vital disclosure by submitting such evidence which establishes the contravention of section 3 of the Competition Act in a matter under investigation. Also, the CCI and the DG should not have sufficient evidence to form such a prima facie opinion or sufficient evidence to establish such a contravention. The applicant seeking leniency is required to:

- cease further participation in the cartel unless otherwise directed by the CCI;
- provide vital disclosure in respect of the contravention;
- provide all relevant information, documents and evidence that may contribute to the establishment of a cartel or as may be required by the CCI without concealing, destroying, manipulating or removing the relevant documents in any manner; and
- cooperate genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings.

The CCI may subject the applicant to further restrictions or conditions after considering the facts and circumstances of the case. If the CCI has

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reason to believe that the applicant has not complied with the condition on which the lesser penalty was imposed, it may try such person for the offence and may also levy the penalty that the person would otherwise be subject to under the Competition Act. The Lesser Penalty Regulations further provide that the discretion of the CCI with regard to a reduction in the fine is to be exercised having due regard to the stage at which the applicant comes forward with the disclosure; the evidence already in possession of the CCI; the quality of the information provided by the applicant; and the entire facts and circumstances of the case.

27 Confidentiality

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 CCI will treat as confidential the identity of and information disclosed by the disclosing cartel member, whether such disclosing party is first or subsequent. However, there are exceptions, such as when disclosure is required under law or the disclosing member has agreed to such disclosure in writing, or the disclosure is a public disclosure by the member under which the CCI may disclose information. The DG may also seek waiver of confidentiality for evidentiary information or documents from the applicant, without compromising on its identity, so as to counter the contentions of other cartel members.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Subject to the provisions of the Competition Act and the Lesser Penalty Regulations, the CCI has the authority to grant full and partial leniency resulting in a reduction of the fine. The Competition Act does not make provision for any plea bargain, settlement or other binding resolution with the party to resolve liability and penalty.

29 Corporate defendant and employees

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

The Competition Act is silent on this aspect. However, it is expected that where leniency is granted to a corporate defendant, the same treatment would also be extended to its employees who cooperate.

30 Dealing with the enforcement agency

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

The practical way is to cooperate with the DG and CCI during the investigation and adjudication procedure, and to furnish the required information.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

Currently, there is no ongoing or proposed leniency and immunity policy assessment or reviews.

Defending a case

32 Disclosure

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

There are no written rules regarding the same. In leniency cases, as a matter of practice, the DG shares a redacted version of the order passed by the CCI framing a prima facie opinion on the matter and ordering investigation by the DG. The DG does not disclose the information collected during investigation or obtained from third parties to the defendants prior to obtaining their replies. Such information is used by the DG to challenge any false statement of the defendant later during the investigation process.

33 Representing employees

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

If there is no conflict of interest between the employees and the corporation, counsel may represent both. If there is a conflict of interest, present or past employees may be advised to seek independent legal advice.

34 Multiple corporate defendants

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

Yes, counsel may represent multiple corporate defendants if there is no conflict of interest. There is nothing in the Competition Act prohibiting this.

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35 Payment of penalties and legal costs

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

There are no specific restrictions under the Competition Act on companies (corporations) paying the legal costs or penalties imposed on their employees.

36 Taxes

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

Penalties or damages are not tax-deductible.

37 International double jeopardy

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 provisions for international double jeopardy under the Competition Act and the CCI may impose a penalty for the conduct of the concerned party in India, whether or not any penalty has been imposed in other jurisdictions. Further, the Competition Act does not have any provision restricting the amount of penalty that may be levied by the CCI to the profit or turnover derived in or out of India. However, the CompAT has recently held that in cases of an enterprise engaged in multi-products the penalty should be imposed on the relevant turnover instead of overall turnover of the enterprise.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The only way provided for under the Competition Act to get the fine down is by way of disclosure of vital information. However, this is also subject to other conditions prescribed in the Competition Act and the Lesser Penalty Regulations.

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Indonesia

HMBC Rikrik Rizkiyana, Albert Boy Situmorang and Anastasia P R Daniyati
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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Law No. 5 of 1999 concerning the Prohibition of Monopoly and Unfair Business Competition Practices (the Indonesian Competition Law or the ICL) is the primary law regulating business competition in Indonesia. Chapters 3 and 4 of the ICL regarding restrictive agreements and restrictive activities set out provisions prohibiting cartel conduct, be it in relation to price, production or market. In addition, provisions on restrictive agreements or activities may also be located in other laws and regulations, such as article 382-bis of the Indonesian Criminal Code prohibiting unfair competition and article 1,365 of the Indonesian Civil Code, which prohibits any person from committing an unlawful act causing damage to another party.

2 Relevant institutions

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

There is only one authority responsible for the enforcement of the ICL: the Komisi Pengawas Persaingan Usaha (the KPPU or the Indonesian Competition Commission), established in 2000. The KPPU may initiate investigations and examinations as well as issue decisions and impose administrative sanctions against all violations of the ICL. For the purpose of the investigation, the KPPU has the power to summon undertakings, witnesses or experts to obtain, examine, and evaluate documents or other instruments of evidence. It has no power, however, to conduct criminal investigations and impose sanctions since criminal investigations are dealt with by the national police and public prosecutor and criminal sanctions are decided by the court.

3 Changes

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

The amendment process is currently still ongoing although no definite deadline is set for the introduction and adoption of the amended Law. In relation to the cartel issue, the proposed amendment would relate to the investigative powers of and process before the KPPU (eg, providing increased investigative power, increased maximum imposed sanction, and institutional capacity of the KPPU). Further, to support the investigation process, it is anticipated that there will be a formal leniency programme, although the KPPU is also aware that it may issue a regulation in order to adopt this programme. Nevertheless, there has been no discussion from the KPPU to accommodate the need of businesses for the antitrust immunity programme, although many practitioners and academics have proposed this.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The prohibition of cartels under the ICL covers horizontal restricted agreements or cartels in the forms of prohibition of price fixing, production arrangements, market allocation, group boycotts, bid rigging, and other arrangements, conspiracy or concerted practices that may restrict competition on the market or may cause harm to consumers. The cartel substantive test is covered in chapters 3 and 4 of the ICL taking the 'per se illegal' or 'rule of reason' approach in each article. The first approach refers to provisions that do not include the phrase 'which may result in the occurrence of monopoly or unfair business practices'. In this approach, the KPPU does not necessarily have to analyse the effect of an agreement on the market as it is considered sufficient to only establish the existence of the prohibited agreement, which is similar to the application of the 'per se illegality' rule as applied in other jurisdictions. This approach applies for price fixing and boycotts. On the other hand, the provisions comprising the abovementioned phrase adopt the second approach, rule of reason. Here, the provisions qualify the agreement as violating the ICL only after the KPPU conducts an in-depth assessment resulting that such agreement has an adverse impact on the market or on the competition. This latter assessment applies to market allocation, bid rigging, and other arrangements, conspiracy, or concerted practices.

The KPPU has so far issued the following Guidelines relating to cartel assessment:

Commission Regulation	Approach
Commission Regulation No. 2/2010 on Bid Rigging	Rule of reason
Commission Regulation No. 4/2010 on Restrictions on Output and Marketing	Rule of reason
Commission Regulation No. 4/2011 on Price Fixing	Per se illegal
Commission Regulation No. 8/2011 on Resale Price Maintenance	Rule of reason

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There is no industry-specific infringement or defence or exemption or immunity applicable under the current ICL, except for small businesses and certain forms of cooperatives. These exceptions or exemptions can be found in article 50 ICL, which includes agreements or activities:

(i) intended to implement any applicable laws and regulations;
(ii) related to intellectual property rights;
(iii) related to the application of technical standards of goods or services that do not inhibit or imped competition;
(iv) a research cooperation agreement intended to improve the standard of life of the society at large;
(v) related to exports of goods or services that do not disrupt domestic supply;
(vi) made by and between small business undertakings; and
(vii) made by and between cooperatives aimed specifically to serving their members.

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It is important to note, however, the ground-breaking precedent on the *Garlic* cartel (2013) in its relation to the application of point (i) above, in which case the KPPU decided that the government, the Minister of Trade and the Directorate General of International Trade of the Ministry of Trade had violated article 24 on conspiracy to impede the production and/or market of garlic, regardless of the fact that they acted within their statutory power and did not engage in business or commercial activities. In the *Garlic* cartel, the Ministry of Trade used its discretion to ease up the importation licence and quota requirements for the 19 reported undertakings to import garlic to Indonesia after the garlic scarcity caused a significant increase in price at the end-consumer level. Despite the fact that the scarcity was due to the previous government's policy on agriculture and that the price sharply decreased after the discretion applied by the Ministry of Trade, the KPPU was of the opinion that the severe scarcity and the ever-increasing price of garlic constituted a conspiracy which the Minister of Trade and the Directorate General were involved in.

Similar to *Garlic* cartel, in the ongoing *Chicken* cartel, the KPPU alleged 12 breeders have conducted a cartel because they attended and signed a document of meeting with the Directorate General of Animal Husbandry and Animal Health of the Ministry of Agriculture of Republic of Indonesia (DG-MoA) that is considered by the KPPU as an agreement to jointly exterminate their day-old-chick and has therefore caused the increase of chicken prices on the market. Despite the fact that the joint extermination was instructed along with a threat of sanctions from the government, the KPPU believes that the extermination was done independently by each breeder without making any agreement.

The precedent in *Garlic* cartel and the progress in the ongoing *Chicken* cartel serves as indication that the KPPU will not apply point (i) above as an absolute exception or exemption. Thus, it is advisable for undertakings to maintain awareness even if they are running their business based on the government and public's interests.

6 Application of the law

Does the law apply to individuals or corporations or both?

The nature of the law applies to individuals as well as to corporations. The ICL refers to an undertaking as any individual or business enterprise, whether incorporated or otherwise, that is established and domiciled or conducts activities within the territory of the Republic of Indonesia, whether individually or jointly through an agreement, in the form of various operations in the economic sector.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The ICL will generally apply to conduct occurring outside Indonesia if one or more of the defendants is established and has domicile in Indonesia or directly or indirectly engages in business activities in Indonesia. If either condition is met, the KPPU may pursue the case when it considers that its action to enforce the ICL would be effective, for example, by enforcing its decision against local subsidiaries or affiliates of the foreign companies.

Further on this issue, there has been precedent of the KPPU applying the extraterritorial doctrine in its investigation over violation of the ICL. This doctrine was raised in KPPU Decision No. 7/2007 regarding the cross-ownership of Temasek and other cases. Referring to the same case decision, the KPPU further stated that according to the national and international law, the competition law may be enforced extraterritorially as long as the requirements in effect doctrine, implementation doctrine, or the single economic entity doctrine are satisfied.

Although not from cartel precedents, it is worth noting the implementation of this doctrine by the KPPU in its merger opinions derived from Government Regulation No. 57 of 2010 on the Mergers, Consolidations and Acquisitions of Shares that May Result in Monopoly or Unfair Business Competition Practices and Commission Regulation No. 2 of 2013 on the Guidelines of Mergers, Consolidations and Acquisition. The merger control legislation clearly stipulates that the KPPU has the jurisdiction to control any merger affecting competitive conditions in the Indonesian (domestic) market by always taking into account the effectiveness of such enforcement. To date there have been numerous foreign mergers being notified to the KPPU; some are: *Nestlé SA/Wyeth (Hong Kong) Holding Company Limited* and *Holcim Ltd/Lafarge SA*. Those transactions took place outside Indonesian jurisdiction yet since it affected the domestic market, the KPPU used its power to assess the transaction.

Although the precedents and the underlying regulations do not relate to a cartel case, the KPPU's position on the extraterritorial application of the ICL is worth noting as the most likely approach taken by the KPPU in any investigation of violation of the law in general.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

An investigation by the KPPU can be triggered on its own initiative or by a complaint filed by undertakings, consumers, other entities, or by other government agencies. The KPPU will open a formal investigation if it concludes that there are reasonable findings to believe that a violation has occurred. There is, however, neither minimum nor maximum time set forth for the investigation process. This means that the KPPU may conduct the investigation process as long as it deems necessary to gather sufficient evidence and information for the investigated case.

Once the evidence and information is deemed to fulfil the requirements, the KPPU will proceed to the formal examination process consisting of two phases: preliminary examination, which will last for a maximum 30 working days, and further examination, which will last for 60 working days and can be extended for a maximum of 30 working days. After the examination is completed, the KPPU must make its decision within 30 working days.

After a decision to start an examination is made, the KPPU will generally summon the defendants to present before a hearing in which the KPPU investigatory team or the plaintiffs will present the case or indictment. Afterwards, the KPPU will give the defendants an opportunity to prepare and submit their response to the allegation. During the further examination, both the KPPU investigator or plaintiffs and the defendants will be given an opportunity to present their witnesses and submit evidence. Since April 2010, hearings in the KPPU have been open to the public.

9 Investigative powers of the authorities

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

Among its powers, the KPPU has the authority to receive complaints, summon parties and witnesses, make conclusions from investigations and hearings, request statements or clarification from related government institutions, determine and stipulate the existence of losses on undertakings or society, and impose administrative sanctions. The investigative powers are set out in broad wording such as 'conduct research', 'conduct investigations', 'obtain, examine and/or evaluate' letters, documents or others instruments of evidence.

Currently, the KPPU has no power to conduct search and seizure, dawn raids or other commanding investigative powers. These, nevertheless, may be amended once the new draft is passed by Parliament and signed by the President.

International cooperation

10 Inter-agency cooperation

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

There are cooperation agreements in place between the KPPU and other competition agencies from other jurisdictions. The IJEPA is the base for KPPU-JFTC (Japan Fair Trade Commission) cooperation, while the KFTC-KPPU Cooperation Arrangement is the foundation of Korean Fair Trade Commission and KPPU cooperation. However, inter-agency cooperation is not limited to those two agreements, as sporadic cooperation with other competition authorities also takes place on an ad hoc basis.

The illustration of the extent of the cooperation would be the KPPU's stance towards the allegation report from its counterpart in Australia, the Australian Competition and Consumer Commission, on

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a possible currencies exchange rate cartel by some Singapore banks. The KPPU has affirmed that it will analyse the report further.

11 Interplay between jurisdictions

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

To date, the KPPU has not conducted any multi-jurisdictional investigations, although there have been cases investigated by the KPPU which involved undertakings domiciled in neighbouring countries.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Proceedings under the KPPU for alleged violations of the ICL, such as cartels, are heard and determined by a panel that consists of at least three commissioners of the KPPU. There is no difference between adjudication of cartel violations and that of other violations (eg, abuse of a dominant position). After the KPPU issues its decision, the defendant may appeal before a competent district court. In case of criminal investigation over a cartel, the case will be heard and decided by a three-judge panel in proceedings before the district court following a criminal investigation by police and the public prosecutor. Under the ICL, it is the public prosecutor, and not the KPPU, that will bring such a criminal case to the competent court.

13 Burden of proof

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

In principle, the burden of proof rests on the party claiming a breach of the ICL, which is the KPPU if the case is initiated by the KPPU or if it is initiated by a complaint from third party without seeking any damages. On the other hand, it rests on the plaintiffs if the complainants do seek compensatory damages.

14 Appeal process

What is the appeal process?

The defendants may file an appeal against the KPPU decisions to the district court within 14 working days after they have become aware of or been notified about the decision. The district court has 30 working days to decide on the appeal. The district court may request the KPPU to carry out additional proceedings if it considers it necessary.

Both the KPPU and the defendants may appeal against a district court decision to the Supreme Court. Under the ICL, the Supreme Court has 30 days to make a decision. In the case of a criminal investigation, the defendants may appeal to the High Court and subsequently to the Supreme Court.

Sanctions

15 Criminal sanctions

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

The ICL does not directly apply criminal sanctions for violation of the law. Criminal sanctions can be imposed only under two circumstances. The first is when the undertaking or individual is obstructing a KPPU investigation and the second is when the defendants do not comply with the final and binding decision (ie, do not refrain from the anticompetitive behaviour). In either case a criminal investigation may be initiated and the undertaking or individual may face criminal sanctions in the form of fines and imprisonment. Depending on the gravity of the offence, criminal penalties vary from a 1 billion to 100 billion rupiah fine or imprisonment ranging from three to six months. Additional sanctions may also be imposed in the form of revocation of business licences, prohibition of liable individuals from assuming the positions of director or commissioner for as long as up to five years, and injunction orders.

There has been a final and binding case that ordered the defendants to pay damages to the reporting undertaking due to use of the competitor's confidential information for the benefit of the defendant at the expense of the reporting undertaking, but the damages have not yet been paid. The KPPU could actually bring this disobedience toward the final and binding KPPU decision to the national police to be further processed for the criminal aspect. As the KPPU has not yet executed such legal action there has therefore been no precedent on the implementation of the criminal sanction to date.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Where the KPPU concludes that a violation has occurred it has the power to:

- annul the agreements or cancel any provisions of an agreement that would violate the ICL;
- impose pecuniary penalties in the amount of a minimum of 1 billion rupiah to a maximum of 25 billion rupiah; and
- award compensatory damages incurred by companies or individuals as a result of anticompetitive conduct.

In rare cases, the KPPU may also order the defendants to lower the prices of their products or refrain from or commit to performing certain activities or practices. For example, in one cartel case that involved two producers of anti-hypertension medicines, the KPPU ordered the defendants to lower the selling prices of their products by 65 per cent and 60 per cent respectively and to reduce the marketing costs of the products by 60 per cent. Subsequently, the Supreme Court has upheld the decision of the district court that overturned the KPPU's decision on this case.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Yes. The KPPU has issued a guideline that lays down the criteria applicable in determining the level or calculation of the fine. According to the guideline, there are two steps in determining the amount of the fine: the first is to determine the basic amount of the fine, and the second is to make an adjustment to the basic amount by increasing or reducing the basic amount as set forth in the first step.

In determining the basic amount, the KPPU will use the sales or purchase value of the goods or services of the defendants in the market concerned. In general, the sales value will be calculated on the basis of the total sales in the year before the violation was committed. Nevertheless, in a bid-rigging case, the determination of sales value will not be based on the calculation of the sales of the year prior to the year the violation was committed, but based on the price of the bid winner.

In order to determine the proportion of sales that would be considered as the basic amount of the fine, the KPPU will take into account the nature and duration of the violation. To determine whether the proportion of the sales considered in the case should be at the highest or lowest level of the scale, the KPPU will consider certain factors as follows:

- size of the company;
- type of violation;
- combined market shares of the defendants;
- geographical scope of the violation; and
- whether or not the anticompetitive agreement has been effectively executed or implemented.

Regarding the basic amount of fine, in the recent *Liquefied Petroleum Gas* cartel case (2014), the KPPU determined the basic imposed fines by multiplying the total sales of alleged period with the excessive profit though the KPPU did not explain how the excessive profit was derived.

It is worth noting that, as acknowledged in the *Container* cartel (2013) decision, if the imposed fines are less than 1 billion rupiah, the KPPU shall weigh in the turnover of the undertakings and also

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the fairness aspect and the ability to pay from the social and economy perspectives.

There will be an additional portion to the basic amount of the fine if the KPPU finds that the defendant is a recidivist or does not cooperate during the investigation, or is the initiator or the leader of the cartel. The final amount of fines imposed on an undertaking in any circumstances may not exceed 25 billion rupiah or 10 per cent of the total turnover of the current year of the examination. However, it is worth noting that the most recent draft amendment proposes the maximum pecuniary penalty to be 500 billion rupiah. Under current legislation, if the undertaking's 10 per cent turnover exceeds 25 billion rupiah, the end fines shall be 25 billion rupiah. The *Tyre* cartel case (2014) replicating such approach of which the KPPU was of opinion that each undertaking's 10 per cent turnover way exceeding 25 billion rupiah thus each undertaking was fined with 25 billion rupiah.

The way the KPPU applies a fine reduction or addition can be clearly seen in the *Container* cartel case (2013), in which the KPPU reduced the original fine of 12 reported undertakings by 10 per cent because of their cooperation. On the contrary, the fine for one of the reported undertakings from the same case was increased by 20 per cent. The KPPU applied the fines calculation on the *Liquefied Petroleum Gas* cartel case (2014) of which denial of the involvement caused 10 of 18 reported parties' fines to be increased by 20 per cent yet their cooperation and good deed caused a 10 per cent reduction of fines. From the same case, one reported party's fine was increased: by 20 per cent for not attending the hearing, by 10 per cent for not providing any document, and by 20 per cent due to denial of the violation. The six reported parties of the *Liquefied Petroleum Gas* cartel case (2014) fine was 10 per cent reduced due to their cooperativeness and good deed and was another 80 per cent reduced for admitting the violation. Both precedents emphasise the importance of full cooperation with the KPPU during the investigation process since it will certainly affect the final outcome.

Nevertheless, important to note that on the *Tyre* cartel case (2014), the KPPU disregarded any of reduction or additional factors of the fine since it was already sufficient for the KPPU to determine the 25 billion rupiah fine for each undertaking merely due to the fact that the 10 per cent total turnover of each undertaking exceeded 25 billion rupiah.

This guideline, however, is not binding on the court in handling the appeal process.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Bid-rigging sanctions are not automatically followed by undertaking debarment from any tender (eg, KPPU Decision No. 18/L/2014 regarding procurement of High Density Polyethylene (HDPE) floating fish net in Pokja Area 7 of Government Procurement Service Unit of Riau Islands (2012) and KPPU Decision No. 19/L/2014 regarding procurement of revitalisation work of a youth centre in West Nusa Tenggara (2011)). Yet in some cases, a one- to two-year debarment, be it from tenders held by a single government institution in a certain area only or from those held by any government institution across Indonesia, can also be found. The most recent precedent is the prohibition of several undertakings in the construction service from participating in any building construction tender using the national budget and regional budget in Dompu Regency, West Nusa Tenggara for one year due to their horizontal and vertical bid rigging in the procurement of construction work of the Samakai Building in Dompu Regency, West Nusa Tenggara (2014), which breached article 22 of the ICL on bid rigging.

19 Parallel proceedings

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

Criminal sanctions can be pursued in respect of the same conduct if the defendants do not comply with the final and binding decision (ie, do not refrain from the anticompetitive behaviour even though the decision has been final and binding) or if the defendant committed obstruction of justice during the investigation or examination. There is no precedent to date with regard to the enforcement of criminal investigation or sanctions.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Under the current legislations, private damage claims are possible under proceedings before the KPPU. Parties may file a complaint to the KPPU and seek damages. However, in such cases, the onus is on the plaintiffs to provide sufficient evidence of the offence and not on the KPPU. In *EMI* (2007), the KPPU has ordered PT EMI Indonesia and EMI Music South East Asia (EMI) to pay 3.8 billion rupiah to PT Aquarius Musikindo for its losses caused by a cartel conducted by EMI.

21 Class actions

Are class actions possible? If yes, 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 under the current ICL. Theoretically, however, any party can submit a class action petition to the relevant first-instance or district court by using the KPPU decision as one of the legal bases for damages.

Cooperating parties

22 Immunity

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

There is no immunity programme under the current ICL. However, the draft amendment to the ICL is providing option for leniency application

Nevertheless, important to note, in the *Minahasa Road Tender* case (2014), the KPPU clearly adopted the leniency programme under the light of Fine Imposition Guideline by mirroring a similar act performed by the Federal Trade Commission and Japan Fair Trade Commission giving incentives for whistle-blowers in the form of absolute fine abolishment or reduction of fine. The KPPU in this case has given an additional 50 per cent fine reduction to PT Ericko Grant Dinarto as the Reported Party IV being the whistle-blower apart from the 10 per cent fine reduction due to cooperativeness during the examination. The 10 per cent fine reduction is also applied to the other three undertakings as reported parties in this case.

23 Subsequent cooperating parties

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

As elaborated in question 22, there is no formal leniency programme under current ICL. Yet the KPPU has used its discretion to provide the similar programme which under current precedent is applicable only for the first going in. Not applicable.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Not applicable.

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Update and trends

It has become more apparent that the KPPU keeps track of pursuing cartel-related cases. One month before deciding 32 importers and feed suppliers violated the cartel provisions in April 2016 in the *Beef* cartel, the KPPU formally initiated the preliminary investigation of the *Chicken* cartel. Soon afterwards, the KPPU formally opened the preliminary investigation of the *Automatic Scooter* cartel in July 2016. It is expected that the KPPU will give its decision in the *Beef* cartel towards the end of 2016.

By autumn 2016, some 85 per cent of the KPPU's published decisions were cartel-related cases (output restriction and collusive tendering). This year, the KPPU initiated seven cartel-related investigations spanning various industries, including construction, food (livestock), motorcycle manufacturing, the service sector and fertiliser production. In addition, during 2016 the KPPU also investigated 13 cartel cases carried over from 2015, deciding on 11 of them by early 2016. It is only in the bid-rigging case of the engineering, procurement, construction and commissioning work (EPCC) of Ammonia-Urea Project in PT Petrokimia Gresik that the KPPU found the allegation was not established due cost saving and efficiency measures arising from the tender.

In the ongoing *Chicken* cartel, the Directorate General of Animal Husbandry and Animal Health of the Ministry of Agriculture of Republic of Indonesia (DG-MoA) is being summoned by the KPPU for its intervention in rescuing poultry breeders. The KPPU alleged 12 breeders conducted a cartel because they attended and signed document of meeting with the DG-MoA that is considered by the KPPU as an agreement to jointly exterminate their day-old-chick and has therefore caused the increase of chicken prices on the market. Despite the fact that the joint extermination was instructed along with a threat of sanctions from the government, the KPPU believes that the extermination was done independently by each breeder without making any agreement. Thus, it is advisable for businesses to remain aware even if they are running their business following government guidelines and the public's best interests.

According to the KPPU's website, it is currently investigating the price of locally produced cows on the market, which is suspected to be too high, while the cows' farmers are experiencing a loss. Also, the KPPU is currently focusing its enforcement on, and closely monitoring sectors where, there is a rigid or high price, or a shortage of supply, such as in the selling of oil and gas for retail markets, banking (owing to high lending interest rates), food, agriculture and infrastructure, as well as in the education and health (including pharmaceutical) sectors, sectors monopolised by state-owned companies or firms holding a market share of more than 50 per cent, poor-quality public services and highly regulated or concentrated markets.

25 Approaching the authorities

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

Not applicable under the current Law. The procedure of leniency shall be further defined with a KPPU regulation under the draft amendment to the ICL.

26 Cooperation

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?

Not applicable under the current Law. The procedure of leniency shall be further defined with a KPPU regulation under the draft amendment to the ICL.

27 Confidentiality

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

Under the ICL, the identity of a person who makes a report on an alleged violation of the ICL shall be kept confidential by the KPPU. The current KPPU Regulation on Case Handling Procedure has extended this rule by granting a witness the right to request the KPPU to keep his or her identity undisclosed. However, if the relevant person intended to file a loss report, then his or her identity shall be disclosed.

With regard to the information disclosed to the KPPU, under the ICL, it is required to maintain confidentiality of information obtained from undertakings that are considered as 'company's confidential information'. In certain cases, the KPPU has extended the definition of this term to also include trade secrets. Furthermore, the KPPU Regulation on Case Handling Procedure has stipulated that, upon request, the KPPU may declare and treat particular documents that fall within certain criteria as confidential and will not be disclosed during examination.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Not applicable.

29 Corporate defendant and employees

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

Not applicable.

30 Dealing with the enforcement agency

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

Not applicable.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As previously mentioned, there has been a proposal on the application of a leniency programme for the ICL amendment.

Defending a case

32 Disclosure

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

According to the KPPU Guidelines on Case Handling, the Commission Council of an ongoing case shall provide the opportunity for each defendant listed in the Violation Allegation Report to view and obtain a copy of all submitted or acquired dossier of the case (information and evidence, including affidavits and minutes of investigations and examinations, during the investigation and examination phases). This process will be conducted in a separate session for each defendant. The defendant shall be liable on its own means of obtaining the copy, some of the most accepted means are by scanning or taking pictures of each piece of evidence. However, the Commission Council shall exempt the dossier disclosure of the case submitted by the defendant that is considered confidential. The defendant may submit such confidentiality status of the dossier to the Commission Council and the Commission Council shall further determine whether they shall grant such proposal.

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33 Representing employees

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

Yes, counsel may represent employees as well as the corporation under investigation so long as there is no conflict of interest for such representation. When it becomes obvious that there would be a different interest between the employee and the company, it is advisable to seek independent legal advice.

34 Multiple corporate defendants

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

Yes, counsel may represent multiple corporate defendants so long as there is no conflict of interest in such representation. But this may lead to suspicion of the KPPU about the anticompetitive practice under investigation (ie, that as the defendants can actually coordinate their litigation during the investigation or examination, it is very possible that they might have coordinated their anticompetitive practice in the past). Thus, when they do not belong to the same group, it is advisable to have different counsel.

35 Payment of penalties and legal costs

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

There is no provision under the ICL that prohibits a company from paying the legal costs of and penalties imposed on its employees.

36 Taxes

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

The ICL is silent on whether or not the pecuniary penalties or private damages award are tax-deductible and so is the draft amendment.

37 International double jeopardy

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

There has been no precedent to date on this issue. However, prior to conducting any international investigation or any investigation that includes foreign undertakings as a part of the investigation, the KPPU shall calculate the effectiveness of such investigation. It is also important to note that the KPPU is more concerned about the impact on Indonesia's market (eg, whether or not such alleged agreements have an adverse effect on the market). Thus, the application of international double jeopardy would heavily depend on: (i) the policy of the KPPU at the time of the investigation took place; and (ii) the case and its possible impact toward Indonesian market.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The total amount of fines may be lower than the basic level if the defendant:

- stops the violation immediately after the KPPU opens an investigation;
- proves that the violation has been unintentionally committed or made under pressure;
- proves that the involvement is minimal;
- acts cooperatively during the investigation or examination;
- argues that the conducts are to implement the applicable laws and regulations or are based on an approval from the competent government authorities; and
- makes a clear statement on his or her willingness to change his or her future practice so as to comply with the ICL.

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The law that deals with restrictive arrangements is the Restrictive Trade Practices Law 5748-1988 (the Antitrust Law).

Certain regulations and block exemption rules have been issued pursuant to the Antitrust Law. The first block exemption rules were introduced in 2001, for a period of five years. Since then, the block exemption rules have been renewed and amended every five years, and additional block exemptions have been introduced. Currently there are 13 block exemption rules, as follows:

- antitrust rules (general provisions and definitions);
- block exemption for arrangements of minor importance;
- block exemption for joint ventures;
- block exemption for agreements for the execution of research and development;
- block exemption for restraints ancillary to mergers;
- block exemption for exclusive distribution agreements;
- block exemption for exclusive purchase agreements;
- block exemption for franchise agreements;
- block exemption for arrangements between aircraft carriers;
- block exemption for arrangements between sea carriers;
- block exemption for agreements between related companies;
- block exemption for non-horizontal agreements that do not concern price; and
- block exemption for collaborations among competitors regarding export of defence equipment.

2 Relevant institutions

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?

Two enforcement institutions were established under the Antitrust Law: the Israeli Antitrust Authority (IAA) and the Antitrust Tribunal.

The IAA is an independent government enforcement agency established in 1994 through an amendment to the Antitrust Law. The IAA employs about 100 staff and is divided into three professional departments: legal, economic and investigations. Therefore, the IAA conducts both investigations and prosecution of cartel matters, and uses other enforcement measures as well.

The Antitrust Tribunal, sitting with the District Court of Jerusalem, has exclusive jurisdiction over non-criminal governmental antitrust proceedings. The District Court of Jerusalem has exclusive jurisdiction over criminal antitrust matters.

3 Changes

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

In October 2013, a new bill was published proposing several amendments to the Antitrust Law. Inter alia, the bill suggests adopting the American triple damages model in private enforcement of antitrust, except for cases where the defendant was granted immunity from criminal prosecution under the leniency programme of the IAA. The proposed amendments also relate to the ability of the IAA to render an administrative declaration in case of violation of an order made by the Antitrust Tribunal or in the case of a breach of the general director's condition imposed in the framework of its decision to clear a restrictive arrangement. (Question 16 elaborates on administrative enforcement measures and on a determination in particular.)

In March 2014, the Antitrust Law was amended to substantially narrow the statutory exemption granted to the agriculture sector (section 3(4) to the Law). The amendment entered into force in March 2015 (see question 5).

In March 2014, the Israeli parliament approved an amendment to the Antitrust Law, under which the general director may conduct examinations regarding the level of competition in various sectors, including examination of the existence of market failures and of barriers to competition. According to this amendment, the general director may hand his reasoned conclusions and recommendations to the minister responsible for the sector under examination and the Minister of Finance, and in a sector which is by law regulated by another body – also to the head of that body.

In November 2014, an amendment to the Antitrust Law was enacted according to which the statutory exemption of vertical mutual exclusivity agreements was abolished, as of February 2016 (after an extension).

In September 2016, the IAA extended the validity of most block exemptions for an additional five years.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

A 'restrictive arrangement' is defined as an arrangement made between two or more persons conducting business that restricts at least one party to the arrangement in a manner that may prevent or reduce competition (section 2(a) of the Antitrust Law).

In addition, the Antitrust Law provides in section 2(b) for a number of specific restraints, the existence of which constitutes an irrefutable presumption that damage to competition exists (that is, per se illegal practices). Accordingly, an arrangement involving a restraint relating to one of the following issues shall be deemed to be a restrictive arrangement:

- the price to be demanded, offered or paid;
- the profit to be obtained;
- the division of all or part of the market, in accordance with the location of the business or in accordance with the persons or type of persons with whom business is to be conducted (market allocation); and
- the quantity, quality or type of assets or services in the business.

Section 2 does not distinguish between horizontal and vertical agreements – both might be found to be restrictive arrangements. For example, an exclusive agreement may be considered as market allocation, and therefore a restrictive arrangement not only under the general definition determined in section 2(a), but also under the irrefutable presumption of section 2(b).

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In addition, section 5 of the Antitrust Law determines that a course of action determined by a trade association for its members or some of them, which is liable to eliminate or reduce competition among them, or such course of action which the trade association recommended to them, shall be deemed to be a restrictive arrangement as defined in section 2, and the trade association and any member acting in accordance with such course of action shall be deemed to be party to a restrictive arrangement.

Entry into a restrictive arrangement without the authorisation of the Antitrust Tribunal (or without a temporary authorisation) is forbidden, unless the arrangement was specifically exempted by the general director or is exempted according to one or more of the block exemptions.

An infringement of the restrictive arrangements chapter in the Antitrust Law is considered a criminal offence, but is also subject to civil and administrative procedures.

The level of knowledge required for a finding of liability in restrictive arrangement offence is actual awareness to the elements of the offence. Intention is not required for a finding of liability.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

The Antitrust Law does not contain any industry-specific infringements. However, in 2014 The Law for Enhancement of Competition in the Food Sector, 5774-2014 (the Food Law) was enacted, the objective of which is to increase competition in the food sector and consequently to bring about a reduction in prices to consumers. While the breach of the Food Law is considered an offence pursuant to the Consumer Protection Act, the general director of the IAA is in charge of the enforcement thereof.

Section 3 of the Antitrust Law provides that, notwithstanding the definition given in section 2 thereof to restrictive arrangements, the following types of arrangements, some of them relating to specific business sectors, shall not be deemed restrictive arrangements (and are therefore granted statutory exemption):

- an arrangement involving restraints, all of which are established by law;
- an arrangement involving restraints, all of which relate to the right to use intellectual property;
- an arrangement entered into by a person assigning a right to real property and a person acquiring such right involving restraints, all of which relate to the types of assets or services that the acquirer of the right is to engage in on such property;
- an arrangement between growers or wholesale marketers involving restraints, all of which relate to the growing or marketing of domestic agricultural produce;
- an arrangement entered into by a company and its subsidiary;
- an arrangement involving restraints, all of which relate to international air or air and ground transportation (sections 3(7) and 3A of the Law and the specific block exemption to arrangement between aircraft carriers determine the conditions for the application of the statutory exemption and block exemption, respectively);
- an obligation of the seller of a business, sold in its entirety, to the purchaser of the business, not to engage in the same type of business, provided such obligation does not contradict reasonable and acceptable practices; and
- an arrangement to which a trade union or employers' association is party, involving restraints, all of which relate to the employment of workers and to working conditions.

Arrangements between international sea carriers no longer enjoy a statutory exemption but instead, may be exempt pursuant to the block exemption to arrangements between sea carriers.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Antitrust Law applies to 'persons conducting business', that is, both to corporations (including non-profit organisations and industry associations) and individuals, provided that they are engaged in the conduct of business.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Antitrust Law does not explicitly mention that it applies to conduct taking place outside Israel, but nor does it negate its application to such foreign conduct. However, based on the purpose of the Antitrust Law – the prevention of restrictive practices that have harmful consequences for competition within Israel – interpreted together with the provisions of the Penal Law 5737-1977, the general director has declared that restrictive practices committed outside Israel, but which have a harmful effect on competition within Israel, will be subject to the Antitrust Law (the 'effects doctrine'). In 2013, the IAA made use of its authority pursuant to section 43(a) of the Antitrust Law and determined that several international corporations had breached the Antitrust Law with alleged worldwide cartel activity in the market for gas-insulated switchgears, which had an anticompetitive effect in Israel.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

An investigation may take the form of an open or a concealed investigation.

An open investigation is conducted mainly by demanding documents and information that may assist in examining whether an offence has been (or is being) committed. This type of investigation has been extensively used by the general director, either through the legal department or the investigations department of the IAA.

The investigations department mostly conducts investigations into activities that may result in criminal charges, and is vested with extensive investigatory powers, including the right to enter any business premises and conduct a search, seize any article or document, question any relevant suspect or witness, and arrest and detention powers. During an investigation, the investigations department usually consults with the legal department of the IAA, inter alia, with respect to the sufficiency of the evidentiary material. Later, the legal department reviews the material collected by the investigations department and either invites the suspects to a hearing or requests the investigations department to carry out additional investigatory actions. A final decision of whether to prosecute is made by the general director following the termination of the hearing proceedings. A criminal investigation in which the findings are that the Antitrust Law has been breached does not necessarily lead to criminal indictment but may end up with an administrative enforcement measure. The appropriate measure is determined on a case-by-case basis.

In general, it takes between several months and several years from the commencement of an investigation until the file is closed.

9 Investigative powers of the authorities

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

Any person is obliged, upon the order of the general director or of any person from among the civil service authorised by him for such purpose, to provide him with all information, documents, ledgers and other certificates that, in the opinion of the general director, would ensure or facilitate the implementation of the Antitrust Law. The IAA makes extensive use of this power.

The general director (or any person authorised by him from among the civil service) may, if he has reasonable grounds to believe it is necessary to ensure implementation of the Antitrust Law or to prevent its contravention:

- enter into any business premises and conduct a search without a search warrant – however, entry into residential premises is only permissible in accordance with a search warrant handed down by a court of competent jurisdiction; and
- seize any article or document (including computer material), if he has reasonable grounds for believing that it may serve as evidence in the hearing of an offence.

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Furthermore, in the event that suspicion arises that a breach of the Antitrust Law has been committed, the general director, or any person authorised by him for such purpose (investigator), may investigate any person related to such contravention, or any person who may have information regarding such contravention, and may order any such person to accompany him on an investigation and to provide any details, documents or information relevant to such contravention. An investigator is authorised to compel oral testimonies, and the person under investigation is obliged to answer any question, except for such questions that might incriminate him or her. Such testimonies may be used against the provider thereof.

In addition, wiretapping is also permissible in certain circumstances subject to the approval of the president of a district court. With respect to a cartel offence, the general director, the chief of the IAA's investigations department and his deputy, and any other investigators the general director may authorise for such purpose, shall have powers of detention, arrest and release, but not the power to detain a person about to commit an offence.

International cooperation

10 Inter-agency cooperation

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

The IAA ascribes importance to inter-jurisdictional relationships and continuous cooperation in all competition matters. This includes the exchange of non-confidential information on enforcement policy and decisions, as well as continuous and unmediated updates on the new legislation and policy in the field of competition.

Inter alia, the IAA is active in the OECD and the ICN (International Competition Network). In 2015, the IAA submitted several working papers and position papers to the OECD Competition Committee regarding oligopolistic markets, private and public enforcement, market research and presentation concerning the Law for the Advancement of Competition in the Food Sector, 5774-2014

The IAA also takes part in the EU's Euro-Mediterranean partnership (EUROMED) and its delegates contribute to the various workshops and seminars.

Additionally, the IAA takes part in the TAIEX programme of the European Commission, a programme aimed to strengthen the professional collaboration among antitrust authorities in Europe.

In 1999 the governments of Israel and the US signed an agreement regarding the application of their competition laws. The purpose of that agreement is 'to promote cooperation and coordination between the competition authorities of the parties, to avoid conflicts arising from the application of the parties' competition laws and to minimise the impact of differences on their respective important interests'. The parties agreed, inter alia, on consultation terms in competition matters and on exchange of information in enforcement efforts and regarding economic sectors.

The IAA also maintains close professional interaction with the European Commission and the competition authorities in the EU member states. In 2015, an IAA representative participated in the OECD training programme for competition authorities in Eastern Europe. Furthermore, the IAA's Investigation Department advised in the establishing operating theory for computer investigations and assisted in creating tagging lists to help developing the capabilities of new competition authorities.

In addition, in 2015, representatives of the IAA's Investigation Department trained investigators from the competition authority in Kenya.

11 Interplay between jurisdictions

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 IAA has a significant interplay with the US Department of Justice and Federal Trade Commission, with which it has an official bilateral cooperation agreement. The IAA also maintains a considerable close interaction with the European Commission. However, the IAA has not published information regarding cooperation with these (or other) authorities in specific investigations relating to cross-border cartels.

We believe that the IAA's participation in international competition organisations has contributed to its learning and to the adoption of practices that seem to operate successfully and are compatible with the domestic market. Examples include the adoption of a leniency programme in 2005 (see questions 22 to 28) and the amendment to the Antitrust Law that authorises the general director to impose financial sanctions on corporations and individuals that are involved in violations of the Law.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel cases may be dealt with in several ways, as follows:

- The general director or the Antitrust Tribunal may clear a restrictive arrangement in advance.
- The general director is authorised to file criminal charges against a person or a corporation that was involved in an illegal restrictive arrangement. The District Court of Jerusalem has exclusive jurisdiction over criminal antitrust matters.
- The general director is authorised to take civil administrative measures such as a consent decree or an administrative declaration by which a particular practice is deemed to be a restrictive arrangement. A consent decree is subject to the approval of the Antitrust Tribunal.
- The general director is authorised to impose monetary sanctions on a person or a corporation that was involved in an illegal restrictive arrangement or had breached a condition stipulated by the general director in a decision to clear a restrictive arrangement.
- The Antitrust Tribunal may issue an injunction upon request of the general director, ordering any person not to take action that contravenes the provisions of the Antitrust Law. It may also order any action necessary for the prevention of such a contravention.
- Private enforcement (including class actions).

13 Burden of proof

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

In the case of an application for clearance to a restrictive arrangement, the burden of proof lies with the parties to the arrangement. The Antitrust Tribunal shall decide to approve a restrictive arrangement, in whole or in part, if it believes that such arrangement is in the public interest, and it may stipulate conditions for its approval.

If a request for an exemption from the need to receive an approval from the Antitrust Tribunal is filed with the general director, the parties to the arrangement are required to prove the following: that the restraints in the restrictive arrangement do not reduce competition in a considerable share of the market affected by the arrangement, or that while they may reduce the competition in a considerable share of the market, they do not result in a substantial reduction of the competition in such market; that the objective of the arrangement is not the reduction or elimination of competition; and that the arrangement does not include any restraints that are not necessary to fulfil its objectives.

With regard to administrative or criminal charges against parties to a cartel, the burden of proof lies with the general director. However, in the case of per se illegal practices (as mentioned in question 4), where the factual basis has been proved by the general director, there is an irrefutable presumption of illegality. As in all other criminal matters, the level of proof required is 'beyond reasonable doubt'.

14 Appeal process

What is the appeal process?

The general director's decision to grant an exemption to a restrictive arrangement, a declaration by the general director that certain conduct is a restrictive arrangement and a decision to impose monetary sanctions are all appealable to the Antitrust Tribunal within 30 days. The Antitrust Tribunal's decisions and the District Court's judgments in criminal cases are appealable to the Supreme Court within 45 days.

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Sanctions

15 Criminal sanctions

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

According to the Antitrust Law, engaging in restrictive practices without the prior approval of the general director or the Antitrust Tribunal may have criminal, administrative and civil consequences (unless the practice is exempted pursuant to either a statutory or a block exemption). The sanctions available under the Antitrust Law for criminal offences are up to three years' imprisonment (or five years, in aggravating circumstances) or a maximum fine of 2.2 million shekels. In addition, a daily fine of 14,000 shekels may be imposed for each day that the offence persists. If a corporation is involved, the said fines will be doubled. Furthermore, if an offence under the Law was committed by a corporation, then every person that was, at the time of the offence, an active director, a partner (except for a limited partner) or a senior officer responsible for the relevant field shall also be liable, unless that person has proven that the offence was committed without his or her knowledge and that he or she took all reasonable measures to ensure compliance with the Law.

The Antitrust Law does not determine minimum levels for sanctions.

Until recent years, in most cases, individuals were sentenced to public work, for periods of up to six months, in lieu of imprisonment, while imprisonment was the exception (the longest imprisonment imposed by a court was nine months, in the floor tiling cartel case in 2002 (Criminal Case (Jerusalem) 366/04 *The State of Israel v Svirsky et al*, decision of 21 February 2002, publication No. 3013673). However, recent decisions of the courts indicate a climate-change and shifting towards stricter sentencing policy that include actual imprisonment. Accordingly, in January 2016, the court imposed an unprecedented sentence of one-year's imprisonment on the CEOs of two of Israel's largest bakeries, in addition to fines of hundreds of thousands of shekels, in a verdict given in the *Bakeries* cartel case (appeal on this verdict is pending in the Supreme Court). In a more recent decision given in September 2016, the court imposed an imprisonment sentence of nine months on the leader of the *Textbooks* cartel (in the framework of a plea bargain), due to his involvement in coordinating price bids on governmental tenders for the distribution and supply of textbooks (for more details on both cases see 'Updates and trends' below). These decisions and other decisions mentioned below, indicate a less tolerant approach of the courts towards corporations and individuals who violate the Antitrust Law, and emphasise the court's intension to increase deterrence through stricter sentencing on hard-core cartel participants.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The following administrative sanctions are available under the Antitrust Law for cartel activity:

- The general director may impose monetary sanctions on corporations and individuals that are involved in violations of the Law, in lieu of criminal indictment.
- A consent decree, according to which the general director and the parties to the cartel may agree, inter alia, on an amount of money to be paid to the State Treasury. The consent decree may include a provision according to which the parties to the cartel do not confess to being parties to a restrictive arrangement. In 2009, the IAA announced its intention to draft official guidelines for the calculation of the amount of money to be paid in the framework of consent decrees; however, such guidelines have not yet been published. To date, very few cartel cases have been concluded with a consent decree. The authorisation of the general director to impose monetary sanctions in 2012 substantially strengthened the director's negotiation power and enabled the settlement with Israel's five largest banks which were held to be parties to a restrictive arrangement (for the exchange of information regarding present and future bank fees charged to customers). The IAA settled for 70 million shekels – a substantial increase compare to the former 'record' of 8 million shekels in the *Telephone Operators* cartel.
- An injunction order by the Antitrust Tribunal upon request of the general director to cease the illegal activity.
- The general director may issue an administrative determination, by which certain arrangement is declared to be a restrictive arrangement. Such determination, unless reversed by the Antitrust Tribunal, is considered to be prima facie evidence in any judicial proceeding.

Under article 50D of the Antitrust Law, the general director is authorised to impose a monetary sanction of up to 1 million shekels on an individual. As for corporations, if in the year preceding the fiscal year in which the infringement took place, the corporation turnover exceed 10 million shekels, the general director may impose a monetary sanction of up to 8 per cent of the turnover, up to 24 million shekels.

In December 2014, the general director imposed on Tnuva, one of Israel's leading food suppliers, and Tiv Tirat Zvi a monetary sanction of 1.04 million shekels for continuing the implementation of a distribution agreement, although the exemption previously granted to that agreement by the general director had already expired.

More recently, in May 2015, the general director imposed a monetary sanction of 20,000 shekels on a small company for failing to comply with the IAA's request for information issued pursuant to section 46(b) of the Antitrust Law. The information was required to the IAA for the examination of a certain merger case. In a later case, dated December 2015, the general director imposed a monetary sanction of 9 million shekels on the Port of Ashdod for abusing its monopoly position in the market of unloading vehicles. Due to the severity of the potential harm to competition found in this case, the general director decided to impose also personal sanctions on two former senior executives of the port in the amount of 20,000 shekels each. This was the first time the IAA used its authority to impose personal monetary sanctions on individuals.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

There are no pronounced sentencing guidelines under which the sanctions are determined by the Court.

In practice, the Court can take into consideration many factors, and in addition to factors relating to the corporation (eg, its size), the individual defendant's personal circumstances are considered. Among the considerations mentioned by the Court in its various rulings were:

- the level of the defendant's actual and personal involvement in the offence, the position of the individual in the corporation, and whether the defendant has personally benefited from the offence (ie, whether he or she was the owner of the corporation or merely a senior employee);
- the duration of the offence, the damage caused or expected to be caused to the public as a result of the offence;
- in cartel cases – the degree of the cartel's implementation; and
- other personal circumstances, such as charity work, service in the army, age, health condition, financial status, former relevant convictions.

As to administrative monetary sanctions, In July 2012, the general director published policy guidelines regarding the criteria and considerations in setting the level of financial sanctions (General Director's Guidelines 2/12). In July 2016, the general director published draft revised guidelines that aim to replace the former guidelines and is based on the experience gathered by the IAA since it has received the authority to impose monetary sanctions. The new draft suggests that the amount of the sanction will be determined in four stages, which includes:

- determination of the maximum amount of the sanction;
- evaluation of the severity of the infringement based on the harm caused to the competition or the public;
- examination of the offender's part in the infringement (including its effect on implementation and actions taken to stop it or prevent its recurrence); and
- considering external circumstances, such as the existence or absence of previous violations.

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The amount of financial sanction will be determined by the general director according to this outline, while taking into account the specific circumstances of each case.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not available as a sanction by the IAA. However, it is at the discretion of the relevant government agency to decide on taking such measures.

19 Parallel proceedings

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

The Antitrust Law provides the general director with both criminal and administrative authorities; some of them may be used simultaneously in respect of the same conduct. While an administrative declaration under section 43 may be accompanied by monetary sanctions or criminal charges (in practice, the IAA refrains from doing this), this is not the case with a consent decree, which may not be accompanied by any other sanction, either administrative or criminal.

Note that the Antitrust Law enables private damages claims alongside administrative and criminal proceedings.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Private enforcement is possible under the Antitrust Law. An act or omission contrary to the provisions of the Antitrust Law shall constitute a tort in accordance with the Torts Ordinance [New Version], 5728-1968, enabling any person to seek a remedy from the court through a civil action for the actual damages he or she suffered. The submission of class actions is also possible in antitrust cases.

Note that the purpose of damages under Israeli law is restitutive and the Antitrust Law does not allow punitive or exemplary damages. However, in October 2013, a new bill was published proposing several amendments to the Antitrust Law. Inter alia, the bill suggests adopting the American triple damages model in private enforcement of antitrust, except for cases where the defendant was granted immunity from criminal prosecution under the leniency programme of the IAA.

The 'indirect purchaser' doctrine was expressly asserted in several matters before the courts, but ultimately the cases were settled without the court ruling on the issue. While no express ruling has yet been given on the application of the 'indirect purchaser' doctrine in antitrust cases, it seems there is a tendency towards the rejection of that defence. In November 2013, in its decision to reject a motion for dismissal of a class action application, the Central District Court determined that the existence of a conflict of interest between the members of two distinct sub-groups of the class action group (direct and indirect injured members) does not deny the possibility of providing compensation to any of the group's members. Note, however, that this issue was not in the core of the debate in that application and was not the subject of the decision. Also notable is the opinion submitted just recently by the Attorney General to the Central District Court in the *Aviation* cartel case, which argues that indirect consumers should be allowed to claim their damages from the cartel members. These developments may be the path for rejecting the 'pass-on' defence in antitrust private actions.

21 Class actions

Are class actions possible? If yes, 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?

A class action may be filed in the case of an offence under the Antitrust Law. The Class Actions Law 5766-2006, which regulates the conduct of antitrust class actions, provides that a class action may be brought not only by a person (individual or corporation) having an interest in the lawsuit or a consumers' association, but also by a public authority active in that field (IAA), which may bring a claim on behalf of 'a group of people [for whom] such lawsuit raises substantial questions of fact or law, which are common to all the members of such group'.

According to the Class Actions Law, a request for the approval of a class action shall first be submitted. Such approval may be granted only if all of the following conditions apply:

- the lawsuit raises substantial questions of fact or law, which are common to all the members of the group, and there is a reasonable possibility that they will be decided in favour of the group;
- a class action is the most efficient and fair way to resolve the dispute under the circumstances; and
- there are reasonable grounds to assume that the interests of all the members of the group will be represented and managed in an appropriate manner and in good faith.

Given the above conditions were held and the Court gave its approval to maintain the action as a class action, the case will be conducted as any other claim that is submitted to court (except for certain procedural differences, such as regarding the approval of settlements).

Cooperating parties

22 Immunity

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

The IAA adopted an official leniency programme for companies and individuals in 2005. The programme provides for amnesty from criminal prosecution to a cartel member – an individual or a corporation and its directors, officers and employees – that comes forward first and helps the IAA in the investigation of cartel activities prior to the opening of an open investigation, provided this party is not 'the leader' of the cartel.

The leniency programme is designed to grant immunity only in regard to cartel activities and obstruction of justice offences related to the cartel activity (as opposed to other forms of criminal antitrust activities such as illegal restrictive arrangements other than cartels, abuse of dominance and illegal mergers).

The leniency programme sets out the following conditions in order to grant an amnesty:

- Leniency will be granted to the first party – corporation or individual – to come forward and deliver full information with respect to an illegal activity in which the applicant was involved.
- Leniency will not be granted to an individual or a corporation that was clearly 'the leader' of the cartel (ie, coerced others to join the illegal activity or initiated it or had a dominant role in the illegal conduct).
- Leniency will be granted to a party reporting illegal activity before an open investigation has commenced.
- If a corporation qualifies for leniency, all directors, officers and employees of that corporation will receive full amnesty from criminal prosecution.
- If the corporation approaches the IAA to deliver information with respect to the illegal activity, the approach should follow a clear and binding decision of the corporation to deliver information to the IAA, as opposed to the unilateral approach of an individual.
- In case the corporation does not approach the IAA, executives and employees may approach the IAA on their own initiative, deliver information and be granted individual leniency if they meet the programme's conditions (eg, the individual was not 'the leader' of the cartel).
- Leniency will be granted only to those who have terminated their part in the illegal activity (however, applicants are required to

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receive the IAA's consent to advise other parties they have ceased their participation in the cartel).
- Leniency will be granted to those who fully cooperate with the IAA investigation on an ongoing basis.
- Leniency will not be granted to a person who was previously either convicted of a cartel offence or has been granted immunity pursuant to the leniency programme in regard to a different cartel.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, 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 partial leniency programme and the leniency programme does not offer any benefits to the second to come forward. However, cooperation with IAA for those who have not applied for leniency (or for those who are not eligible for leniency) could still be possible according to the general criminal law rules, in the course of a plea bargain (eg, becoming a state witness in the appropriate case).

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The leniency programme does not offer any benefits to the second or third to come forward. However, in the event that an investigation is being conducted against a person, and during the investigation this person provides information with regard to another cartel in which he or she is involved and qualifies for leniency, then the provision of such information will be considered a lenient circumstance with regard to the ongoing investigation.

25 Approaching the authorities

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?

One of the conditions for the grant of leniency is that the application to the IAA is made before the commencement of an open investigation and that there is no information about an application to the IAA by another person involved in the cartel. Other than this, there is no set deadline. The leniency programme grants full leniency.

26 Cooperation

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?

The immunity granted pursuant to the leniency programme is dependent on full and ongoing cooperation throughout the entire investigation and trial process. This cooperation includes providing the information held by the applicant for immunity, by way of full and true disclosure, including detailed cartel-related documents and the names of those involved. If a corporation is applying for immunity, information is expected to be provided by all the relevant employees and managers. In addition, the applicant for immunity must comply with the provisions of the IAA during and after the investigation, to assist in the investigation and to fully testify with respect to the cartel, as necessary.

27 Confidentiality

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?

No confidentiality is offered to an applicant according to the leniency programme. In criminal proceedings, the IAA is obligated to fully disclose all relevant material in its possession, including information received by the IAA from an immunity applicant. Such information will be disclosed after indictment is issued by the prosecution, and often earlier, already in the hearing phase.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

As in every criminal case, the prosecution may enter into a plea bargain in antitrust cases. In antitrust cases, any plea bargain is subject to the approval of the Jerusalem District Court. However, if the plea bargain includes an agreement to become a state witness, the agreement requires pre-approval by a state district attorney. In practice, the IAA has entered into plea bargain settlements in several cases.

Alternatively, if the IAA chooses civil enforcement rather than the criminal route, it may enter into a consent decree with the parties to the restrictive arrangement. The consent decree is subject to the approval of the Antitrust Tribunal.

29 Corporate defendant and employees

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

Leniency granted to a corporation will include the corporation itself, as well as its past and present employees and managers, but not those who do not fully cooperate with the IAA.

30 Dealing with the enforcement agency

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

An application for leniency may be submitted to the IAA's chief investigator, providing him or her with information about the cartel and enabling the IAA to examine whether the applicant meets the prerequisite conditions of the leniency programme. In the case of a corporation, the application should be made by an authorised representative that has the power to oblige the corporation.

As leniency granted to a corporation may benefit its employees and managers as well, it seems that no ethical problem arises if counsel acts on behalf of them all.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

We are not aware of any policy assessment or reviews. However, in June 2010, the IAA launched a campaign aimed at encouraging the public to apply the leniency programme. The IAA admitted that the leniency programme had so far only been applied in very few cases, and that the campaign was one of the steps taken to strengthen the enforcement of the criminal provisions of the Antitrust Law.

This campaign was probably the result of a recommendation by the state comptroller in the 2009 Annual Report of the State of Israel's Comptroller (published in May 2010, publication No. 960/1-2010), according to which, during the period between the endorsement of the leniency programme in 2005 and August 2009, only two applications had been submitted to the IAA pursuant to leniency agreements (both were accepted). Consequently, the state comptroller recommended in his report that the IAA re-examine the leniency programme and consider how to encourage the public to apply it.

In January 2015, during the IAA's annual competition conference, a discussion panel was held for the purpose of drawing conclusions regarding the effectiveness of the leniency programme. The IAA's representatives stated that during the past decade only four applications had been submitted to the IAA pursuant to leniency programme, thus presenting the problematic nature of the existing leniency programme and, by implication, its relative failure. However, there was no

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Update and trends

The Veterinarians' cartel
In February 2016, the court convicted the Veterinarians Association for recommending a course of action by a trade association, which constitutes a restrictive arrangement, after it admitted distributing a recommended price list among its members, consisting of details on medical procedures and their costs. Specifically, the court ruled that the association's intent was to influence the prices and to reduce competition among veterinarians, and that its distribution carried the risk of seriously harming competition. In April 2016, the court issued a verdict on this matter imposing a fine of 80,000 shekels on the Veterinarians Association.

The Meteorological Station Services cartel
In February 2016, the Jerusalem district court convicted three companies and their CEOs of bid rigging in connection with a tender issued by the Meteorological Service for the maintenance of weather stations. The CEOs of the companies met in order to coordinate their bids and divide the market among the companies, so that one company would win the tender in the north region and the other company would win in the south region. In July 2016, after the court did not accept the IAA's position the conduct included aggregative circumstances, the court issued the sentence on the defendants. Each of the three companies was fined 250,000 shekels and the CEOs of the companies were sentenced to several months of community service and fines ranging from 100,000 to 150,000 shekels.

The Textbooks cartel
In July 2016, the Jerusalem district court convicted two defendants – a company and its CEO – according to a plea agreement, of being a party to a restrictive agreement in aggravating circumstances, due to their involvement in the *Textbooks* cartel. The cartel involved price bidding of governmental tenders for the distribution and supply of textbooks. In September 2016, the court imposed nine months' imprisonment and a fine of 100,000 shekels on the company's CEO, as well as a fine of 500,000 shekels on the company.

The Bakeries cartel
In January 2016, the Jerusalem district court imposed a sentence of one-year's imprisonment – the longest imprisonment ever imposed by a court in antitrust violations – on the CEOs of Davidovitch Bakery and Berman Bakery for their involvement in a restrictive arrangement in aggregate circumstances. In addition, the court imposed on the CEOs fines amounting to hundreds of thousands of shekels, as well as heavy fines in the range of approximately 1 million shekels on the bakeries. In February 2016, an appeal was filed at the Supreme Court by both the IAA and the defendants. The IAA argued that the sentence was too lenient and requested that the imprisonment be increased to between two-and-a-half and four-and-a-half years – closer to the maximum punishment limit of five years' imprisonment, while the defendants' appeal seek to mitigate the punishment to avoid the prison sentences and reduce the fines. The appeal is still pending.

The Computing cartel
In May 2016, the IAA announced its intention to file an indictment against several companies and officers for allegedly coordinating tenders and bids in the computing field, subject to a hearing. Specifically, according to the IAA, seven computer companies coordinated among themselves 22 different tenders during the years 2009–2012, totalling tens of millions of shekels.

Indictment against a city council deputy head
In August 2016, the IAA announced its intention to file charges, subject to a hearing, against the former deputy head of the city council of Daliat el-Carmel, Carmi Maklada, who allegedly participated in coordinating a tender for roads development in the neighbouring council of Isfiya. According to the allegations, Maklada, who was managing a company dealing with infrastructure works when the tender was published, agreed to submit a losing bid in exchange for a payment of 40,000 shekels by a competing company.

clear indication of any anticipated review or amendment to the leniency programme.

Defending a case

32 Disclosure

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

The IAA is obligated to disclose all material that is relevant and is part of the factual basis or justification for its administrative decision. Specifically, with respect to criminal enforcement, after issuing an indictment, the prosecution must fully disclose to the defendant all relevant material in its possession.

33 Representing employees

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

In general, and if no ethical restrictions relating to the conflict exist, there is no restriction on a legal counsel representing both the corporation and its employees.

According to the Bar Association Rules (Professional Ethics) of 1986, an advocate shall not represent parties with conflicting interests in the same issue. However, this prohibition will not apply to the drawing up of an agreement and to the handling of a matter where both sides have agreed in writing that it may be done by the same advocate.

Accordingly, and for the benefit of the employee, an employee should be advised to seek independent legal advice in any case of a possible conflict of interests with the corporation. For example, if an employee is not a senior manager of a corporation that is suspected of being involved in a cartel, and is not him or herself involved in the cartel, he or she should seek independent legal representation, since no liability should be imposed on him or her.

34 Multiple corporate defendants

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

There is no fundamental prohibition on counsel representing multiple corporate defendants. Again, this depends on the ethical rules and the specific circumstances of each case.

35 Payment of penalties and legal costs

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

In the case of an administrative monetary sanction, the Antitrust Law forbids a corporation to pay, directly or indirectly, a monetary sanction that has been imposed on a controlling shareholder, an officer or an employee of the corporation, and determines that an agreement to do so will be void.

In respect of criminal sanctions, the Antitrust Law does not explicitly allow or prohibit the payment of an employee's penalty or costs by the corporation. However, the Companies' Law determines that a company may indemnify an office holder for 'reasonable litigation expenses' only if one of the following applies:

- where the investigation came to end without the submission of criminal charges against the office holder and without the imposition of a penalty in lieu of criminal charges (eg, an administrative fine);
- where the investigation came to end without the submission of criminal charges against the office holder, but with the imposition of a penalty in lieu of criminal charges, provided that the offence does not require cognition of criminal nature;
- where criminal charges were submitted but the office holder was acquitted; or
- where the office holder was found guilty of an offence that does not require intent or cognition of its criminal nature.

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The outcome is that a corporation may not pay the legal costs or penalties imposed on office holders or on any other employee with regard to cartel offences in which they were involved, unless:

- the investigation came to an end without the submission of criminal charges against the office holder, and without the imposition of a penalty in lieu of criminal charges; or
- criminal charges were submitted, but the office holder was acquitted.

Legal costs imposed on an office holder who was not involved in the cartel but was found liable under the strict liability provisions applied to office holders, as determined in the Antitrust Law, may be subject to indemnification.

36 Taxes

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

Fines and other penalties are not tax-deductible. Compensation to plaintiffs in private actions for damages may be tax-deductible in certain circumstances.

37 International double jeopardy

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?

While there is no ruling on this matter, generally, since enforcement in Israel derives from the effect the cartel had in Israel, the double jeopardy doctrine will not apply.

There is no ruling yet regarding overlapping liability in private damage claims.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

There is a possibility of reaching an agreement with the prosecution on a sanction within the framework of a plea bargain, and therefore reducing the chances of higher fines (or imprisonment, or both) being imposed in the event of conviction. However, such agreement is subject to the approval of the court.

Another alternative would be trying to convince the IAA to switch to the administrative enforcement path (on the grounds of, eg, the severity of the felony, the parties' position in the market and the strength of the evidence). In addition, as mentioned in question 14, an appeal may be submitted on, inter alia, the amount of fine or monetary sanction, or the severity of a court's judgment. It should be noted, however, that the primary tendency of the IAA in hard-core cartel cases would be criminal action.

The mere implementation of a compliance programme will not constitute a defence. However, the implementation of an effective compliance programme may constitute a defence for executives from the criminal strict liability that applies to them pursuant to section 48 of the Law. In addition, an effective compliance programme that ensures the immediate cessation of the illegal activity and the prevention of a repeated breach, or even taking actions to rectify the results of the breach, may be a consideration for reducing the administrative financial sanction pursuant to section 50E(5) of the Antitrust Law. In any event, the level of the fine is determined case by case based on the circumstances.

Notably, in criminal proceedings there are no sentencing guidelines under which the fines are calculated; hence, judges may consider any relevant factor including personal and financial aspects. However, there is no way to predict the effect of specific factors grounds on the sentencing.

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Italy

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

On 10 October 1990, Parliament adopted Act No. 287, the Competition and Fair Trading Act (the Act) (as amended by Act No. 57 of 4 March 2001 and by Act No. 248 of 4 August 2006, which established rules on market liberalisation and regulation).

Before 1990, Italy did not have full antitrust legislation, although anticompetitive conduct was sometimes punished under provisions of the Civil Code. The Act meets the requirements of article 41 of the Italian Constitution, which protects and guarantees the right of free enterprise and brings Italy's legislation into line with EU law. The main purposes of the Act are to foster and protect market conditions that allow economic entities equal opportunities to compete and gain access to the market, and to protect consumers by encouraging lower prices and improving the quality of products through the operation of market forces.

The borderline between the scope of EU legislation and national legislation is clear and precisely determined as to concentrations, but is less clear with regard to agreements impeding competition and alleged abuses of a dominant position. EU law applies wherever effective competition in the Common Market, or a substantial part of it, is significantly affected. In recent years, the European Union has tended to concentrate its efforts on cases of greater relevance to the EU, leaving the authorities of individual member states to deal with cases of mainly national concern. Furthermore, under article 1(3) of the Act, when the European Commission begins proceedings relating to an agreement or an alleged abuse of dominant position, the Antitrust Authority (the Authority) suspends any investigation that it may have begun under the Act, except with regard to those aspects that are purely domestic in scope.

2 Relevant institutions

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 designated to investigate cartel matters is the National Competition Authority (the Competition Authority), which is an independent technical body. The Competition Authority is responsible for enforcing the Act, and hence for controlling agreements that impede competition, abuses of dominant position and concentrations. It is also empowered to enforce the legislative provisions on misleading and comparative advertising, and on the abuse of economic dependence (in the latter case, if the abuse is relevant in respect of the protection of competition and the market).

The Competition Authority has jurisdiction to apply competition rules in almost all fields of the market, with some exceptions.

As provided by article 20(4) of the Act, in relation to matters (including cartels) concerning insurance companies, the Competition Authority, before adopting a decision, is required to request the opinion of the Institution for the Supervision of Insurances (IVASS). The opinion, however, is not mandatory.

In the electronic communications market, the Competition Authority applies competition rules, but it is required to request the opinion of the Electronic Communications Regulator, AGCOM, with regard to proceedings involving companies operating in such market. Again, this opinion is not mandatory.

The Competition Authority is an independent organisation with the status of a public agency, and is required to submit reports to Parliament and the government. It is a collegiate body currently composed of three members appointed jointly by the chairpersons of the Senate and the Chamber of Deputies, who make decisions by majority vote.

The Competition Authority has a directorate general for competition, which is responsible for handling competition cases. The Secretary General of the Competition Authority is appointed by the Minister of Industry acting on a proposal by the Chairperson of the Competition Authority, and is responsible for overseeing the organisation and operations of the staff and of the offices.

The Competition Authority's decisions can be appealed before the administrative courts (of first and second instance).

3 Changes

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

Italy has been asked to implement Directive 2014/104/EU by 27 December 2017 on antitrust damages actions. Such an implementation shall impact on national legislation not compliant, both of a substantial and of a procedural nature (see Update and Trends).

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 2 of the Act prohibits all agreements between undertakings, decisions by associations of undertakings or concerted practices (even if taken in compliance with statutory regulations) that may have as their object or effect the prevention, restriction or distortion of competition within the national market, and in particular those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment to the detriment of consumers;
- 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 such contracts.

The Authority has applied a per se rule in condemning cartels, stating that when agreements between undertakings even only potentially reduce competition substantially within the national market or in a substantial part of it, they are prohibited (article 2 of the Act). The actual restrictive effects of the conduct are taken into account when determining the fine to be imposed on the undertakings. Intention of the restrictive competitive effects is not required for a finding of a liability, as the case law has specified that just the intention of the conduct is required in this respect.

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Vertical agreements may also be prohibited under article 2. The Authority, however, has often applied a rule of reason when investigating distribution agreements and other kinds of vertical arrangements. Moreover, the adoption of EC Regulation No. 2790/99, establishing the new block exemption regulation concerning vertical agreements (now replaced by Regulation No. 330/2010), also caused the Authority to definitively abandon a formal assessment of vertical restraints under article 2 of the Act, and to focus instead mainly on the market power of the undertakings concerned. In this regard, in case No. I/487, *Sagit Contratti Vendita e Distribuzione del Gelato*, of 31 October 2001, relating to the notification of a distribution agreement pursuant to article 13 of the Act (which states that the companies entering into an agreement may notify it to the Authority), the Authority took the economic approach as set forth in articles 2 and 3 of Regulation No. 2790/99. In particular, the Authority established that, because the market-share of the undertakings concerned was above the 30 per cent threshold, it was necessary to assess whether the vertical agreement at issue constituted a breach of article 2 of the Act.

This is consistent with article 29 of Council Regulation No. 1/2003 (referred to by recital 14 of Regulation No. 330/2010), which states that, where the vertical agreements to which the exemption provided for in article 2 applies have effects incompatible with the conditions laid down in article 101(3) of the Treaty on the Functioning of the European Union (TFEU) in the territory of a member state or in a part thereof, the competent authority of that member state may withdraw the benefits of application of such Regulation. The Authority established that it was also necessary to assess the opportunity to withdraw the block exemption benefit concerning the aforementioned vertical restraints due to the existence of a large number of exclusive relationships in the same market.

Following the modernisation of EC competition law pursuant to Council Regulation No. 1/2003, the enforcement of article 101(3) TFEU provisions on cartels has been decentralised so that it is now applied by national competition authorities and national courts. Accordingly, the Authority has to assess the existence of harm to trade among member states before examining the case under article 101(1) TFEU and allowing for an exemption under article 101(3) TFEU. This new task is likely to boost either horizontal cooperation between the Authority and other national competition authorities or vertical cooperation between the Authority and the Commission. Since the new rules came into force, the Authority has opened most investigations on cartels under article 101 TFEU rather than article 2 of the Act.

In Decision No. 15604, dated 14 June 2006, the Authority concluded that gas companies operating in the supply market for jet fuel had entered into a horizontal agreement on pricing and distribution that violated article 101 TFEU. The following fines were awarded: ENI, €117 million; Esso, €66.6 million; Kuwait, €46.8 million; Shell, €53.3 million; Shell IAV, €3.1 million; Tamoil, €19.6 million; and Total, €8.8 million.

In Decision No. 16404, dated 25 January 2007, the Authority concluded that companies operating in the supply market for marine paints had entered into a horizontal agreement for the purpose of defining the conditions for participation in tenders for the supply of paints to ship owners and shipyards. According to the Authority, the parties had exchanged confidential information on prices (minimum and average ones), the percentage of rebates to apply and, finally, had agreed on market partitioning. The following fines were awarded: BOAT, €1.08 million; IP, €1.08 million; Hempel, €324,000; Sigma, €756,000; and Jotun, €1.13 million.

In Decision No. 16835, dated 17 May 2007, the Authority concluded that company groups operating in the market for chipboard panels had entered into a horizontal agreement for the purpose of partitioning the market. According to the Authority, the companies had coordinated their commercial strategies and, in particular, fixed prices, price increases and other contractual terms to be applied to customers, as well as a list of customers to which price increases should not apply. The agreement also concerned import–export policies and the fixing of product characteristics. The following fines were awarded: Sacic Legno, €2.52 million; Sit, €3.02 million; Sia, €5.54 million; Sama, €7.06 million; Gruppo Frati, €6.96 million; Fantoni, €3.28 million; Saib, €1.76 million; and Xilopan, €529,200.

On 22 November 2007, the Authority concluded that Acea and Suez had entered into a horizontal agreement by coordinating their commercial strategies and by exchanging information on their participation to public tenders; the two companies participated in public bids for water services by setting up an ATI (temporary group of companies) even though they had all the requirements to participate in the bid on their own. The Authority deemed that this behaviour had the purpose of limiting competition in the bids and, therefore, partitioning the market. The following fines were awarded: Acea, €8.3 million; and Suez, €3 million (case No. I/670).

On 26 February 2009 (case No. I/694), the Authority concluded that 26 companies operating in the market of the production of pasta (representing almost 90 per cent of the whole Italian market) had entered into a horizontal agreement to agree an increase of pasta prices to be applied to distributors. The agreement took place between October 2006 and March 2008 by means of an exchange of information during meetings organised by the trade union of the companies involved. The Authority ascertained that prices applied by the companies to distributors had increased by more than 50 per cent, which had been passed on by distributors to consumers (the retail price, in fact, increased by 36 per cent). By coordinating their conduct, both smaller companies (affected by higher production costs) and bigger companies were able, notwithstanding the increase of their prices, to freeze their market share as the distributors (before the general increase) were obliged to accept the new conditions. The Authority, when fixing the penalties, also took into consideration the relevant increase of the price of raw materials and the general worsening of the companies' performance in recent years. The overall amount of the penalties imposed was equal to €12.5 million.

In January 2010 (case I716), the Authority concluded proceedings initiated against the National Psychologists' Register by accepting the commitments offered by the parties.

The Authority had ascertained that the psychologists enrolled in the Register had entered into a horizontal agreement to fix their minimum tariffs. The Psychologists' Deontological Code provided that the tariffs should be fixed by taking into account the importance and dignity of the profession and by referring to the parameters fixed by the Code to calculate the right tariff amount. It was also provided that the violation of the Code's provisions should result in disciplinary sanctions.

The Authority assessed that such provisions affected competition on the market, as the tariffs should be freely fixed between the parties at the beginning of the professional relationship.

The National Psychologists' Register offered commitments to the Authority that consisted of amending the Code by repealing those deontological provisions pertaining to the minimum tariffs and to the importance and dignity of the profession. The Authority accepted the commitments and did not impose any fine.

On 15 June 2011 (Decision No. 22521), the Authority concluded that 22 company groups operating in the market of overland forwarding had entered into a horizontal agreement for the purpose of partitioning the market. The Authority ascertained that the companies and their trade association had fixed increases in price by means of an unceasing exchange of information. During meetings at the trade association, companies had informed each other of their costs and had agreed increases in price to be applied to consumers. Once such increases had been fixed, the association circulated application memoranda, so that those companies that did not participate in the meetings could also act in accordance with the agreed conditions. As a result of such concerted practice, companies could increase their prices, being confident that their competitors would adopt the same increases. The Authority ascertained that the alleged conduct had completely altered market conditions so that a price increase of 50 per cent had occurred. The Authority found that all the main operators in the market had continuously participated in the agreement between 2002 and 2007, and imposed penalties in the amount of €76 million. Schenkel, which claimed for admission to the leniency programme, did not incur any penalty, as it had spontaneously informed the Authority of the secret cartel, while Agility and DHL obtained a reduction in the fine of 50 per cent and 49 per cent, respectively. Finally, Alpi Padana and Spedipra did not incur any penalty due to the operation of the statute of limitations.

On 16 March 2012 (Decision No. 23338), the Authority sanctioned 15 shipping agents and two trade associations for a secret cartel that lasted five years (from February 2004 to December 2009). The Authority ascertained that the companies had fixed the prices for agency services (ie, preparation and issue of documents, such as bills of landing for exported goods and 'delivery orders' for imported goods), known as 'fixed duties', in violation of article 101 TFEU. According to the

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Authority, a complex agreement was carried out. On the one hand, during several meetings of the Port Committee, the companies had coordinated the price of fixed duties and (from 2008) the loyalty discount to be applied to forwarding agents. On the other hand, trade associations had reflected companies' decisions into the agreements entered into between 2004 and 2007 by means of memoranda that recommended that all the associates be compliant with the agreements.

The Authority ascertained that the cartels raised anticompetitive effects into the whole market of maritime transport. In fact, even if the concerted activity was carried out by companies operating in the Port of Genoa, many documents acquired during the investigation revealed that the concerted prices were also applied for transactions taking places in other Mediterranean ports, such as Gioia Tauro and La Spezia, and in the Italian port system in general. The total amount of the sanctions was equal to €4 million. Two companies received a reduction of the fine as a result of their cooperation during the proceedings. Many companies had also offered commitments, which the Authority rejected.

In Decision No. 24405 (case I743), dated 11 June 2013, the Authority concluded that four companies operating in the market for maritime passengers' transportation had entered into a concerted practice to raise the 2011 summer season prices by up to 65 per cent on specific routes (Civitavecchia–Olbia, Genova–Olbia, Genova–Porto Torres). The Authority ascertained the conduct by taking into account the parties' parallel behaviours, concluding that concentration was the only plausible explanation for higher prices and dismissing the alleged justifications of the parties (such as increasing petrol costs and companies' financial losses). The following fines were awarded: Moby, €5,462,310; GNV, €2,370,795; SNAV, €231,765; and Marinvest, €42,575.

On 30 May 2013 (Decisions No. 24377, 24378, 24379; cases I749, I750, I753), the Authority ascertained that three notary's councils in the Milan, Bari and Verona districts had repealed recent provisions for the liberalisation of tariffs by reintroducing uniform tariffs for notaries' deeds, under threat of disciplinary sanctions to the associated notaries.

In Decision No. 24823 (case I760) dated 27 February 2014, the Authority imposed a total fine of over €180 million on the pharmaceutical companies Roche and Novartis for an alleged cartel in relation to the treatment of eyesight diseases.

The collusion concerned two pharmaceutical products: Avastin, intended for cancer treatment, and Lucentis, used for the treatment of eyesight diseases.

Although registered only for the treatment of certain forms of cancer, in certain countries (including Italy), Avastin has also been used 'off-label' (ie, used for a purpose other than that for which the product has been authorised for sale) to treat common eyesight diseases. The incentive for off-label use of Avastin resulted from the circumstance that the cost of an Avastin treatment was far lower of a Lucentis-based treatment (€81 versus €900).

Avastin and Lucentis were based on two different active substances developed by the same US company, Genentech, which then licensed Avastin to Roche and Lucentis to Novartis. Genentech was subsequently acquired by Roche. This resulted in a situation where both companies had an interest in the sale of Lucentis, Novartis by earning sales revenue and Roche by earning licence fees.

According to the Authority, since 2011 Roche and Novartis had engaged in a 'complex collusive strategy' to create obstacles to the off-label use of Avastin and to push demand towards Lucentis, by alleging that the off-label use of Avastin could be dangerous to patients. The Authority considered this conduct to further limit competition that had developed between the products. Moreover, as Roche did not require an 'on-label' registration of Avastin for ophtalmic use, only Lucentis was reimbursed by the Italian healthcare system: as a consequence, the Authority found that the damages of the cartel (in terms of healthcare expense in excess) amount to several hundreds of million euros per year.

In light of the seriousness of the infringement, the Authority imposed fines on Roche and Novartis of €90.5 million and €92 million respectively.

The decision represents a very significant hardening of the Authority's fining policy. The Authority, adhering to the Commission Guidelines on the calculation of fines, applied a basic amount set at 25–30 per cent of the value of sales of the goods concerned (in the past the Authority used to limit itself to 5–10 per cent). Moreover, contrary to the Authority's normal practice in this case fines were imposed on parent companies.

In Decision No. 25422 (case I779) dated 21 April 2015, the Authority accepted the commitments offered by Priceline Group's companies Booking.com BV and Booking.com (Italy) and closed, with respect to these companies, the investigation opened on 7 May 2014.

In more detail, the Authority opened an article 101 TFEU investigation against two online travel agencies, Expedia and Booking.com. The investigation referred to some clauses inserted in the agreements concluded by Expedia and Booking.com with their hotel partners which prevented the latter from offering on their own websites or through competing platforms and other channels better rates and conditions than those advertised on the Expedia and Booking.com sites (MFN clauses).

The Authority pointed out some monitoring tools adopted by Expedia and Booking.com that were thought to strengthen compliance with such clauses, for example, the use of price comparator sites, such as Kayak and Trivago, owned by the two companies. Moreover, monitoring was also strengthened by some contractual provisions which in case of non-compliance empowered Expedia and Booking.com to lower the ranking of the non-compliant hotels that are published on their sites.

Pursuant to the Authority such a strategy was likely to produce restrictive effects on the Italian market of online travel agencies.

During the investigation, Booking.com submitted commitments consisting of a significant reduction of the scope of the MFN clauses. The revised MFN clauses will only apply to prices and other conditions publicly offered by the hotels through their own direct online sales channels, leaving them free to set prices and conditions on other competing platforms and on their direct offline channels, as well as in the context of their loyalty programmes. The commitments apply, starting from 1 July 2015, to all bookings made by consumers with regard to hotels located in Italy and will have a duration of five years. The Italian Competition Authority concluded that such commitments are suitable to address the competition concerns related to Booking.com's behaviour.

In its turn Expedia informed the Authority that starting from 1 August 2015 it had modified its MFN clauses, similarly to Booking.com (the revised MFN clauses just apply to prices and other conditions publicly offered by the hotels through their own direct online sales channels, leaving them free to set prices and conditions on other competing platforms and on their direct offline channels). Having regard to the above policy change, the Authority, by Decision No. 25940 dated 23 March 2016, closed the proceedings against Expedia.

By decision No. 25966 (case I790) dated 19 April 2016 the Authority imposed fines for a total amount of €66 million to Sky Italy, RTI-Mediaset, Infront Italy and the Serie A National Football League (the Football League) for the 'allocation agreements' between Sky and Mediaset on the television rights to the 2015–2018 seasons.

In June 2014 when the Football League auctioned the broadcasting rights relating to Serie A's next three seasons, it divided the offer into five packages. At the end of the procedure, Sky should have been entitled to matches contained in packages A and B on satellite platforms and digital terrestrial, respectively, for which it submitted the best bids, while Mediaset – offering the best bid for package D – should have been entitled to broadcast the remaining games on all platforms.

After the bidding process, however, the final allocation structure was different as the League decided to assign: (i) only the satellite package A to Sky; (ii) the digital terrestrial package B to Mediaset (despite the fact that its offer was nearly €150 million lower than the Sky offer); and (iii) the package D to RTI, which in turn transferred this package on to Sky.

Following the investigations, the Authority found that the rights' allocation resulted from a concerted agreement between the competitors, promoted by the Football League.

The Authority considered the agreement to constitute a violation of article 101 TFEU, restrictive by 'object' and thus very serious, aiming at conditioning and altering the outcome of the competitive bid, while also foreclosing potential new entrants in the relevant market.

Mediaset was fined of a sanction equal to €51 million, while Sky, which initially took position against the other parties' initiatives and then kept a cooperative attitude vis-à-vis the Authority, a sanction of €4 million.

Finally, the Act does not contain criminal law provisions.

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Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are no block exemptions under the law. However, when certain conditions are met, the Authority may authorise agreements or categories of agreements that restrict competition for a limited period of time (article 4 of the Act). To qualify for this exemption, the companies concerned must show that the agreements improve conditions of supply in the market, that the limitations on competition are absolutely necessary to obtain these positive effects and that the improved conditions of supply deliver a substantial benefit to consumers (eg, by reducing prices or providing goods or services that would not otherwise be available). However, the exemption may not involve the authorisation of restrictions that are not strictly necessary for the aforementioned purposes, nor may it allow competition to be eliminated in a substantial part of the market.

In addition, pursuant to paragraph 2 of article 4, the Authority may subsequently, after giving notice, revoke the exemption when the party concerned abuses it or when any of the conditions on which the exemption was based are no longer met.

On 1 July 1996, the Authority published an application form to encourage the voluntary submission of negative clearance notifications and exemption applications.

Special rules are provided for banking, insurance, broadcasting and publishing.

With specific regard to regulated markets, case law has specified that a regulated conduct is exempted from the compliance to competition law principles only if the need to comply with regulation rules does not leave to the company any margin of autonomy, not even with reference to the modalities of fulfilment.

6 Application of the law

Does the law apply to individuals or corporations or both?

Anticompetitive agreements include concerted practices and resolutions adopted by associations of undertakings and consortia. Furthermore, the law applies not only to corporations, but also to any entrepreneur, including individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Article 2 of the Act prohibits agreements between undertakings that have as their object or effect the appreciable prevention, restriction or distortion of competition within the national market or a substantial part of it. It is the effects of the conduct on the Italian market and not where it occurs that places it under the jurisdiction of the Act. Therefore, even if the conduct occurred abroad, but produced anticompetitive effects in the Italian market, it is punishable under article 2.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

An investigation may be initiated by the Authority itself, or by a written declaration or notice brought to the Authority's attention by a party, which may be:

- a company that claims to have been damaged by the alleged anticompetitive behaviour;
- a consumer or consumers' association; or
- a public authority (such as the competent ministry) in areas of business in which the development of trade, the evolution of prices or other circumstances suggest that competition may be impeded, restricted or distorted.

The declaration or notice must be signed. The investigation cannot be initiated on the basis of an anonymous allegation.

However, an investigation may also be initiated by companies whose practices may be subject to inquiry where they notify the Authority that either a concentration or an agreement (either vertical or horizontal) has occurred.

While the pre-merger (or concentration) notification is mandatory, the notification of an agreement is voluntary. In this respect it is worth noting that, pursuant to article 13 of the Act and article 3 of DPR No. 217 of 30 April 1998 (containing the procedural rules), companies that enter into an agreement may notify the Authority. In such case, the Authority shall open a formal investigation within 120 days of the notification being received. Otherwise, the Authority may not start any further investigation of the agreement unless the notification was inaccurate or incomplete.

Under the EU modernisation rules (Regulation No. 1/2003, article 3), whenever the Authority applies the national antitrust rules, it will be required to apply article 101(1) and (3) TFEU at the same time if there is harm to trade among member states.

Pursuant to article 12 of the Act, after assessing the data in its possession and the information brought to its attention by the public authorities or by any other interested party, including bodies representing consumers, the Authority conducts an investigation to ascertain whether there is any infringement of the prohibitions provided in articles 2 and 3.

Pursuant to article 14 of the Act, the Authority notifies the undertakings and entities concerned that an investigation is starting.

Article 14-bis of the Act (added by Legislative Decree No. 223 of 4 July 2006 as amended by Act No. 248 of 4 August 2006) provides that, where the conduct allegedly in breach of the Act is likely to produce a relevant and irreparable damage to competition, the Authority (after having checked, by a summary investigation, the existence of the violation) may adopt interim measures.

The owners or legal representatives of the undertakings or entities may make representations in person or through an attorney within the deadline set at the time of notification, and may file submissions and briefs at any stage during the course of the investigation. Article 14-ter of the Act provides that within three months from the opening of a procedure, the companies under investigation may also offer commitments to the Authority to correct the anticompetitive conduct. After an evaluation of the suitability of the commitments, also based on an open market test, the Authority may make the commitments binding and close the proceedings without an adjudication of the alleged violations. If the companies do not honour the commitments, the Authority may levy administrative fines of up to 10 per cent of the companies' turnover. The Authority may reopen the proceedings if there is a change in a factual element in the case, the companies engage in behaviour contrary to the commitments made or the Authority's decision is found to be based on incomplete, inexact or misleading information. The rules applicable to this procedure are set forth in the Notice adopted by the Authority by the decision of 12 October 2006.

Once the investigation is closed, the Authority notifies the interested parties by means of a statement of objections of the results. The interested parties shall be notified at least 30 days before the conclusion of the case. The interested parties may submit their briefs until five days before the final hearing before the Authority.

An investigation concerning a possible cartel is normally completed within 240 days of the start of the investigation.

Decisions of the Authority are taken by a majority of votes of the panel.

9 Investigative powers of the authorities

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

The Authority may at any stage during the investigation:

- request undertakings, entities and individuals to supply any information in their possession and make available any relevant documents;
- call witnesses to give oral testimony before the authority;
- conduct inspections of the undertaking's books and records and make copies of them, availing itself of the cooperation of other government agencies where necessary;
- produce expert reports and economic and statistical analyses; and
- consult experts on any matter relevant to the investigation.

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Searches and seizures ordered by the Authority may be carried out through an investigative body, the Guardia di Finanza, and do not need to be authorised by a judge or magistrate.

Any information or data regarding the undertakings under investigation is wholly confidential and may not be divulged, even to other government departments. The Authority may fine anyone who refuses or fails to provide the information or exhibit the documents referred to in subsection 2 without justification. The fine can be up to €25,822, which is increased up to €51,645 in the event that inaccurate information or documents are submitted, in addition to any other penalties provided by current legislation.

International cooperation

10 Inter-agency cooperation

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

The Authority is a member of the International Competition Network (ICN) and the European Competition Network (ECN).

The ICN is a competition authority forum that is open, on a voluntary basis, to all national and multinational competition authorities entrusted with the enforcement of competition law. The ICN is the only international body devoted exclusively to competition law enforcement. The main purposes of the ICN are to provide antitrust authorities with a specialised, yet informal, venue for maintaining regular contact and addressing practical competition issues, and to improve worldwide cooperation. By enhancing convergence and cooperation, the ICN aims to promote more efficient, effective antitrust enforcement worldwide.

However, the ICN does not exercise any rulemaking function and will only issue recommendations on best practices. It will be left to the

individual antitrust agencies to decide whether and how to implement the recommendations through unilateral, bilateral or multilateral arrangements, as appropriate.

The ECN is regulated by specific EC rules and is the common organisation that facilitates the application of European antitrust provisions at national level, as well as the cooperation among the antitrust authorities of the member states and the European Commission.

Moreover, it should be noted that, following the increasing development of internet commerce and services, and the subsequent delocalisation of the supply of goods and services, coordination between member states is becoming more and more frequent. For example, the investigations against Booking.com and Expedia (please see question 4) have been conducted by the Italian Authority in collaboration with the National Competition Authorities of France and Sweden, with the coordination of the European Commission, and the commitments offered by Booking.com have been evaluated and accepted by all the three authorities.

11 Interplay between jurisdictions

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

As specified above, the Authority is a member of the International Competition Network (ICN). The ICN facilitates procedural and substantive convergence in antitrust enforcement. In particular, it promotes cooperation between different national authorities by the exchange of information and coordination of investigations to eliminate unnecessary and duplicative procedural burdens. The ECN facilitates the application of European antitrust provisions at national level as well as cooperation among the antitrust authorities of the member states and the European Commission.

Moreover, the Authority is a member of the various advisory committees set up by the Director-General for Competition of the European Commission to receive the non-binding opinions of the antitrust authorities of different member states with regard to draft decisions on EU cases relating to agreements, abuses of dominant position and concentrations.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Antitrust matters, including cartels, are adjudicated before the Authority. However, private actions to obtain the annulment of anticompetitive

contracts or the award of damages are adjudicated before the ordinary judicial courts (explained below).

13 Burden of proof

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

The burden of proof rests with the Authority, or in private actions before the ordinary judicial courts, with any plaintiff seeking to establish the existence of a cartel.

Pursuant to the well-established case law of the Authority and administrative courts, 'smoking gun' evidence (such as confessions or cartel's written evidence) is not required, since direct proofs are very rarely found for this kind of infringement. The presence of serious, precise and coherent clues of the existence of the cartel is necessary to prove the illegal behaviour.

For example, regarding cartels in the form of a concerted practice, the courts have considered the existence of a parallel behaviour among the undertakings as sufficient evidence, provided that contact among the undertakings is proved (eg, the participation of undertakings at meetings where sensitive information was exchanged ('external factors') and that the parallel conduct is not alternatively justifiable from a rationale viewpoint ('internal factors').

14 Appeal process

What is the appeal process?

According to article 33 of the Act, appeals against administrative decisions of the Authority fall within the exclusive jurisdiction of Tar Lazio (the administrative court).

The appeal is essentially limited to a review of the legality of the decision on the basis of specific grounds, such as lack of jurisdiction, infringement of law and abuse of power. The latter may, however, involve a review of the reasoning and completeness of the motivation for the decision being challenged. The court may also verify the correctness of the factual grounds upon which the decision is based.

It should also be noted that, as a general principle of administrative law, the outcome of this review may only be an annulment of the decision and not a different decision, except for the quantification of the fines, which may be reassessed.

Moreover, the judgments of the administrative court of first instance may be challenged before the Consiglio di Stato (the highest court, charged with the judicial review of administrative actions). However, there is no stay of execution pending this appeal, as judgments of the administrative court of first instance are immediately enforceable. Nonetheless, the Consiglio di Stato may decide, under article 111 of Legislative Decree No. 104/2010, to grant this suspension should serious and irreparable damages result from the execution of the judgment on the appealing parties.

Pursuant to article 2 of Legislative Decree No. 1/2012 (which entered into force on 22 September 2012), private actions involving annulment proceedings, claims for damages and petitions for emergency measures to be adopted in respect of infringements of the provisions of the Act and of article 101 TFEU must be filed before the Companies' Tribunals (a specialised division of the court of first instance having territorial jurisdiction).

Sanctions

15 Criminal sanctions

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

There are no criminal sanctions for cartel activity provided for in the antitrust legislation. However, article 501 of the Criminal Code provides that whoever, in the exercise of his or her business, either through speculative practices or otherwise, hides, interrupts the supply of or

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buys raw materials or primary goods or foodstuffs so as to noticeably alter the prices of these and to cause them to become scarce, shall be sentenced to imprisonment (from six months to three years) and shall be fined up to €25,822.

It follows that if a cartel is involved in the above-mentioned activities, some criminal issues may arise.

Criminal sanctions are also provided in the event of boycotts. Individuals involved in boycotts may be sentenced to up to three years in prison (article 507 of the Criminal Code).

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The Act provides for administrative sanctions. Pursuant to article 15 of the Act as modified by article 11 of Act No. 57 of 5 March 2001, if the investigation provided for in article 14 reveals infringements of the Act, the Authority shall set a deadline within which the undertakings and entities concerned must remedy such infringements. In the most serious cases it may decide, depending on the gravity and duration of the infringement, to impose a fine of no more than 10 per cent of the turnover of each undertaking or entity for the previous financial year. Time limits shall be laid down within which the undertaking must pay the fine.

In the case of non-compliance with restraining orders, the Authority shall impose a fine of no higher than 10 per cent of the turnover or, in cases where the penalty has already been imposed, a fine of no less than double the penalty already imposed, with a ceiling of 10 per cent of the turnover. It shall also set a time limit for payment of the fine. In cases of repeated non-compliance, the Authority may decide to order the undertaking to suspend activities for up to 30 days.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Sentencing criteria are provided for in article 15 of the Act. When determining the fines, the Authority shall take into account the duration and seriousness of the violation, and may impose fines of up to a maximum of 10 per cent of the turnover realised by the interested company during the year preceding the beginning of the investigation. Furthermore, the following criteria for the setting of administrative fines are provided for by article 11 of Act No. 689 of 24 November 1981:

- the seriousness of the violation;
- actions carried out by the fined party to eliminate or reduce the effects of the violation;
- the fined party's previous behaviour; and
- the economic conditions of the fined party.

The Authority also makes reference to the Commission Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003.

On 22 October 2014, the Authority adopted new Guidelines on methods of setting fines aimed at defining, even on the basis of guidelines and recommendations of the administrative judge, a specific calculation method of the penalties associated with infringement of competition rules.

The purpose of the Antitrust Authority's decision was to make its deterrent policy more effective, by rendering its decision-making process more transparent and predictable.

In the Guidelines, the Authority first of all specifies that the basic amount of the fine shall be established by multiplying a percentage (up to 30 per cent) of the sales of goods and services related to the infringement for the duration of the same. It also establishes a minimum percentage, normally not less than 15 per cent of the value of sales, for the most harmful restrictions of competition (ie, for secret price-fixing cartels, market sharing and output-limitation horizontal agreements). Criteria for assessment of the gravity of the offence include the following elements: competitive conditions in the relevant market (for example, the level of concentration and the existence of barriers to entry); prejudice against innovation; the actual implementation of the infringement; and the degree of the actual economic impact.

The Authority also provides for the possibility of adjusting the basic amount of the fine with an additional penalty, the size of which would range between 15 per cent and 25 per cent of the value of sales, regardless of the duration of the infringement and of its effective implementation (entry fee).

The Authority establishes specific mitigating and aggravating circumstances, for example further reduction of up to 50 per cent of the basic amount of the fine may be applied if during the investigation the undertaking provides information and documentation which is deemed to be crucial to the identification of other infringements (other than the infringement in the current proceeding) and may be legitimate grounds for conditional immunity from penalties, in accordance with the leniency programme (the Amnesty Plus programme). Moreover, the Authority may increase the penalty by up to 50 per cent if, during the last financial year prior to the issue of the infringement decision, the undertaking concerned recorded a particularly high global turnover compared to the value of sales related to the infringement or if it belongs to a group of significant economic size. See also below the immunity rules under the leniency programme.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

No, but the Authority may decide to order the undertaking to suspend its general activities for up to 30 days.

19 Parallel proceedings

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

There are no criminal sanctions for violations of antitrust law in Italy, only administrative and civil sanctions. The Competition Authority pursues the 'public enforcement' of competition law in the public interest and applies administrative sanctions. Private parties, on the other hand, are entitled to the 'private enforcement' of competition law. Depending on the actual circumstances of the case, they may bring a claim in court and be awarded damages that are in fact civil sanctions.

Thus, administrative sanctions and civil sanctions may indeed be pursued in respect of the same conduct, although by different subjects and on different legal bases.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Any person who believes he or she has been damaged by a cartel may bring a suit against the companies involved in the alleged anticompetitive conduct.

Victims of a cartel must, as a minimum, receive full compensation of the real value of the loss suffered. The entitlement to full compensation therefore extends not only to the actual loss due to anticompetitive conduct, but also to the loss of profit resulting from any reduction in sales, and encompasses a right to interest.

This principle also applies to indirect purchasers (ie, purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered considerable harm because an illegal overcharge was passed on to them in the distribution chain). Specific rules and case law on passing on are still missing, but it seems admissible for a defendant to give evidence that a direct or intermediary purchaser plaintiff has passed on an alleged price overcharge to an indirect purchaser and therefore suffered either no damages or limited damages (pass-on defence).

In addition, damages to reputation have been considered relevant. Punitive damages are not awarded.

Changes will be introduced on the occasion of the implementation in Italy of the European Directive 104/2014 to all the rules not compliant, in particular of a procedural nature (see Update and trends).

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21 Class actions

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

On 23 July 2009, Parliament passed a law instituting class actions (Law No. 99/09, which amended the new article 140-bis in the Consumers' Code originally contained in Law No. 244/2007, which never entered into force). Article 140-bis of the Consumers' Code provides that each consumer may take action before the civil courts against companies to apply for the payment of damages and the restitution of the amounts due as a result, inter alia, of anticompetitive behaviour. The court first decides the admissibility of the request (although it can suspend its decision if a proceeding concerning the same issue is pending before the Authority), and then determines whether the infringement occurred and the amount due or the criteria to be taken into consideration to determine such amount.

The new provisions came into force in January 2010 and apply to anticompetitive conduct occurring after 15 August 2009.

Only one class action has been initiated for an antitrust violation since the class action provisions entered into force. It was initiated by an association of consumers claiming damages for the unfair raising of prices for the transportation of maritime passengers a few months after the opening of the antitrust proceedings for the concerned cartel. The Genoa Court admitted the claim, and more than 7,000 consumers have already adhered to the action. However, the case is of a 'follow on' type and meanwhile the administrative courts have definitively quashed the Authority's decision. Thus, the action is unlikely to proceed.

The Parliament is examining proposals for a material change of the current class action rules in order to make the procedure more viable and effective for the plaintiffs.

Cooperating parties

22 Immunity

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

Paragraph 2-bis of article 15 (added by Legislative Decree No. 223/2006 as amended by Act No. 248 of 4 August 2006) provides that in certain cases the fine can be cancelled or reduced. On the basis of such rule of law, the Italian Antitrust Authority adopted an Immunity and Leniency Programme on 15 February 2007 (Decision No. 16,472) following a public consultation. The Immunity and Leniency Programme applies to secret cartels only. The first company to spontaneously inform the Authority of a secret cartel (whistle-blowers) will be awarded full immunity from fines if they submit decisive evidence on the cartel that the Authority does not possess. Companies will have to withdraw immediately from the cartel and cooperate with the Authority throughout the proceedings. The request must be submitted to the Authority in writing or orally. If a company does not have all the evidence readily available, it may still lodge the request and ask for a term by which it will provide full evidence (marker). If the Authority turns down the request for immunity or leniency, companies may withdraw the documentation supporting their application. In order to be admitted to the leniency, further conditions shall be met: the company shall terminate the anticompetitive conduct after having presented the petition for the leniency; during the proceedings, the company shall cooperate with the Authority in a continuing and effective way; and the company shall not inform anybody of its intention to apply for the leniency.

23 Subsequent cooperating parties

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

Parties that cooperate after the immunity application – those who are not first in – may be awarded a reduction in their fine of up to 50 per cent if they offer qualified evidence. Companies will have to withdraw immediately from the cartel and cooperate with the Authority throughout the proceedings. Rules on procedure are the same as those applicable to the parties who are the first in to cooperate.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Companies going in second may be awarded a reduction in their fine of up to 50 per cent if they offer qualified evidence.

If a second-in company offers information on a different, previously unknown offence in which it is involved, it may benefit from full immunity in the latter case, but not in the one in which it is second in. There are no specific differences between going in second versus third, but the promptness of the cooperation carried out by the company is taken into account by the Authority when determining the level of reduction of the fine.

25 Approaching the authorities

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

If a company has sufficient evidence to request immunity, the best time to approach the authorities is as soon as possible and even before the Authority initiates the proceedings. No deadlines exist, but upon the request of a company seeking immunity (a marker), the Authority may fix a deadline within which such a company shall submit all the evidence requested thereto. In the event the company does not comply with such a term, the evidence provided shall be evaluated by the Authority in the context of a reduction of the sanction.

26 Cooperation

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?

Pursuant to article 7 of the Immunity and Leniency Programme (updated on 31 July 2013 by Decision No. 24560), companies applying for full leniency as well as those applying for a fine reduction must satisfy some specific cooperation duties to be admitted to the programme. In particular, an undertaking must cease its behaviour upon leaving the cartel, unless the Authority requests or permits the company not to do so in order to keep the investigations secret, and must fully and continually cooperate with the Authority for the entire duration of the proceedings. For the company, such cooperation involves, inter alia:

- the duty to immediately provide all the relevant information and evidences;
- the obligation to remain at the Authority's disposal, to immediately answer any request, to act to permit the Authority to hear its employees and to secure information and documents before employees' dismissal or discharge;
- a prohibition to cancel, modify or hide relevant information or documents; and
- a prohibition to inform anyone (except other antitrust authorities or external legal experts under a duty of confidentiality) of its intention to file a leniency application as well as of the existence or the object of a filed application until the investigation is notified to the parties, unless the Authority permits it.

27 Confidentiality

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?

Applicants (and subsequent cooperating parties) may request the Authority to keep certain documents or sections thereof confidential, provided that such a request is well grounded (the document contains trade secrets, commercial strategies, personal information, etc). The Authority will assess whether the request is grounded and whether it

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Update and trends

Italy has been asked to implement Directive 2014/104/EU by 27 December 2017 on antitrust damages actions. Such an implementation shall impact on national legislation not compliant, both of a substantial and of a procedural nature.
Having regard to cartels' regulation, changes will be introduced, inter alia, with reference with:

- limitation rules: pursuant to current regulation the limitation period (in order to take an action for the compensation of damages caused by a cartel) is five years starting from the time of knowledge of the damage. Following the implementation of the Directive the limitation period will be of five years after having knowledge of the infringement, starting from the termination of the same;
- quantification of harm: pursuant to the Directive there is a presumption that cartel infringement caused harm. Such a principle is not recognised by current legislation and shall be implemented; and
- passing on: the Directive introduced a rebuttable presumption of the passing on of damages produced by a cartel for indirect purchasers at the recurring of three conditions (when the claimant proofs the infringement, this infringement resulted in an overcharge for the direct purchaser and he purchased products or services that were subject of the illegal cartel). Such a provision shall be implemented as pursuant to current legislation – article 2697 of the Italian Civil Code – the indirect purchaser shall demonstrate damage and causal link between damage and alleged conduct.

needs to show the documents or sections thereof to prove the cartel. The Authority will inform the interested party of its conclusions on the confidentiality request. If the request is upheld, the Authority will keep the documents confidential and shall not disclose them to the parties involved in the proceedings or to third parties.

Access (by the parties involved in the proceedings) to the confession provided is postponed until the Authority notifies the parties of the statement of objections.

Access (by the parties involved in the proceedings) to documentation provided may be postponed until the Authority notifies the parties of the statement of objections.

By Decision No. 21,092 of 6 May 2010, the Authority also specified that third parties, even if granted access to the proceedings, cannot have access to the confession and to the related documents.

If the Authority decides to turn down the immunity or leniency application, applicants may withdraw the documentation provided to support their application.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

No. The Authority can only accept commitments (see above).

29 Corporate defendant and employees

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

Not applicable.

30 Dealing with the enforcement agency

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

An applicant for leniency must file a request with the Authority. Such request may be submitted by the corporate defendant as well as the company's counsel. In addition, the Authority has made available a specific telephone and fax number to facilitate communications by interested parties.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No.

Defending a case

32 Disclosure

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

Defendants have right of access to any documents produced or permanently retained by the Authority in the course of the proceedings, with the exception of those documents containing personal, commercial, industrial and financial information of a confidential nature relating to the individuals or to the undertakings involved in the proceedings. Nonetheless, if the charges are based on such documents, they must be disclosed to defendants, at least with regard to the portions containing evidence of the infringement or essential information for the defence of the undertaking concerned.

It is also provided that the Authority may defer access to the documents requested until it has been ascertained that they are relevant for the purposes of acquiring evidence of infringements, in any case, not beyond the date of notification of the statement of objections (while the confession provided pursuant to a leniency request must be postponed until the Authority notifies the parties of the statement of objections).

33 Representing employees

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

There are no personal sanctions against employees; therefore, the issue of conflict of interest does not arise.

34 Multiple corporate defendants

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

Pursuant to the general principles of the professional code of ethics, counsel may not represent parties where there may be a conflict of interest. In other cases, no specific rule is provided.

35 Payment of penalties and legal costs

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

Not applicable.

36 Taxes

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

The issue is controversial.

In this respect the Provincial Tax Court of Milan has recently admitted the chance for companies to deduct antitrust fines as business expenses for tax purposes (decision No. 136/32/02).

The Tax Court stated that since an anticompetitive practice is likely to increase a company's revenues, there is a 'causal link' between such an unlawful practice and its taxable income. Consequently, according to the Court, the amount of a fine imposed for such an unlawful practice is sufficiently linked to the business activity of the company to be deductible for tax purposes. In this respect the Italian Supreme Court in its decision of 21 January 2009, held that business expenses are deductible provided they are 'functionally linked' to an activity which is potentially able to generate income. According to the Tax Court, the concept of an 'activity which is potentially able to generate income' should be construed to include unlawful activities.

However, the position taken by the Tax Court is in contradiction with the most recent case law of the Italian Supreme Court. For instance, by decision No. 5050/2010, the Italian Supreme Court stated that antitrust penalties are not deductible for tax purposes since an

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administrative penalty imposed by the Authority is the punitive consequence of a violation of a rule prohibiting certain business practices. A sanction which punishes the exercise of an unlawful activity cannot be considered as a productive activity and, therefore, is not a business expense which can be deducted from the company's income.

37 International double jeopardy

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?

Fines imposed in other jurisdictions are not taken into consideration. Within the jurisdiction, the rule of ne bis in idem applies; thus, a company cannot be fined twice for the same illegal conduct (irrespective of the identity of the damaged parties).

Regarding private damage claims, indirect purchasers (ie, purchasers who had no direct dealings with the infringer) are also entitled to claim damages, but the damage cannot be duplicated and the pass-on circumstance must be assessed.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The optimal way to get the fine down is to act quickly. A corporation that is a member of a cartel or party to a prohibited horizontal agreement should cease the behaviour and by adhering to a compliance programme inform the Authority as soon as possible. The amount of the fine may also be proportionate to the duration of the conduct, thus it must be ceased immediately if a case is started by the Authority. The Authority is more inclined to be lenient with companies or undertakings that have taken concrete steps to limit the effects of their illegal practice.

The Authority is particularly strict in cases where the companies acted through associations representing the industry in question. It is therefore recommended that active steps to leave the association or at least to signal a refusal to adopt the association's illegitimate practices be taken.

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Japan

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947) (the Antimonopoly Law), as amended from time to time, is the legislation that prohibits cartels. In addition to the prohibition under the Antimonopoly Law of Japan, collusion in a public bid is subject to penalty under the Criminal Code. The Law Concerning Exclusion and Prevention of Public Bid Rigging and Actions against Involved Officers provide the measures that the Fair Trade Commission of Japan (JFTC) may take against the activities of government officers involved in public bid rigging.

2 Relevant institutions

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

The JFTC is the sole enforcement agency established by the Antimonopoly Law. In contrast to the United States, there is no enforcement agency in Japan that shares the power and responsibility to enforce the Antimonopoly Law with the JFTC, while the Public Prosecutors' Office is in charge of criminal procedures after the JFTC files an accusation.

The JFTC is the investigator and prosecutor with regard to offences under the Antimonopoly Law. The JFTC consists of a chair and four commissioners. The General-Secretariat, headed by the secretary-general, is attached to the JFTC for the operation of its business, and consists of the Secretariat, the Investigation Bureau and the Economic Affairs Bureau (including the Trade Practices Department). In general, the Investigation Bureau is in charge of investigations and issuance of orders.

3 Changes

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

No fundamental legislative amendment to the substantive law under the Antimonopoly Law or changes in the JFTC's enforcement thereunder with regard to cartels have been made since 2011, unlike those made in recent years to strengthen the power of the JFTC.

Having said that, amendment to the Antimonopoly Law abolishing the JFTC's administrative proceedings became effective as of 1 April 2015. Under the current Antimonopoly Law, JFTC orders are directly subject to review by judicial courts, without going through administrative proceedings, under the applicable administrative procedure laws. More specifically, a defendant company may file a complaint directly with the Tokyo District Court to quash such JFTC orders. Complaints to quash the JFTC orders will be examined by a panel of three or five court judges. The substantial evidence rule which is applicable to actions for quashing JFTC decisions before the Tokyo High Court and in which the court is bound by the JFTC's findings was abolished. Namely, the Tokyo District Court is not bound by the JFTC's findings of fact and a defendant company may submit evidence to the judicial court proceedings without such restrictions as imposed by the substantial evidence rule. A JFTC order will be quashed if the judicial court finds that the order is contrary to the laws. See question 14 regarding the current system with regard to the appeal process of JFTC orders.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Under the Antimonopoly Law, an agreement or understanding among competitors to eliminate or restrict competition among them that substantially restrains competition in a particular field of trade is prohibited as an unreasonable restraint of trade (article 3, latter part). While the Antimonopoly Law does not explicitly limit the scope of conduct in violation of the Antimonopoly Law as an unreasonable restraint of trade to that among competitors, the Tokyo High Court, in a 9 March 1953 decision, held that only restrictions among competitors constitute an unreasonable restraint of trade. Unreasonable restraint of trade by a trade association is also prohibited under article 8, paragraph 1, item 1 of the Antimonopoly Law.

Cartels and bid rigging are typical examples of an unreasonable restraint of trade prohibited under the Antimonopoly Law. Agreements that cover topics such as price fixing, production limitation, and market and customer allocation are typical examples of cartels. Note that joint activities, collaboration or alliance among competitors that have pro-competitive effects (and therefore should be subject to the rule of reason analysis) are also reviewed under the latter part of article 3 of the Antimonopoly Law.

While the latter part of article 3 of the Antimonopoly Law prohibits only conduct that substantially restrains competition in the relevant market, the JFTC seems to have enforced the Antimonopoly Law as though the law prescribes that such cartels are illegal per se, and the JFTC has not accepted the arguments of defendant companies.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There is no industry-specific conduct that constitutes an unreasonable restraint of trade (cartels) under the Antimonopoly Law.

Certain activities by small businesses, such as cooperatives qualified under the applicable laws, are exempted from the application of the Antimonopoly Law under article 24. Certain other joint activities among competitors are exempted from the application of the Antimonopoly Law by the provisions of other individual business laws over particular industries (such as the Road Traffic Act, the Maritime Traffic Act, the Insurances Act and the Air Aviation Act). In the foreign trade area, certain export cartels that meet the requirements provided in the Export and Import Act are also permitted to some extent.

The JFTC made public its understanding that unless the Antimonopoly Law or individual laws contain a relevant provision for exemption from the Antimonopoly Law, the Antimonopoly Law may be applied to any form of conduct that meets the conditions that would

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establish it as a violation of the Antimonopoly Law, even if it arose as a result of an approval, a recommendation, an instruction or administrative guidance by the governmental agencies.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Antimonopoly Law applies to the conduct of 'entrepreneurs', which includes both corporations and individuals. The trade association is also subject to the prohibition under the Antimonopoly Law.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Antimonopoly Law contains no provision expressly setting forth the JFTC's jurisdiction. However, the JFTC considers that it has jurisdiction over conduct that has an effect on the Japanese market, irrespective of where such activities are carried out. Therefore, the JFTC may have jurisdiction over cartel cases involving the Japanese market. With regard to the procedures to be followed under the Antimonopoly Law, the JFTC may use the public service for its inquiries or orders to defendant corporations outside Japan that do not have a presence in Japan. The provisions therefor indicate that the JFTC has jurisdiction over the conduct of such corporations outside Japan that have no presence (eg, a subsidiary, business office or agent) in Japan.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

When the JFTC discovers an alleged violation of the Antimonopoly Law in the form of an unreasonable restraint of trade by any means (such as through a complaint by a third party, information from an employee of the suspected corporation or an application under the leniency programme), the JFTC first conducts a feasibility study for the investigation, and then determines whether to conduct either an administrative investigation or compulsory measures for criminal offences under the Antimonopoly Law.

9 Investigative powers of the authorities

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

Compulsory investigation for criminal offences

The JFTC may inspect, search and seize materials in accordance with a warrant issued by a court judge under the Antimonopoly Law as part of the compulsory investigation of criminal offences.

The JFTC has made public that it will initiate a criminal investigation under the Antimonopoly Law where there is a considerable reason to suspect a malicious and material violation of the Antimonopoly Law, including cases involving price fixing, restriction of supply, market division and bid rigging; that an entrepreneur or industry is repeatedly violating the Antimonopoly Law; or that an entrepreneur is not complying with a cease-and-desist order and it is difficult to correct such conduct using the JFTC's administrative measures under the Antimonopoly Law. Where, as the result of the investigation, the JFTC is convinced that a criminal offence has taken place, it will file a criminal accusation with the Public Prosecutors' Office.

Administrative investigation by the JFTC

The JFTC may, on a compulsory basis, if necessary, during the conducting of an investigation of a case:

- order persons involved in a case or any other relevant person to appear at a designated time and place to testify or to produce documentary evidence;
- order experts to appear and give expert testimony;
- order persons to submit account books, documents or other material, and retain these materials (ie, production orders); and
- enter any place of business of persons involved in a case and any other necessary place to inspect the conditions of business operation and property, account books, documents and other material (ie, dawn raid).

The JFTC may also conduct investigations on a voluntary basis.

The JFTC usually conducts a dawn raid (a compulsory investigation) in a cartel or bid-rigging case. Having said that, a dawn raid requires the consent and presence of the manager of a corporation, who may approve the JFTC's entry onto the premises on behalf of the corporation, with regard to entry onto the premises of the suspected company for the dawn raid. The presence of a lawyer, including in-house counsel, is not a legal requirement to lawfully or validly conduct the dawn raid.

The JFTC removes originals of documents and materials held at the offices of companies during a dawn raid, either by an order or a request to which the investigated corporation responds on a voluntary basis. Note that the Rules on Administrative Investigations provide that persons who are ordered to submit materials are entitled to make photocopies of such materials, unless doing so would impede the investigation.

It is usual for the JFTC to question employees with regard to the subject matter of the investigation at the same time as the dawn raids (either at the site or the JFTC's office) and, in addition, after the completion of a review of materials and collection of information from other persons, to request such persons to respond to questions. The questioning is usually conducted by the JFTC on a voluntary basis with the consent of an individual to be questioned.

Further, the JFTC usually issues a report order requesting certain information, such as the types of product and the sales thereof, and a production order requesting the production of documents during the process of the administrative investigation, although it sometimes also requests that information, documents or both be submitted on a voluntary basis.

The Antimonopoly Law provides the criminal penalties (ie, imprisonment for up to one year or a fine of up to ¥3 million) for any individual that refuses, obstructs or evades inspection as provided in the Antimonopoly Law. Corporation can also be subject to a fine of up to ¥3 million.

International cooperation

10 Inter-agency cooperation

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

Yes. The legal basis of the cooperation is as follows.

In 1999, Japan and the US signed an Agreement Concerning Co-operation on Anticompetitive Activities, providing for coordination and cooperation with respect to antitrust enforcement activities. Under the Agreement, the competition authorities of each country are mutually bound to give notification of enforcement activities that may affect the other's interests.

Japan also entered into similar agreements with the European Commission in 2003 and Canada in 2005.

Moreover, Japan signed economic partnership agreements (EPA) with various countries, such as Singapore, Mexico, the Philippines, Malaysia, Thailand and Chile.

The JFTC has concluded memoranda on cooperation with competition authorities such as the Philippines (August 2013), Vietnam (August 2013), Brazil (April 2014) and Korea (July 2014).

The JFTC may exchange information with other competition authorities to some extent. See question 11.

11 Interplay between jurisdictions

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

Although the JFTC seems to have made no public announcement with regard to the scope and degree of the information actually exchanged pursuant to the above agreements with other competition authorities for particular cases involving cartels, there have been cases in which the competition authorities have apparently coordinated their investigations of conduct on a global basis.

The Antimonopoly Law stipulates that the JFTC may provide information to foreign competition authorities, excluding cases where 'proper enforcement' of the Antimonopoly Law 'may be disturbed or

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when interests of the country may be violated', although it is also stipulated that the JFTC must confirm that the confidentiality of information is firmly secured in foreign countries receiving information from the JFTC to the same degree as confidentiality is secured in Japan, and that measures must be taken to ensure that such information will not be used in criminal procedures overseas.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

If the JFTC, as a result of a compulsory investigation for criminal offences, determines that the alleged conduct constitutes a cartel in violation of the Antimonopoly Law and that criminal sanctions are appropriate, it files a criminal accusation with the Public Prosecutors' Office, and criminal sanctions under the Antimonopoly Law will be imposed on the corporation and individuals through the criminal procedures under the applicable laws in the same manner as for other criminal cases.

If the JFTC conducts an administrative investigation and issues a cease-and-desist order or a payment order for the administrative surcharge, or both, a defendant corporation that has an objection against such administrative orders may file a complaint, within six months after the service of the order, with the Tokyo District Court to quash such JFTC order, and the Tokyo District Court decisions over complaints to quash JFTC orders can be appealed to the Tokyo High Court and then to the Supreme Court.

Prior to the amendment to the Antimonopoly Law which became effective as of 1 April 2015, complaints to quash JFTC orders were examined through administrative proceedings presided by the administrative judges appointed and authorised by the chairperson and commissioners of the JFTC. JFTC orders, the relevant advance notice of which was rendered prior to 1 April 2015, shall still be subject to the administrative proceedings of JFTC pursuant to the Antimonopoly Law before the amendment.

Complaints to quash JFTC orders are examined by a panel of three or five court judges.

Since the substantial evidence rule in which Tokyo High Court is bound by the JFTC's findings of fact as long as they are supported by substantial evidence was abolished, the Tokyo District Court shall not be bound by the JFTC's findings of fact and a defendant company may submit evidence to the judicial court proceedings.

An appeal against a judgment rendered by the Tokyo High Court to the Supreme Court can be accepted if certain requirements set forth in the Civil Procedure Law are fulfilled.

13 Burden of proof

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

In a criminal case, the criminal procedures for a cartel are same as those for other crimes, and the burden of proof lies with the public prosecutors, who must prove the fact that constitutes the violation of the Antimonopoly Law without reasonable doubt. On the other hand, in appellate judicial proceedings (for challenging JFTC decisions), or civil proceedings involving claims for injunctions or damages, or both, a relatively relaxed standard of proof will apply. In these proceedings, the party with the burden of proof must prove that the alleged facts are 'highly probable'.

14 Appeal process

What is the appeal process?

See question 12.

Sanctions

15 Criminal sanctions

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

For an unreasonable restraint of trade, the Antimonopoly Law stipulates criminal penalties including a fine of up to ¥500 million for a corporation; and servitude (labour in a prison) for up to five years, a fine of up to ¥5 million, or both for an individual (such as an employee in charge of a cartel).

Although criminal penalties have been continuously imposed from the 1990s, ever since the price-fixing case involving the petroleum business in 1984, the number of criminal cases has been small. In February 2016, the JFTC filed a criminal accusation on bid rigging concerning the construction to restore roads after the East Earthquake.

The JFTC made public its reasons for filing an accusation in the given case, which included the effects of the given cartel on the national economy and knowledge of the participants to the bid rigging and to the violation of the Antimonopoly Law. To our knowledge, the judicial court, regarding individuals, has decided on suspended sentences where decisions involved imprisonment. We do not have statistics for sentences regarding criminal cases involving cartel cases.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Administrative sanctions – JFTC enforcement

If a violation of the Antimonopoly Law is supported by evidence, the JFTC may order the entrepreneur that committed the violation to cease and desist from such act and to take any other measures necessary to eliminate such act. The statutory limitation for the JFTC to issue cease-and-desist orders is five years after the conduct ceased. The cease-and-desist order is effective upon the service thereof to its recipient, and such recipient must comply with its terms, even if the recipient initiates administrative proceedings, unless the enforcement of such order is specifically suspended by a decision of the court or the JFTC.

The JFTC is required to order payment of an administrative surcharge by entrepreneurs found to have participated in an unreasonable restraint of trade that directly affects prices or that consequently affects prices by curtailing the volume of supply (price fixing or cartels on supply, market share or customers that affect prices).

The amount of the administrative surcharge is calculated as the following percentage of the sales of the products or services that are subject to the cartels for the period of the cartel concerned up to three years from the date such conduct ceased.

The rate of administrative surcharge under the Antimonopoly Law is as follows:

Principle

- Manufacturers, etc: 10 per cent;
- retailers: 3 per cent; and
- wholesalers: 2 per cent.

Small and medium-sized corporations

- Manufacturers, etc: 4 per cent;
- retailers: 1.2 per cent; and
- wholesalers: 1 per cent.

An administrative surcharge at a rate of 150 per cent of the respective rate set out above is imposed on those entrepreneurs, in general, that have repeated conduct in violation of the Antimonopoly Law and that have been subject to an administrative surcharge payment order within the past 10 years. On the other hand, the administrative surcharge rate shall be decreased by 20 per cent in certain circumstances (such as withdrawal from the cartel at an early stage).

An adjustment will be made through the system that, if both an administrative surcharge and criminal fines are imposed on the same entrepreneur based on the same conduct, the amount of administrative surcharge shall be calculated by deducting 50 per cent of the amount of the criminal fine.

Under the Antimonopoly Law, the administrative surcharge rates is increased by 50 per cent if a corporation planned conduct that constitutes an unreasonable restraint of trade in violation of the Antimonopoly Law; requested another corporation to act in violation of the Antimonopoly Law; or prevented other corporations from ceasing such conduct. Further, if the corporation that played a leading role in the conduct constituting an unreasonable restraint of trade is a corporation that has repeatedly acted in violation of the Antimonopoly Law within the past 10 years, the amended Antimonopoly Law provides that

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the administrative surcharge be calculated at a rate double that of the applicable surcharge.

The number of defendant companies to which the JFTC has imposed administrative surcharge orders was 277 in the 2011 fiscal year, 113 in the 2012 fiscal year, 181 for 2013 fiscal year, 128 in the 2014 fiscal year and 31 in the 2015 fiscal year. The total amount of administrative surcharge paid in each year was approximately ¥44 billion, ¥25 billion, ¥30 billion, ¥17 billion and ¥85 billion respectively.

Private actions – private enforcement

Although private enforcement of the Antimonopoly Law through civil damage suits by private plaintiffs is not as common in Japan as it is in the United States, a party (such as a competitor or a customer) that suffers damage from a cartel is entitled to undertake civil action for recovery of damages based on the provisions of strict liability under article 25 of the Antimonopoly Law or on the more general tort law provisions of the Civil Code. The Antimonopoly Law enables a plaintiff to claim compensation more easily. That is, if a suit for indemnification of damages or a counterclaim under the provisions of article 25 (strict liability) has been filed, the court is required, without delay, to request the opinion of the JFTC regarding the amount of damages caused by such violations.

Note that a legally interested person such as a plaintiff may review and reproduce the case records of administrative proceedings by the JFTC. Further, the JFTC made a public announcement in 1991 that it will provide plaintiffs with access to certain investigation records that the JFTC collects during its investigation through a request by the court if a damage suit is filed in the court, except for certain information such as trade secrets and privacy information. Through these procedures, documents protected by attorney–client privilege in other jurisdictions may be produced during judicial review in Japan.

Civil actions for an injunction under article 26 of the Antimonopoly Law are not available for the unreasonable restraint of trade.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

No sentencing guidelines are publicly available for Antimonopoly Law violations or for other crimes. The criminal penalties (servitude and fines) seem to be determined based on the scale or effects, the time period and maliciousness of the conduct in violation of the Antimonopoly Law, similar to other criminal cases involving the violation of economic illegal conduct.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Each governmental agency seems to have its own rules and such rules are not, to our knowledge, publicly available. However, based on our experience, the business of many corporations subject to investigation by the JFTC on the suspension of a cartel, or to which the JFTC's orders were rendered, was suspended, and such corporations were restricted from participating in bids presided over by the governmental agencies. The time period for the suspension seems to differ for the governmental agencies.

19 Parallel proceedings

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

When the JFTC finds an alleged violation of the Antimonopoly Law to be an unreasonable restraint of trade by any means (eg, a complaint by a third party, information from an employee of the suspected corporation or application under the leniency programme, or both), the JFTC first conducts a feasibility study for the investigation, and then determines whether to conduct either an administrative investigation or compulsory measures for criminal offences under the Antimonopoly Law. Both an administrative surcharge and criminal penalties can be imposed on the same entrepreneur based on the same conduct. If both the administrative surcharge and criminal fines are imposed on the same entrepreneur based on the same conduct, the amount of the administrative surcharge shall be calculated by deducting 50 per cent of the amount of the criminal fine. The JFTC made a public announcement that it will not file a criminal accusation against the corporation and an officer or employee of the 'first in' who is cooperative. Because the JFTC has exclusive rights to file a criminal accusation with regard to the violation of the Antimonopoly Law and the Public Prosecutors' Office is highly likely to respect such decision by the JFTC, in practice the 'first-in' corporation and the officer or employee thereof are exempt from the criminal sanctions with regard to the violation of the Antimonopoly Law.

Having said that, civil actions may be brought by a plaintiff to the court regardless of whether an administrative surcharge or a criminal penalty (or both) is imposed.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Private damage claims are available, although no triple damages are available in Japan. Namely, a party (eg, a customer) who suffers damage from a cartel is entitled to undertake civil action for recovery of damages based on provisions of strict liability under article 25 of the Antimonopoly Law or on the more general tort law provisions of the Civil Code. The Antimonopoly Law enables a plaintiff to claim compensation more easily. That is, if a suit for indemnification of damages or a counterclaim under the provisions of article 25 (ie, strict liability) has been filed, the court may, without delay, request the opinion of the JFTC regarding the amount of damages caused by such violations. Note that no compensation for punitive damages or triple damages is allowed. An indirect purchaser may file an action. However, the damages to be compensated under the applicable laws require, in civil proceedings, as in any civil tort cases, that the plaintiff alleging the defendant's violation of the Antimonopoly Law bears the burden of proof to demonstrate:

- the illegality of the defendant's conduct;
- damages;
- the causal relationship between the damages and the violation; and
- the negligence or wilfulness of the violator, the conclusion of which depends on whether the plaintiff may prove the causal relationship between the damages and the violation, if the plaintiff argues that indirect sales is within the scope of the damages.

See question 16 for further information about private damage claims.

21 Class actions

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

No class action is available with regard to violations of the Antimonopoly Law. Each plaintiff must file its complaint individually.

Cooperating parties

22 Immunity

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

An immunity (ie, a leniency) programme is provided under the Antimonopoly Law.

If an entrepreneur committing an unreasonable restraint of trade voluntarily and independently reports the existence of a cartel and provides related materials to the JFTC, and ceases such violation before the initiation of an investigation, immunity from or a reduction in the administrative surcharge payment shall be applied to such entrepreneurs as follows:

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Update and trends

No fundamental legislative amendments have been made to the substantive law under the Antimonopoly Law. Having said that, the bill of amendment to the Antimonopoly Law abolishing the JFTC's administrative proceedings was passed by the National Diet on 7 December 2013 and the amended Antimonopoly Law (the 2013 Amendment) was promulgated on 13 December 2013. The 2013 Amendment became effective on 1 April 2015. Under the 2013 Amendment, JFTC orders will be directly subject to review by judicial courts, without going through administrative proceedings, under the applicable administrative procedures laws. More specifically, a defendant company may file a complaint directly with the Tokyo District Court to quash such JFTC orders. Complaints to quash the JFTC orders will be examined by a panel of three or five court judges. The aforementioned substantial evidence rule applicable to actions for quashing JFTC decisions before the Tokyo High Court under the current law will also be abolished. Namely, the Tokyo District Court will not be bound by the JFTC's findings of fact and a defendant company may submit evidence to the judicial court proceedings without such restrictions as imposed by the substantial evidence rule. A JFTC order will be quashed if the judicial court finds that the order is contrary to the laws.

We have not seen material changes in cartel enforcement since 2010, while the JFTC seems to continuously put the priority of its investigations on price fixing cases and bid-rigging cases. Having said that the JFTC is working for the introduction of a administrative surcharge that the JFTC may impose on the defendant companies at its sole discretion.

- first applicant filed before the initiation of an investigation – total immunity;
- second applicant filed before the initiation of an investigation – 50 per cent deducted;
- third applicant filed before the initiation of an investigation – 30 per cent deducted; and
- any applicant filed after the initiation of an investigation – 30 per cent deducted.

The number of leniency applicants shall be up to five: up to five applicants before a dawn raid, and up to three applicants after the JFTC conducts a dawn raid if there are fewer than five before the dawn raid. A 30 per cent discount will be made for the third to the fifth applicants. A joint application for leniency may be made by multiple corporations within the same business group.

The corporation first in is totally exempt from the administrative surcharge. The JFTC made a public announcement that it will not file a criminal accusation against the first-in corporation, officer or employee thereof to cooperate. Because the JFTC has the exclusive right to file a criminal accusation with regard to the violation of the Antimonopoly Law, and the Public Prosecutors' Office is highly likely to respect such a decision by the JFTC, in practice this means that the first-in corporation and the officer or employee thereof is exempted from criminal sanctions. The suspension of transactions, which is customarily ordered by the relevant public offices (such as the ministries and local government authorities) with which the suspected corporation has business may be shortened. Having said that, the corporation cannot be discharged of civil liability.

23 Subsequent cooperating parties

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

Leniency is available for subsequent parties after the first to report, as follows:

- second applicant filed before the initiation of an investigation – 50 per cent deducted;
- third applicant filed before the initiation of an investigation – 30 per cent deducted; and
- any applicant filed after the initiation of an investigation – 30 per cent deducted.

The number of leniency applicants shall be up to five: up to five applicants before a dawn raid, and up to three applicants after the JFTC conducts a dawn raid if there are fewer than five before the dawn raid. A 30 per cent discount will be made for the third to the fifth applicants. A joint application for leniency may be made by multiple corporations within the same business group.

No immunity from the criminal accusation is available for the second and subsequent applicants.

24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The administrative surcharge is reduced by 50 per cent. While there is no 'amnesty plus' under the Antimonopoly Law, the 'second in' may be exempted from or have the administrative surcharge reduced by 100 per cent if it applies as first in for leniency for another cartel case. There is no exemption from criminal and civil liability for the second in.

25 Approaching the authorities

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

No deadline is provided under the Antimonopoly Law with regard to an application (ie, marker) with Form 1. However, the Antimonopoly Law limits the number of the applicants who may enjoy the immunity or decrease in the amount of administrative surcharges; the applicant must file as soon as possible before another applicant files an application.

With regard to the submission of detailed information and admission of conduct in violation of the Antimonopoly Law (Form 2) and evidence, the JFTC sets the deadline, usually two weeks. All or at least a substantial part of the information must be submitted to the JFTC in order for leniency to be granted.

26 Cooperation

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?

Full cooperation is required for the JFTC to grant the leniency (ie, all of the relevant information must be disclosed and all of the evidence available to the applicant must be produced for the JFTC). If the JFTC requires statements, oral statements by individuals are permitted. The level of cooperation is the same for all applicants (eg, the first and subsequent applicants). However, if the information or evidence is inconsistent, the JFTC will further investigate the case before granting leniency to applicants.

Cooperation with the JFTC regarding its investigation, other than those for leniency, has no legal effects.

27 Confidentiality

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

While the Antimonopoly Law provides the confidential obligation under the Antimonopoly Law for the JFTC officials in general, there are no specific provisions with regard to the confidentiality for leniency applicants under the Antimonopoly Law.

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The JFTC made a public announcement that the JFTC shall disclose the names of the applicants to which administrative surcharge is exempted or reduced and the exemption or reduced ratio thereof under the leniency program if the JFTC issues an administrative surcharge payment order for the case involving such an applicant on or after 1 June 2016. Before 31 May 2016, only when the applicants so desired the JFTC would make such information public so that the applicants may request to shorten the period for the suspension of the transactions with the relevant ministries and local governments.

The JFTC requests the applicants to keep the application and contact with the JFTC therefor in strict confidentiality, so that the JFTC may successfully investigate the case.

The JFTC allows applications with an oral explanation in certain circumstances, while an application must be filed in written form (see question 30). However, it can be difficult to go through the entire process of the leniency application with no written materials.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

No. Plea bargains, settlements or other binding resolutions between the JFTC or the Public Prosecutors' Office and defendant companies are not permitted.

29 Corporate defendant and employees

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

The administrative surcharge that is exempted or reduced is imposed on an entrepreneur, mainly a corporate defendant. While individuals who are first in line may be exempted from a criminal accusation, there is no such treatment for later applicants. The Antimonopoly Law does not distinguish between former employees and current employees; however, the JFTC will usually investigate the current employees of defendant corporations.

30 Dealing with the enforcement agency

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

The Leniency Rules make anonymous prior consultation available. A corporation contacting the JFTC for leniency will be informed of the expected order (marker) of the leniency application if it reports to the JFTC in order to apply for the leniency programme. The leniency applicant is required to file the relevant form with the JFTC by facsimile to prevent the JFTC from receiving more than one written report at the same time. The products or services that are subject to the violation, and the types of conduct in violation of the Antimonopoly Law, are required to be set forth in the form. The JFTC will inform the applicant of the priority of the first party (marker) and the deadline for submission of evidence and materials. The applicant will be required to submit the evidence and materials before the designated deadline using another form. If the JFTC so determines, certain parts of the material may be provided to the JFTC orally. Before an investigation begins, the JFTC will give priority to the corporation which submitted its initial report to request its application for the leniency programme by facsimile earlier than other entrepreneurs.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No ongoing policy discussions are publicly available with regard to the leniency programme.

Defending a case

32 Disclosure

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

The JFTC has a policy whereby it will provide plaintiffs with access to certain investigation records which the JFTC collects during its investigation, upon the request by a court if a damage suit is filed in the court, except for certain information such as trade secrets and private information.

33 Representing employees

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

Yes. Unless there is a conflict of interest or differences in the defence strategy, the lawyer who represents the corporation may represent the employee. However, in practice, if the individual's conduct becomes subject to a criminal sanction, an independent lawyer should represent such individual.

34 Multiple corporate defendants

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

Yes, legally speaking, unless a conflict of interest exists. However, after the leniency programme was introduced by the 2006 Amendment, it seems that multiple representation of suspected companies should be avoided.

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35 Payment of penalties and legal costs

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

Yes. However, the payment of legal fees and expenses to defend such employee may trigger the liability of the management of the corporation under the shareholders' derivative suits, unless such payment is for the purpose and effect of mitigating the company's liability. A company may not bear the criminal penalties on behalf of individual officers or employees.

36 Taxes

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

No. Neither criminal fines nor administrative surcharges are tax-deductible. Income tax is not imposed on the compensation awarded to plaintiff due to the conduct in violation of the Antimonopoly Law.

37 International double jeopardy

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

To our knowledge, there are no formal rules that are publicly available. However, we are under the impression that the JFTC is concentrating on activities that affect the Japanese market or customers. It is not clear whether the JFTC would enforce the Antimonopoly Law with regard to indirect sales as distinguished from direct sales.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The JFTC has no discretion to reduce administrative surcharges unless otherwise explicitly provided under the Antimonopoly Law (as the leniency programme). Therefore, to reduce the amount of the administrative surcharge, the suspected corporation must cease the cartel conduct as soon as it is found and produce evidence to show that the corporation ceased such conduct before the investigation, and, if possible, file an application for the leniency programme as the first in.

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Korea

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation is the Monopoly Regulation and Fair Trade Act (the Act).

2 Relevant institutions

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

In general, the Korea Fair Trade Commission (KFTC) enforces the law. The Commission is an independent administrative branch of the Korean government responsible for administrative investigation, prosecution and adjudication. It has nine commissioners, consisting of a chair, a vice chair, three standing commissioners and four non-standing commissioners. In addition, it has approximately 535 employees as of September 2016. Within the Secretariat of the Commission, the Cartel Investigation Bureau is primarily responsible for the administrative investigation and prosecution of cartels. As for criminal prosecution, upon receipt of a criminal referral from the Commission, the Prosecutors' Office has the authority to investigate and prosecute cartels for criminal punishment.

3 Changes

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

Yes. Under the 29 March 2016 amendments to the Act, which became effective on 29 March 2016, if a party that received a reduction or exemption from corrective measures or administrative surcharges based on its leniency application or cooperation with the investigation engages in a new cartel after such reduction or exemption, such party will no longer be eligible for any reductions or exemptions from corrective measures or administrative surcharges based on a leniency application or cooperation with an investigation for five years from the initial reduction or exemption from corrective measures or administrative surcharges (the relevant provision will become effective on 30 September 2016).

On 7 October 2015, the KFTC amended its Notification on the Detailed Standards for Imposition of Administrative Surcharges. Before the amendment, when administrative surcharges are imposed upon a sham bidder company that participated in bid-rigging, the relevant sales which are the basis for imposing the administrative surcharge are deemed to be the successful bidder company's contract amount (or the successful bid amount if a contract was not executed) and this could be reduced within the scope of a half. However, under the amendments, while the contract amount (or successful bid amount) could be reduced within the scope of a half if there are four or fewer sham bidder companies, if there are five or more sham bidder companies the contract amount may be reduced within the scope of N-2/N (N refers to the number of sham bidder companies). Also, as grounds for reduction of the administrative surcharge at the stage of calculating the final imposed administrative surcharge, the amendments added the 'degree of unjust enrichment actually obtained' by the company that engaged in the illegal act.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 19(1) of the Act generally prohibits 'any agreement' between or among competitors that unreasonably restrains competition. Specific types of conducts where agreements among undertakings are prohibited under the above provision are as follows: (i) fix, maintain, or alter prices; (ii) determine the terms and conditions for trade in goods or services or for payment of prices or compensation thereof; (iii) restrict the production, shipment, transportation, or trade in goods or services; (iv) restrict the territory of trade or customers; (v) hinder or restrict the establishment or expansion of facilities or installation of equipment necessary for the manufacturing of products or the rendering of services; (vi) restrict the types or specifications of goods at the time of production or trade thereof; (vii) establish corporation of the like with other undertakings to jointly conduct or manage important parts of businesses; (viii) decide the successful bidder, successful auctioneer, bidding price, highest price or contract price, and other matters prescribed by the Enforcement Decree of the MRFTA; or (ix) practically restrict competition in a particular business area by means of interfering or restricting the activities or contents of business by other undertakings (including the undertaking that has conducted the activity) other than the acts referred to in (i) to (viii) above.

In theory, cartels are not illegal per se; to be illegal, cartel behaviour must be unreasonably anticompetitive in a relevant market. In practice, however, the illegality of hard-core cartels is proven without much evidence of anticompetitiveness. Meanwhile, an agreement among undertakings is required in order to constitute illegal cartel activities, and, not only explicit agreements but also implicit agreements are included in such agreement. Moreover, according to article 19(5) of the Act, it may be assumed that there is an agreement among undertakings where there is a significant possibility that such undertakings collaboratively engaged in the applicable act (see question 13 for a more detailed explanation). In this case, if there is proof of direct or indirect contact or information exchange among undertakings, this may serve as circumstantial evidence that enforces the above assumption.

The Act provides for both administrative sanctions (such as administrative fines) and criminal prosecution. The Commission will file a criminal referral with the Prosecutors' Office if the violations are so objectively obvious and serious as to greatly restrain competition.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are some very limited statutory exemptions from the Act that apply to specific activities and that are provided for in the relevant statutes for specific industries such as export and import, small businesses, marine or air transport and agriculture.

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In principle, the same cartel regulations apply to government-regulated conducts as ordinary cases which do not involve government-regulated conducts. However, the application of the Act is excluded in the following cases: (i) where administrative agencies are granted by other laws the specific power to issue administrative dispositions to undertakings regarding competition factors such as prices, and undertakings agreed on prices, etc based on such administrative disposition; and (ii) where other laws stipulate that administrative agencies may provide administrative guidance to undertakings in regard to engaging in cartel activities that are prohibited under the Act and the administrative agencies induced the agreement among undertakings by providing administrative guidance in compliance with the relevant provisions of such laws and, as a result, the undertakings reached an agreement within the scope of such administrative guidance.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Act applies to both corporations and the individuals involved.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The law extends to conduct that takes place outside Korea if it has an effect on the relevant market in Korea. For example, in 2002 and 2003, the Commission imposed administrative fines on the foreign companies that participated in the graphite electrodes and vitamins cartels, respectively. In addition, in December 2008, the Commission imposed administrative fines on the four companies that participated in the Asian paper cartel following an investigation that was triggered by a leniency application and conducted in cooperation with the Australian Competition and Consumer Commission. Article 2-2 of the Act, which took effect on 1 April 2005, expressly provides for extraterritorial application of the Act.

The Korean Supreme Court is of the position that cases where 'activities have an effect on the Korean market' under article 2-2 of the Act should be limited to cases where the applicable activity that occurred outside of Korea has a direct, significant and reasonably foreseeable effect on the Korean market. However, if the Korean market is included in the subject of a collaborative agreement to restrain competition between undertakings outside of Korea, then such foreign activity (ie, the agreement to restrain competition) is subject to the application of article 19(1) of the Act since such agreement has an effect on the Korean market unless other special circumstances exist. Based on the above Supreme Court case, recently, the KFTC announced that it would amend article 2-2 of the Act to the effect that such provision may be applied to cases where there is 'a direct, significant and reasonably foreseeable effect' on the Korean market.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

In Commission proceedings, before an adjudication or decision is made, there are two stages: an investigation and a deliberation. In an investigation, the Commission typically conducts an onsite inspection of the suspected violators, seizes or requests documents, questions witnesses and requests information from the suspected violators. The Commission reviews information and documents obtained and, if appropriate, issues an examiner's report against the suspected parties. The parties are then allowed to examine the documents attached to the examiner's report, and to respond to it in writing and at an oral hearing. While respondents have three weeks to provide a written response to the examiner's report (two weeks for a case handled by a sub-committee), if the parent company of the respondent is located abroad or the contents of the case are complicated, the period to submit the response may be extended. The KFTC will hold the hearing within 30 days after it receives the written responses from the respondents (or, if a response is not submitted, 30 days from the date when the deadline for submission has expired). At the end of a hearing, a final decision is taken by the full college of the commissioners and then notified to the respondents. A written decision is issued several weeks or, in a complex case, several months after a final decision is taken internally.

It is difficult to generalise about the timing of cartel cases. However, from initial investigation to final disposition, they usually take at least one year and, more often, a few years. Once the KFTC has commenced an investigation of alleged illegal activities, it cannot issue corrective orders or impose administrative fines after five years has passed from the commencement of such investigation and, accordingly, the final disposition must be made within five years from the date of the initial investigation.

9 Investigative powers of the authorities

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

Under article 50 of the Act, the Commission has broad administrative investigative powers. The Commission may request the submission or production of information, documents or other materials (including computer records and electronic data), oral statements or written answers to questions. Such requests may be addressed to suspected violators, parties or witnesses. The Commission may appoint expert witnesses and request them to give their opinions. The Commission may seize any documents or materials so produced.

Commission officials may enter the business premises of suspected violators, examine books and records and other materials belonging to them, request the production of such books, records or materials, and request oral statements. The Commission may seize any documents or materials so produced.

No court approval is required for the above investigation procedures.

Anyone who obstructs Commission investigations or refuses to comply with any of the Commission's requests mentioned above is subject to administrative fines or criminal sanctions under the 22 June 2012 amendment to the Act. Prior to the amendment, only civil fines were imposed for any interference with Commission investigations; however, the amendment provides for criminal sanctions (ie, imprisonment of up to three years or a criminal fine of up to 200 million won, or both) for refusing, obstructing or evading a Commission investigation through means such as a verbal or physical assault or intentionally delaying or obstructing the entry of Commission officials onto the business premises. However, Commission officials have no power of forcible entry or search and seizure. Also, Commission officials have no general surveillance powers (including wiretapping).

As for criminal investigations by the Prosecutors' Office, upon receipt of a criminal referral from the Commission, as in other criminal cases, the Prosecutors' Office has broad powers to investigate, such as arrest or search and seizure. In order for prosecutors to conduct investigations including an arrest, search or seizure, warrants issued by the court are required.

International cooperation

10 Inter-agency cooperation

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

Korea cooperates with a number of other countries either through cooperation agreements (eg, with the EU) or MOUs (eg, with the US, Japan, China and Brazil). Although the level of cooperation in the past has been rather limited, there has been growing cooperation recently with these countries in cartel cases (eg, by conducting coordinated dawn raids in the *Air Cargo*, *LCD*, *CRT*, *Marine Hose* and *Electric Cable* investigations, or through informal exchanges of information in the investigation of individual cases, often with waivers obtained from cooperating companies). Korea actively participates in the OECD Competition Committee. In addition, Korea has actively participated in the International Competition Network (ICN) since its creation in 2001. Korea has also attended the annual East Asia Top-level Officials' Meeting on Competition Policy (EATOP) from 2005.

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11 Interplay between jurisdictions

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?

A cartel investigation in the US and the EU may increasingly lead to the Commission launching an investigation in Korea (eg, through coordinated dawn raids upon exchanges of information as in the *Air Cargo*, *LCD*, *CRT*, *Marine Hose* and *Electric Cable* investigations, or as in the *Graphite Electrodes* and *Vitamins* cartels).

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The Commission both investigates and adjudicates on cartel matters. Following an investigation by the officials of the Commission Secretariat, the full college of commissioners (except for in minor matters on which the decision may be taken by a chamber of three commissioners) begins a deliberation, which consists of at least an oral hearing. At the end of the deliberation, the decision is taken by the full college of commissioners.

13 Burden of proof

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

The Commission has the burden of proof in Commission proceedings. Until recently, article 19(5) of the Act provided, in effect, that once a unilateral action or parallel behaviour is established, a rebuttable presumption shall be created that an agreement existed, thereby shifting the burden of proof concerning the existence of an agreement onto respondents. The validity of the presumption has been disputed, and thus, effective from 4 November 2007, article 19(5) was amended to provide for a presumption only when certain circumstantial evidence of a meeting of the minds exists.

It may be said that the standard regarding the burden of proof that the KFTC has to establish regarding the existence of collaborative acts is 'highly probable'. While it is difficult to clearly define the applicable degree for 'highly probable' under Anglo-American law, it may be viewed as requiring a standard that is higher than the balance of probabilities standard.

In criminal proceedings, the burden of proof falls on the Prosecutors' Office. The prosecutor must establish the case through evidence that has evidentiary value to the degree that there is no reasonable doubt in the mind of the judge regarding the facts of the charges. This may be understood as requiring evidentiary value similar to that of beyond a reasonable doubt.

14 Appeal process

What is the appeal process?

Commission decisions may be reconsidered by the full college of commissioners upon application by respondents. The respondents may object to the decision of the KFTC within 30 days from receipt of the written decision from the KFTC. Commission decisions may also be appealed by respondents to the Seoul High Court. Commission decisions taken upon reconsideration may be appealed only to the Seoul High Court by the respondents. The respondents may appeal to the Seoul High Court within 30 days from receipt of the written decision from the KFTC or from the receipt of the decision on reconsideration. The Seoul High Court has exclusive jurisdiction to review the legality of the KFTC's decision, including the amount of any administrative fines imposed, through a panel composed of three judges. Generally, litigation procedures at the Seoul High Court take about six months to two years. From the Seoul High Court, either the Commission or the respondents may lodge an appeal to the Supreme Court; such appeal can be made within two weeks from the date of receiving the decision of the Seoul High Court. While a panel composed of four Supreme Court justices decides cases at the Supreme Court, in the event that such panel cannot reach a unanimous decision or there is a need to change a previous Supreme Court decision, the determination is made by a full panel, which is comprised of more than two-thirds of the 14 Supreme Court justices. The time it takes for the Supreme Court to render a decision varies for each case, and it is difficult to uniformly indicate such time frame.

Sanctions

15 Criminal sanctions

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

Corporate violators are subject to a criminal fine of up to 200 million won. Individuals are subject to imprisonment of up to three years or a criminal fine of up to 200 million won, or both. Under the Act, the KFTC must first make a referral to the Prosecutor's Office for a party to be indicted for illegal acts where criminal sanctions may be imposed. Meanwhile, as examined above, under the 16 July 2013 amendments to the Act, which became effective on 17 January 2014, the KFTC's obligatory referral obligations have been strengthened. Prior to the amendments, only the prosecutor general could make a request for referral to the KFTC. According to the amendments to the Act, the chair of the Board of Audit, the administrator of the Public Procurement Service or the administrator of the Small and Medium Business Administration may make a request to the KFTC to refer a case to the Prosecutor's Office. If such request for referral is made, the KFTC is obliged to make such referral. The amendments to the Act also explicitly recognise an exception to referral in the case of cartel activity leniency applicants.

The Commission is increasingly filing criminal referrals with the Prosecutors' Office against corporations as well as individuals. Upon investigation and indictment by the Prosecutors' Office, in most cases the courts imposed only criminal fines (rather than imprisonment) on individuals as well as corporations. To date, such trend appears to be continuing. In a small number of cases, the courts imposed imprisonment on individuals but with a suspension of execution. To date, the longest imprisonment sentence imposed was for two years with a suspension of execution for three years.

Number of cases where the KFTC made a criminal referral to the Prosecutor's Office

Year	Number of criminal referrals
2007	7
2008	5
2009	5
2010	1
2011	8
2012	2
2013	12
2014	36
2015	9
2016 (to August)	17

Source: Korea Fair Trade Commission

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The KFTC can impose administrative fines against corporate violators that engaged in cartels of up to 10 per cent of the relevant sales and, if there are no sales, an amount of up to 2 billion won. Relevant sales refer to the sales amount of relevant products or services, or an amount that is equivalent thereof, by the corporate violators during the violation period in a specific transacting sector. Corporate violators are also subject to a cease-and-desist order and other appropriate administrative corrective orders. While there are cases where only a corrective order is issued regarding cartel activities, in most cases an administrative fine is imposed along with the corrective order. There are no civil sanctions that may be pursued by the government.

The amount of administrative fines that are imposed on cartel cases is continuously increasing. Some of the recent examples of cartel cases where a large amount of administrative fine was imposed are

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as follows: the *Liquefied Petroleum Gas* case (2009), the *Refineries* case (2011), the *Life Insurance* case (2011), the *Steel Sheet* case (2012) and the *Honam Express Railway Construction Bid-Rigging* case (2014).

Number of cartel cases and total amount of administrative fines imposed by the Fair Trade Commission

Year	Number of cartel cases found guilty	Fines imposed (won)
1981 to 2001	359	Per year, average of 22,187 million
2002	47	53,109 million
2003	23	109,838 million
2004	35	28,759 million
2005	46	249,326 million
2006	45	110,548 million
2007	44	307,043 million
2008	65	205,325 million
2009	61	62,903 million
2010	62	586,000 million
2011	71	571,000 million
2012	41	398,939 million
2013	46	369,731 million
2014	76	1,125,923 million
2015	88	626,265 million
2016 (to August)	47	788,542 million

Source: Korea Fair Trade Commission

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

The KFTC's Notification on Detailed Standards Regarding Imposition of Administrative Fines is the guideline on the imposition of administrative fines and, as an administrative regulation, it has binding force internally at the KFTC.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

In the case of a party that engages in a cartel regarding government or public institution procurement, such party can be restricted from participating in a tender held by the government or public institution for a period of up to two years. The head of the relevant government or public institution has the authority to restrict such participation.

Currently, the Act on Contracts to Which the State is a Party (the Act in regard of the Operation of Public Institutions applies such Act) restricts the right of a party to participate in tenders for two years in the case of a party that led the cartel and was the successful bidder, one year in the case of a party that led the cartel and six months in the case of a party that participated in a cartel.

19 Parallel proceedings

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

As stated above, the Act provides for both administrative sanctions that may be pursued by the Commission and criminal sanctions that may be pursued by the Prosecutors' Office. However, article 71 of the Act provides for criminal prosecution only when the Commission files a criminal referral with the Prosecutors' Office. Under the Act, the Commission shall file a criminal referral with the Prosecutors' Office if it determines that a violation of the Act is objectively so obvious and serious as to greatly restrain competition, and the prosecutor general may request the Commission to file a criminal referral with the Prosecutors' Office when he or she believes that a violation of the Act is objectively so obvious and serious at to greatly restrain competition. In addition, article 315 of the Korean Criminal Code and article 95 of the Construction Industry Basic Law provide for the offence of bid rigging, which may be prosecuted by the Prosecutors' Office even without regard to receiving any criminal referral from the Commission. Consequently, both administrative sanctions and criminal sanctions can be pursued in respect of the same conduct.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Article 56 of the Act provides for awarding damages to a person who has suffered from a violation of the Act, such as cartel behaviour, unless the defendant companies prove that the violation was neither intentional nor negligent. When the amount of damages is difficult to prove with specific evidence, the court may award an amount of damages on the basis of overall evidence in the proceedings. Indirect purchasers may bring a damages lawsuit but may, depending on the case, have difficulty in establishing causation and the amount of damages. No punitive or exemplary damages are permitted (ie, only the actual damage amount that occurred due to the applicable cartel may be compensated). However, the National Assembly is currently discussing the possibility of adopting a system of punitive damages for illegal acts such as cartels. In addition, the litigation costs are borne by the unsuccessful party, and the successful party may make a request for payment of the stamp fee, delivery fee and a portion of the attorney fees (this is designated as a certain percentage of the value of the litigation under the law) to the unsuccessful party. Meanwhile, a lawsuit for compensation of damages is not limited to only direct purchasers; indirect purchasers are also permitted to raise such claims.

In the case of a civil damages claim based on cartel activities, to date there are no precedent cases where the defendants' pass-on defence was directly accepted or a detailed analysis was implemented regarding dual recovery issues. However, in its decision on the flour cartel case (Korean Supreme Court, case No. 2010Da93790, rendered on 29 November 2012), the Supreme Court determined that, if it is possible that damages were partially reduced based upon an increase in the price of the products, it would be valid to take into account such circumstances when calculating the amount of compensation of damages based upon the principle of fairness. In sum, in the above decision, while the pass-on defence was not directly accepted, the Supreme Court took into account that pass-on may have actually occurred and, accordingly, this was ultimately reflected when calculating the final compensation of damages amount at the stage of limiting the liability of the defendants.

21 Class actions

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

No class actions are permitted for a violation of the Act. If there are several parties that were injured due to a cartel, sometimes a lawsuit is commenced by several joint plaintiffs or, under the system of selecting a representative party from those injured from the cartel, a lawsuit is commenced by one plaintiff or a number of plaintiffs among those several parties that were injured. In such system, if several parties that have the same interest need to become joint parties to the litigation, a party that could represent all the parties is selected as the 'representative party' on their behalf; this system makes the litigation simpler and more convenient. The decision that the representative party receives from the court is also effective against those parties that selected the representative party. The difference between the representative party system and class action system is that, while the representative party is a party selected or authorised by several parties for joint litigation, the representative in a class action obtains permission from the courts

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without the authorisation from the injured parties and carries out the litigation on behalf of such injured parties. The National Assembly is discussing the possibility of adopting a class action system for parties that have been injured by illegal acts such as cartels.

Cooperating parties

22 Immunity

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

For the first time, in 1996, Korea adopted the leniency programme only for the first company to report. In 2001, the Act was amended to provide for leniency for a company who reported, or cooperated in the investigation of, a cartel. On 1 April 2005, the Commission issued the Notification on Implementation of the Leniency Programme for Corrective Measures Etc Against Confessors, which adopted a 'marker' system, required a leniency application to be in writing and allowed a maximum of 12 days within which to supplement evidence after receipt of a marker from the Commission. On 1 July 2006, the Commission amended the Notification, permitting oral applications for leniency and increasing the period for supplementation of evidence to 15 days, which may be extended by the Commission by up to an additional 60 days upon showing of a reason.

Under article 35 of the Enforcement Decree of the Act adopted in 2001, the first company to report the cartel to the Commission prior to the Commission's commencement of investigation would be given a reduction in administrative fine of no less than 75 per cent. After the commencement of a Commission investigation, the first to come forward to the Commission would be given a reduction in administrative fine of no less than 50 per cent. Other parties to come forward to the Commission and cooperate would be given a reduction in administrative fine of up to 49.99 per cent.

So long as a party comes forward to the Commission and cooperates with the Commission, even if it is not the first or second to do so, such company would benefit from the leniency programme. The Commission has discretion in determining the percentage rate of reduction in administrative fine within the permitted range for any leniency applicants. 'Amnesty plus' was not available under the 2001 rules, although the Commission has discretion in determining additional reductions similar to 'amnesty plus'.

Effective for cartel activity that started on or after 1 April 2005, article 35 of the Enforcement Decree of the Act was amended. Under the 2005 rules, the first to come forward to the Commission before or after the commencement of the Commission investigation and cooperate would be given an automatic reduction in fine of 100 per cent. The second to come forward to the Commission before or after the commencement of the Commission investigation and cooperate would be given an automatic reduction in administrative fine of 30 per cent, but effective on 4 November 2007, article 35 of the Enforcement Decree was again amended to increase the 30 per cent to 50 per cent for leniency applications made on or after the effective date.

Under the 2005 and 2007 rules, if a company is not first or second to come forward to the Commission and cooperate, such company will not benefit from the leniency programme. The Commission has no discretion in determining the percentage rate of reduction in administrative fine for leniency applications.

In addition, the 2005 rules provide for 'amnesty plus', granting an automatic reduction in administrative fine of between 20 per cent and 100 per cent, depending on the relative scale of the second cartel over the first cartel. The 2007 rules deny leniency to cartel participants who have forced others to participate or not to stop participating.

Joint leniency applications were not allowed until article 35 of the Enforcement Decree of the Act was amended, effective on 13 May 2009, and the Notification was amended effective on 19 May 2009, permitting joint leniency applications under certain circumstances. Joint leniency applications are now permissible by affiliate companies belonging to a same business group, provided that they were not competitors. Joint leniency applications are also permissible by both a transferor company and a transferee company of a transfer of a cartelised business, and by both the new company and the predecessor company of a corporate spin-off, provided that they did not participate in the same cartel at the same time.

Prior to the amendments in May 2009, leniency applicants had to terminate any cartel activity at the latest before the Commission rendered its final decision in order to qualify for leniency. Following the amendments, leniency applicants are now required to terminate the cartel activity immediately after their application in order to qualify for leniency, except when they are requested by the Commission to assist its investigation.

In the past, upward movement of leniency rank was available only if a higher-ranked leniency applicant failed to meet the leniency requirements. The May 2009 amendments, however, also provide for upward movement of leniency rank in the event of a voluntary withdrawal of a higher-ranked leniency application or a cancellation of higher leniency rank.

Article 35 of the Enforcement Decree of the Act was amended to take effect as of 22 June 2012. Under this amendment, in the case that two companies engaged in a cartel, the first company applying for leniency would be given a 100 per cent reduction in fine, but the second company would not be given any reduction in fine for leniency (although up to a 30 per cent reduction in fine may be available for 'voluntary cooperation'). In the case that three or more companies engaged in a cartel, no reduction in fine would be available to the second (or subsequent) company filing a leniency application after two years from the time the first company filed for leniency (again, although up to a 30 per cent reduction in fine may be available for 'voluntary cooperation').

A company whose leniency application has been accepted by the Commission will be exempt from criminal prosecution, except where the violation is objectively so obvious and serious as to greatly restrain competition. A company executive who sponsors a cartel on behalf of his or her company would be exempt from criminal prosecution under the same conditions as the company. On 1 November 2007, however, a considerable uncertainty arose to the exemption from criminal prosecution when, in a case for which the Commission filed a criminal referral against several participants other than two leniency applicants, the Prosecutors' Office indicted the two leniency applicants as well as all the other participants, on the belief that under the Criminal Procedure Act a Commission criminal referral against a participant would be deemed to be effective as against any and all of the participants in the same cartel. Similarly, the Prosecutors' Office indicted two executives of the corporate leniency applicants against whom the Commission did not file a criminal referral. The lower courts dismissed the indictments against the corporate leniency applicants and their executives on the ground that the indictments lacked proper criminal referrals from the Commission. The uncertainty has recently been resolved by the Supreme Court, which upheld the decisions of the lower courts in September 2010. Meanwhile, as examined above, under the 16 July 2013 amendments to the Act which became effective on 17 January 2014, an exemption from the obligation to refer a leniency applicant for cartel activities is explicitly recognised.

On 21 July 2011 the Commission revised the Notice to decrease the minimum reduction rate of 20 per cent to 'up to 20 per cent' for 'amnesty plus', and to enable the Commission to grant a total of longer than 75 days of supplemental period especially for international cartel cases.

Based on the 2 January 2015 amendment to the Notification on Implementation of the Leniency Programme for Corrective Measures Etc Against Confessors, the previous practice of having the secretary general of the KFTC provisionally confirm the marker of the leniency applicant was abolished and the Notification was amended so that the marker of the leniency applicant would only be confirmed through deliberation and adjudication by the Commission. In the past (ie, before 2015), under the Notification, when a marker was perfected by a leniency applicant, the secretary general of the KFTC issued a notice of provisional confirmation of the marker to the applicant, but some leniency applicants tended to slow down their cooperation with the KFTC's investigation once they had received such a provisional confirmation. Thus, in order to prevent leniency applicants from slowing down their cooperation after receiving a notice of provisional confirmation, the KFTC abolished the system of issuing a notice of provisional confirmation of a marker for a leniency applicant, by amending the above notification.

Based on the 15 April 2016 amendment to the Notification, the attendance of officers and employees of the leniency applicant at the

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hearing was added as one of the standards for determining whether the leniency applicant had 'faithfully cooperated'. According to the KFTC press release, such amendment was made since it was necessary to determine the credibility of the details in the leniency application and to prevent changes to previous statements by providing the commissioners with an opportunity to directly examine the relevant officers and employees.

As discussed in question 3, under the 29 March 2016 amendments to the Act, which became effective on the same date, if a party that received a reduction or exemption from corrective measures or administrative surcharges for its leniency applicant marker or cooperation with the investigation engages in a new cartel after such reduction or exemption, such party will not be eligible for any reductions or exemptions from corrective measures or administrative surcharges for its leniency applicant marker or cooperation with an investigation for five years from the initial reduction or exemption from corrective measures or administrative surcharges (the relevant provision will become effective from 30 September 2016).

Over the past several years, as the table below shows, the number of cartel cases in which the Commission accepted leniency applications has increased dramatically.

Number of cartel cases in which leniency applications have been accepted by the Fair Trade Commission

Year	Number of cartel cases in which leniency applications accepted	Fines imposed (won)
1999	1	314 million
2000	1	43 million
2001	0	–
2002	2	1,288 million
2003	1	3,433 million
2004	2	–
2005	7	173,673 million
2006	7	54,992 million
2007	10	221,373 million
2008	21	150,600 million
2009	17	42,000 million
2010	18	557,100 million
2011	32	552,200 million
2012	13	275,128 million
2013	23	352,312 million
2014	44	769,428 million
2015	48	406,020 million
2016 (to August)	19	686,566 million

Source: Korea Fair Trade Commission
Note: Fines after reduction

23 Subsequent cooperating parties

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

As examined in question 22, after the Enforcement Decree of the Act was amended in 2005, if a company is not first or second to come forward to the Commission and cooperate, such company will not benefit from the leniency programme. However, even if the leniency programme is not applicable, if an undertaking consistently acknowledges that it engaged in the applicable conduct and cooperates with the investigation from the investigation stage until the conclusion of deliberation, the amount of administrative fines imposed on such undertaking may be reduced within the scope of 30 per cent pursuant to the provisions of the Notification on Detailed Standards Regarding Imposition of Administrative Fines.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

See question 22.

25 Approaching the authorities

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

With respect to the first question, the application for immunity can be filed until the end of deliberation by the commissioners and there are no time limits in regard to filing prior to or after the time when the KFTC's investigation has commenced. However, in case of cartels involving two enterprisers, the second-rank leniency applicant must file its application for leniency within two years from the date on which the voluntary report of the first-rank leniency applicant was filed.

With respect to the second question, there is a marker system under the Notification on Implementation of the Leniency Programme for Corrective Measures Etc Against Confessors. If an applicant files for leniency with the Commission, the Commission official who receives such application will note the date and time, and rank or marker on such application, and will provide it to the applicant after signing off on such application. In the event that an applicant requires a significant amount of time to obtain evidentiary materials or there are special circumstances present where evidentiary materials cannot be submitted at the time of such application, an application that omits certain portions may be submitted. Under such circumstances, the applicant may be initially granted a 15-day supplemental period, which may be extended for up to 60 additional days if a valid reason is provided to the Commission. However, as an exception, if it is recognised that such extension is required in order to collect relevant evidentiary materials and obtain statements in international cartels, such extension may go beyond 60 days. If the applicant satisfies the applicable requirements and is confirmed for leniency by the Commission, then such application will be deemed to have been filed as of the time when the initial application was made.

26 Cooperation

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?

Under article 35 of the Enforcement Decree of the Act, a leniency applicant must faithfully cooperate until the conclusion of the KFTC investigation by, inter alia, making statements regarding all the relevant facts of the unfair collaborative acts and submitting the relevant materials, to receive a reduction or exemption of the corrective order or administrative fine, or both. According to the KFTC's Notification on Imposition of Corrective Measures and Operation of Leniency System for Leniency Applicants of Unfair Collaborative Acts, 'until the end of the investigation' refers to the period 'until the end of deliberation by the Commissioners', and whether a leniency applicant has faithfully cooperated is comprehensively determined based on the following factors:

- whether all the facts regarding the relevant collaborative acts known by the leniency applicant were provided in statements without undue delay;
- whether all materials regarding the relevant collaborative acts that were held or could be collected by the leniency applicant were promptly submitted;
- whether prompt responses and cooperation were provided regarding inquiries by the KFTC that were necessary to confirm facts;
- whether officers and employees (if possible, including previous officers and employees) made utmost efforts to continuously and truthfully cooperate, inter alia, during the KFTC's investigation and the examination process (including personal attendance of the hearing);
- whether evidence related to the collaborative acts was destroyed, manipulated, mutilated or concealed; and

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Update and trends

In a case where ramen noodle manufacturers exchanged information on their price increase plans and details thereof, the KFTC issued corrective orders and imposed administrative surcharges against such manufacturers (2012). On appeal, the Seoul High Court held that a cartel among the ramen noodle manufacturers existed by considering the following facts: (i) external conformity in ramen prices existed; (ii) ramen noodle manufacturers engaged in continuous meetings; and (iii) price information and other relevant information was exchanged (2013).

However, the Supreme Court held that the existence of information exchange alone is insufficient as evidence to establish the existence of a cartel. Rather, it opined that the existence of a cartel agreement has to be determined by comprehensively considering the following: the structure and characteristics of the relevant market, nature and details of the exchanged information, principal, timing and method of information exchange, purpose and intent of the information exchange, existence of external conformity or discrepancy among the involved enterprisers' prices and outputs after the information exchange, the process and details regarding such external conformity or discrepancy and other impacts on the market caused by the information exchange. The Supreme Court then reversed the decision of the Seoul High Court by considering, among others, the following facts: (i) some of the activities by the enterprisers were difficult to exist in a cartel; (ii) external conformity is difficult to find since some differences existed in the average rates of price increases; and (iii) information exchange cannot serve as per se evidence for establishing the existence of agreements to decide and maintain prices (2016).

- whether the facts regarding the illegal acts or leniency application were provided to a third party prior to the issuance of the examiner's report without the approval of the KFTC.

There is no particular difference in the obligation to cooperate between a first-ranked leniency applicant receiving a 100 per cent exemption of the administrative fine or a lower-ranked leniency applicant receiving a 50 per cent reduction of the administrative fine.

27 Confidentiality

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

The identity of leniency applicants and the information and evidentiary materials are treated as confidential. The investigations, hearings and decisions must be conducted or made in a manner so as not to disclose the information. However, the Commission may disclose the information 'if necessary for the bringing or carrying on a lawsuit relating to the case' in or for which a leniency application was made. In an administrative lawsuit regarding the Commission's disposition or a civil lawsuit for compensation of damages for a cartel, the relevant court may order the KFTC to submit leniency-related materials upon a motion by the parties. In such case, the KFTC should comply with such court order and submit the relevant materials. The degree of confidentiality protection afforded to lower-ranked leniency applicants is the same.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Not only are plea bargains and settlements for cartel activities not permitted by the KFTC, the consent decree system only applies to other violations of the MRFTA excluding cartel activities; they are also not permitted by the Prosecutor's Office and the courts.

29 Corporate defendant and employees

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

A company whose leniency application has been accepted by the Commission will be exempt from criminal prosecution, except where the violation is objectively so obvious and serious as to greatly restrain competition. Also, a company's current and former employees who sponsor a cartel on behalf of their company would be exempt from criminal prosecution under the same conditions as the company.

30 Dealing with the enforcement agency

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

See question 25.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No.

Defending a case

32 Disclosure

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

Among the materials attached to the examiner's report, the KFTC must disclose all materials to a defendant, excluding confidential materials necessary for the protection of trade secrets or privacy, materials related to the leniency application, and confidential materials prescribed under other statutes.

33 Representing employees

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

Subject to the Bar rules on conflicts of interest, counsel may represent those employees under investigation, as well as the corporation.

34 Multiple corporate defendants

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

Due largely to the leniency programme, in general, representation of multiple corporate defendants would neither be possible nor advisable. This is the case regardless of whether such corporate defendants are affiliated.

35 Payment of penalties and legal costs

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

In general, corporate internal rules and regulations may permit the corporation to pay the legal costs or penalties, or both, imposed on its employees for behaviour other than intentional violations or gross negligence.

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36 Taxes

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

Since administrative fines that are imposed due to cartel activities constitute 'public charges imposed as sanctions for non-performance of duties, or a violation of prohibitions or restrictions under Acts and subordinate statutes' under article 21(iv) of the Corporate Tax Act, they are not included as deductible expenses when calculating the income amount. In the case of civil compensation of damages, since they are not expenses that are generated from ordinary business activities, they are also not included as deductible expenses. In sum, both of the above amounts are not tax-deductible.

37 International double jeopardy

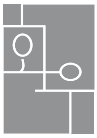
Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

Even if a company has had sanctions imposed on it by foreign competition authorities based on the same cartel activity, in principle this does not influence the KFTC's sanctions imposed for such cartel activity. However, with respect to criminal procedures, under article 7 of the Criminal Act, the criminal sanctions imposed in Korea may be reduced or exempted in the case of a party that already had criminal sanctions imposed on it abroad. To date, there are no precedent cases in civil damages claims where it was analysed or considered that the compensation of damages related to the applicable case was already made in other jurisdictions.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The best way to obtain leniency and reduce any administrative or criminal fine is to be the first to come forward to the Commission and cooperate fully, completely and in good faith. If a company that violated the MRFTA receives a rating of 'A' or higher in the assessment rating of its compliance programme, the KFTC may provide a one-time reduction of the administrative surcharge, but this does not apply in the case of cartel activities.



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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation is the Law on Protection of Competition published in the Official Gazette of the Republic of Macedonia No. 145/2010 in November 2010. This law has been amended and changed a few times. However, such amendments and changes do not affect the relevant provisions regarding cartels in the basic wording of the cited law.

General rules on misdemeanours and misdemeanour liability are regulated in the Law on Misdemeanours published in the Official Gazette of the Republic of Macedonia No. 124/2015.

More detailed rules about leniency are provided in the Decree on Further Conditions for Release from or Decrease of a Fine and on the Procedure in which the Misdemeanour Commission shall Render a Decision, which was adopted by the Commission for Protection of Competition in 2012.

Also, there are several by-laws made in 2012 that regulate relevant aspects related to prohibited agreements and potential exemptions. These are: Regulation on Group Exemption of Certain Agreements for Research and Development; Regulation on Group Exemption of Certain Agreements for Distribution and Servicing of Motor Vehicles; Regulation on Group Exemption of Certain Vertical Agreements; Regulation on Group Exemption of Transfer Technology Agreements, Licence Agreements and Know-how Agreements; Regulation on Group Exemption of Certain Horizontal Agreements for Specialisation; Regulation on Group Exemption of Certain Insurance Agreements; and Regulation on Agreements of Minor Importance.

In January 2015, the Commission for Protection of Competition, together with the Agency for Public Procurement published the Guide on Discovering of Illegal Agreements in Procedures of Awarding of Public Procurement Contracts. This guide provides explanations addressed to the governmental authorities and institutions and others which are obliged to apply public procurement rules on how to recognise cartels and related aspects in public tendering.

Aspects of incrimination of cartel activities are regulated by the Criminal Code of the Republic of Macedonia published in the Official Gazette of the Republic of Macedonia No. 37/1996, article 283 ('Preventing, limiting or causing distortion of competition'). This law is the subject of permanent changes and amendments. However, the relevant provisions of the Criminal Code for cartels were introduced from the very beginning of the implementation of this law in 1996. The last change of this law with regard to cartels was made in 2014.

2 Relevant institutions

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 Commission for Protection of Competition through the Misdemeanour Commission within the Commission for Protection of Competition investigates cartel matters as matter of competition law. It is in charge of investigation of the companies and issuing monetary fines. The Commission for Protection of Competition also applies relevant criteria arising from the competition rules in the EU in assessment of the forms of distortion of competition that may affect the trade between the Republic of Macedonia and the EU, in accordance with article 69 of the Stabilisation and Association Agreement concluded between the Republic of Macedonia and the EU and its member states.

The right to judicial protection against decisions of the Commission for Protection of Competition, including decisions of its Misdemeanour Commission, is possible by filing an administrative lawsuit to the Administrative Court of the Republic of Macedonia. Further appeal is allowed against decisions of the Administrative Court of the Republic of Macedonia before the Higher the Administrative Court of the Republic of Macedonia.

In the case of criminal liability, the public prosecutor's office is in charge. The competent courts would be the authorised forum for deciding upon indictments in cartel cases.

3 Changes

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

The last changes to the cartel regime were made in 2014 by amending the Criminal Code of the Republic of Macedonia. This amendment was caused by a collision between the provisions of the Law on Protection of Competition and the Criminal Code from the aspect of application of leniency. This issue was resolved by amending the Criminal Code provisions related to cartels as a criminal offence. At the time of writing and pursuant to the publicly available sources, there is no current proposal to change the cartel regime.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Law on Protection of Competition is the substantive law on cartels.

Cartels are defined as agreements and decisions and/or concerted practices between two or more undertakings intended to coordinate their competitive behaviour on the market and/or influence the relevant parameters of competition, especially by fixing the purchase or selling prices or other trading conditions, limit the production or establish sales quotas, share the markets, make arrangements for participation in tenders, limit the import or export, and/or anticompetitive behaviour towards other undertakings – competitors to the cartel participants.

As a general legal frame, this law further determines which agreements concluded between undertakings, decisions of associations of undertakings and concerted practices in particular would be prohibited as follows:

- directly or indirectly fix the purchase or selling prices or any other trading conditions;
- limit or control the production, market, technical development or investments;
- share the market or the sources of supply;
- apply dissimilar conditions to equivalent or similar transactions with other trading partners, thereby placing them in less favourable competitive position; or
- make the conclusion of the agreements subject to acceptance of supplementary obligations by the other contractual parties, which

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by their nature or according to the commercial customs are not connected with the subject of the agreement.

As a legal consequence of such acts, the Law on Protection of Competition provides that such agreements or decisions or certain provisions thereto are null and void. However, any determination that a prohibited agreement and/or decision or practice is in place and that, therefore, a misdemeanour has been committed, would be subject to prior investigation of the market and other relevant data by the Commission for Protection of Competition and a determination of the effects of such provisions on the market.

Under the Law on Misdemeanours, a legal entity shall be liable for a misdemeanour, where the law so provides, if the misdemeanour has been committed by an action, an omission or a failure to exercise due supervision by the competent body or by the responsible person in the legal entity, or by an action or an omission of another person authorised to act on behalf of the legal entity, within the scope of its supervision, or when such person has overstepped its authorisations in order to achieve a benefit for the legal entity. Negligence on part of the responsible person in the legal entity shall be sufficient to establish misdemeanour liability for the legal entity. A foreign legal entity shall be liable for a misdemeanour if the misdemeanour was committed on the territory of the Republic of Macedonia or if the misdemeanour caused effects on the territory of the Republic of Macedonia.

The Criminal Code of the Republic of Macedonia provides for general determination, ie, it refers to agreement or participation in the concluding of an agreement, decision or agreed behaviour, prohibited by law, and aiming to prevent, limit or cause competition disorder.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

Applicable competition legislation does not deal with specific industries. However, clear rules are established in functioning of the regulated sectors such as banking, insurance, energy and telecommunications by relevant laws and regulations.

On the other hand, the Law on Protection of Competition implies certain exceptions to the general rules on prohibited agreements.

The provisions on prohibited agreements shall not apply to agreements, decisions of associations of undertakings and concerted practices that contribute to the improvement of the production or distribution of goods or services or to the promoting technical or economic development, while allowing consumers a fair share of the resulting benefit, and which do not impose on the undertakings concerned restrictions, which are not indispensable to the attainment of these objectives and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Furthermore, as an exception and when necessary for the purpose of protecting the public interest, the Commission for Protection of Competition may ex officio by a decision determine that the prohibition is not to be applied on a particular agreement, decision of association or concerted practice under the terms and conditions provided by the law.

Also, in general, provisions on prohibition shall not apply to the agreements of minor importance (ie, any agreement wherein the joint market share of the parties in the agreement and the undertakings under their control on the market does not exceed the threshold of 10 per cent in the case of horizontal agreement or the threshold of 15 per cent in the case of vertical agreements). Where it is not possible to determine whether the agreement is horizontal or vertical, the threshold of 10 per cent shall apply. This exception also applies if the market share of the undertaking has not increased by more than 2 per cent in the previous two business years.

'Block exemptions' apply to: (i) vertical agreements on exclusive distribution right, selective distribution right, exclusive purchase and franchise right; (ii) horizontal agreements on research and development, or specialisation; (iii) agreements on transfer of technology, licence or know-how; (iv) agreements on distribution and repair of motor vehicles; (v) insurance agreements; and (vi) agreements in the transport sector. The relevant by-laws cited in question 1 determine the conditions that the agreement must contain, as well as the limitations or conditions that such agreements are not allowed to contain and the other conditions that have to be met.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Law on Protection of Competition applies to 'undertakings' – defined as any type of business venture, regardless of the manner of organisation and form of management (trade company, sole proprietor, cooperative society, association of undertakings, etc), freelance professions (lawyers, doctors, architects, accountants, notaries, etc), public undertakings established for the purpose of carrying out activities of public interest, as well as any other legal entity or natural person, institution, and other legal entity and natural person having public powers or any state administrative body engaged in conducting an economic activity, no matter if they are deemed commercial entities or not.

The Criminal Code applies to individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The extraterritoriality principle applies in Macedonian legislation. The Law applies to agreements, decisions and concerted practices that produce effects on the territory of the country, even if they are caused with acts and actions carried out or undertaken by the undertakings outside of the territory of the Republic of Macedonia.

It further provides that the assessment of various forms of prevention, restriction or distortion of competition, that may affect the trading between the Republic of Macedonia and the EU, in accordance with article 69 of the Stabilisation and Association Agreement, concluded between the Republic of Macedonia and the EU and its member states, the criteria arising from the proper application of the rules regulating competition in the EU shall be accordingly applied.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The procedure against cartels would be initiated as a misdemeanour procedure at the Misdemeanour Commission within the Commission for Protection of Competition.

It may be initiated ex officio, on a request of the secretary general of the Commission for Protection of Competition or on a request of a natural person or legal entity having a legitimate interest in determining the existence of a misdemeanour. If the natural person or legal entity having a legitimate interest wishes to remain anonymous or a request which does not contain data on its submitter is submitted, the Misdemeanour Commission shall conduct a procedure ex officio, provided that it determines that a significant distortion of competition may occur.

The Misdemeanour Commission shall initiate the misdemeanour procedure by a conclusion against which no appeal or lawsuit for initiation of an administrative dispute shall be allowed.

The Misdemeanour Commission shall mandatorily initiate a procedure, provided that it determines that a significant distortion of competition may occur.

The criminal proceeding would be initiated either by the public prosecutor's office or on the basis of a reporting by any third party.

9 Investigative powers of the authorities

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

The Law on Protection of Competition provides the Misdemeanour Commission with wide powers in the process of investigation of misdemeanour and collection of evidence and therefore court approval for the actions cited below is not required.

The Misdemeanour Commission can by a conclusion request from the undertakings to submit data regarding their economic and financial status, their business relations and connections, data regarding

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their statutes and decisions, the number and identity of the persons concerned by such decisions, as well as other data necessary for conducting the procedure. Failure to submit the data within the requested deadline, the submission of false, incomplete data or data that may mislead the Misdemeanour Commission shall constitute a misdemeanour.

If any of the data constitutes a business secret, the undertakings shall be obliged to clearly mark such data and to indicate the legal basis for their classification as business secret. When submitting data that constitute a business secret, the undertakings shall be obliged to deliver to the Misdemeanour Commission one copy where the data that constitutes a business secret are included (confidential version) and one copy where the data that constitutes a business secret (non-confidential version) are deleted. If the undertakings deliver only the confidential version of the requested data, by marking the data that constitutes a business secret, the Misdemeanour Commission shall request delivery of the non-confidential version of the requested data within a time period of three days as of the day of receipt of the request. If the undertakings fail to deliver the non-confidential version of the requested data within that time period, the Misdemeanour Commission shall deem that the delivered data does not contain data that constitutes a business secret.

It further empowers the Misdemeanour Commission in the case of justified suspicion that a particular undertaking possesses documents or other items or knowledge that could be of importance for proving the existence of a misdemeanour, to be granted by the concerned undertaking to:

- unhindered access to any business premises, land or means of transportation of the undertaking being of importance for determining the existence of a misdemeanour;
- unhindered examination of the books or other documents being of importance for determining the existence of a misdemeanour, regardless of the medium where these are stored;
- unhindered taking or keeping copies or extracts from those books or documents in any form;
- unhindered temporary taking and keeping of the books or the other documents being of importance for determining the existence of a misdemeanour for a period necessary for their copying, provided that they cannot be copied on the spot;
- unhindered temporary taking and keeping of items, books or other documents being of importance for determining the existence of a misdemeanour for a period necessary for determining the relevant facts and evidence arising from such items, books and documents, but not longer than the legally valid conclusion of the procedure;
- unhindered sealing of the business premises and the books or the other documents for a period and to the extent necessary for the examination, but not for longer than seven days;
- an authorised person or other employee in the undertaking who is to explain the facts or documents being of importance for determining the existence of a misdemeanour in minutes; and
- an authorised person or other employee in the undertaking who is to give a written explanation about the facts or documents being of importance for determining the existence of a misdemeanour within a determined time period.

However, the law provides the Misdemeanour Commission with the general right to unhindered carrying out of the other activities being of importance for determining the existence of a misdemeanour.

The public prosecutor's office has all the powers to legally investigate any justified suspicion for committed crime. During the investigation, the Public Prosecutor shall collect evidence and data which are needed in order for the Public Prosecutor to decide whether or not a charge will be brought against a suspect. The Public Prosecutor is required to collect evidence that go against the suspect, but also evidence that are in favour of the suspect. For the purposes of the investigation, the Public Prosecutor may order the following actions to be taken: search of premises or person, temporary securing or confiscation of possessions and property; examination of the suspect and of witnesses, collecting forensic evidence, inspection of sites, reconstructing events, and special investigation measures (such as wiretapping).

International cooperation

10 Inter-agency cooperation

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

Under the Law on Protection of Competition, the Commission for Protection of Competition shall carry out the activities of international cooperation related to the implementation of international obligations of the Republic of Macedonia transferred within the competence of the Commission for Protection of Competition, shall participate in the implementation of projects of international bodies and bodies of the EU, and shall cooperate with the bodies of the other countries and institutions in the field of competition.

The Commission for Protection of Competition has developed cooperation with regional competition authorities, especially through holding international conferences and working group meetings.

Furthermore, under the Law on Protection of Competition, in the performance of its responsibilities, the Commission for Protection of Competition shall cooperate with other state bodies and organs regarding issues related to the protection of competition. The Commission for Protection of Competition and the state bodies and organs shall be obliged to exchange data and information necessary for discharging their responsibilities, the scope of which is limited to data and information appropriate and proportionate to the purposes for which they are exchanged.

In this regard, the Commission for Protection of Competition has entered into the Memorandums of Understanding with several regulatory agencies in the Republic of Macedonia such as the Audio-Visual Agency, Agency for Electronic Communications, Agency for Regulation of Railway Sector and the Regulatory Energy Commission. The most recent Memorandum of Understanding was signed in May 2015 with the Ministry of Interior for exchange of data, experiences, knowledge, education and improvement of experts.

11 Interplay between jurisdictions

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 are no publicly available data on such interplay with the Macedonian jurisdiction in cross-border cases.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The Misdemeanour Commission is tasked with establishing the facts in the reported case and has powers to collect evidence in this regard, including by holding oral hearings.

For the purpose of providing the participants in the procedure with the possibility to state their opinion on the relevant facts and circumstances, the Misdemeanour Commission, prior to scheduling the oral hearing, submits to the participants a preliminary statement of objections raised against them. The participants in the procedure shall have the right to state their views in writing regarding the findings contained in the statement of objections, to give comments and to propose new evidence that they have at their disposal and that, in their opinion, are relevant for proper determination of the facts within a period of 15 days as of the day of receipt of the statement of objections.

Prior to the adoption of the final decision in the procedure, the Misdemeanour Commission shall deliver a final statement of objections to the participants in the procedure.

If the facts determined in the course of the procedure show that a misdemeanour foreseen by the provisions of the Law on Protection of Competition has been committed, the final statement of objections shall also contain a statement about the type and the amount of the misdemeanour sanction to be pronounced, as well as explanation of the circumstance taken into consideration in the process of determination of the sanction.

The participants in the procedure shall have the right to state their views in writing about the objections contained in the final statement

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of objections within a period of eight days as of the day of its receipt. The participants in the procedure shall have the right to propose new evidence, provided that they have not been at their disposal at the moment when stating their views to the preliminary statement of objections.

Note, however, that following the initiation of the procedure by the Misdemeanour Commission, and until the delivery of the final statement of objections at the latest, the person against whom a procedure is initiated may propose to the Misdemeanour Commission to undertake commitments by which the distortion of competition caused by actions or omissions by the person against whom the procedure is initiated shall be overcome.

The Misdemeanour Commission by a conclusion shall not accept the proposed commitments in case of a significant distortion of competition. No appeal or lawsuit for initiation of an administrative dispute shall be allowed against the conclusion. The Misdemeanour Commission shall by a conclusion accept the proposed commitments, provided that they are sufficient for overcoming the distortion of competition caused by actions or omissions by the person against whom the procedure is initiated. The conclusion whereby the proposed commitments are accepted shall contain a description of the commitments, deadline for their fulfilment, and commitment for the person against whom the procedure is initiated to provide evidence that the commitments are fulfilled. No appeal or lawsuit for initiation of an administrative dispute shall be allowed against the conclusion.

Prior to making a decision to accept, that is, refuse the proposed commitments, the Misdemeanour Commission shall publish a short description of the case and the proposed commitments on the website of the Commission. All interested parties shall have the right to submit written comments to the Misdemeanour Commission within 15 days as of the day of publication.

If commitments are proposed, the procedure before the Misdemeanour Commission shall be in abeyance until the expiry of the period determined in the conclusion by which the Misdemeanour Commission has accepted such commitments. If no evidence is submitted that the commitments are fulfilled after the expiry of that period, the procedure before the Misdemeanour Commission shall continue.

If the Misdemeanour Commission determines that there are no legal conditions for conducting a procedure due to fulfilment of the undertaken commitments, it shall by a conclusion terminate the procedure against which no appeal is allowed. A lawsuit for initiation of an administrative dispute with a competent court may be filed against this conclusion within eight days as of the day of receipt of the conclusion.

If no commitments have been proposed, then, after the Misdemeanour Commission fully establishes the factual condition being of importance for proper making of the decision, it shall adopt: a decision whereby it shall establish that the person against whom the procedure is initiated has committed a misdemeanour provided for by the provisions of the Law on Protection of Competition and shall impose a corresponding misdemeanour sanction; or a decision whereby it shall establish that the person against whom the procedure is initiated has not committed a misdemeanour provided for by the provisions of the Law on Protection of Competition.

Within a period of 30 days as of the day of receipt of the final decision of the Commission for Protection of Competition may order to the perpetrator of the misdemeanour necessary behavioural and structural measures for elimination of the harmful effects from the distortion of competition which have occurred due to the misdemeanour and to determine deadlines for their implementation. Prior to the adoption of such decision, the Commission for Protection of Competition shall provide the perpetrator of the misdemeanour with the opportunity to state its opinion in writing regarding the measures and the deadlines within eight days as of the day of receipt of the request for an opinion.

13 Burden of proof

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

The Commission for Protection of Competition has the burden of proof to evidence the existence of cartel misdemeanour. The law does not specify the level of proof required.

14 Appeal process

What is the appeal process?

The decisions of the Misdemeanour Commission within the Commission for Protection of Competition are final. A lawsuit for initiation of an administrative dispute with the Administrative Court of the Republic of Macedonia may be submitted against such decisions. Such lawsuit should be submitted within a preclusive period of eight calendar days as of the day of receipt of the decision and it shall postpone the enforcement of the decision.

In the case of a court judgment finding that the criminal offence 'Preventing, limiting or causing distortion of competition' has been committed, the defendant has the right to file an appeal to the competent appellate court in term of 15 calendar days as of the day of receipt of the judgment. Extraordinary legal remedies against the final judgment are also available under certain conditions before the Supreme Court of the Republic of Macedonia.

Sanctions

15 Criminal sanctions

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

The Criminal Code of the Republic of Macedonia provides criminal liability for cartels for individuals only. Namely, pursuant to the wording of the criminal offence incriminated by article 283 of the Criminal Code, the responsible person in the legal entity who shall conclude an agreement or shall participate in the concluding of an agreement, decision or agreed behaviour, prohibited by law, and aiming to prevent, limit or cause competition disorder, and thus the legal entity obtains property benefit of greater extent or causes damage of greater extent, shall be sentenced to imprisonment of one to 10 years. However, the responsible person in the legal entity shall be released from the punishment, provided that he or she has discovered or has contributed considerably in the discovery of the conclusion of the agreement, the adopted decision or the agreed behaviour prohibited by law, resulting in determination, that is, reduction of the fine for the legal entity by the competent body for protection of competition in the procedure for determination of cartel existence, in accordance with the rules for protection of competition.

Based on the publicly available information, there is no practice with regard to this particular criminal offence in order to provide relevant analysis with regard to differences in sentencing.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Regarding the civil sanctions, the Law on Protection of Competition provides as legal consequence for prohibited agreements, decision and concerted practice their absolute invalidity. In addition, this Law provides for a right to be compensated to any person that has suffered damages as result of any action prohibited by the provisions of the Law on Protection of Competition. The damages will be determined and assessed in accordance with the rules of the civil law. Maximum or minimum limits to such damages are not prescribed by law.

As consequence of determined misdemeanour in case of cartels, a fine in an amount of up to 10 per cent of the value of the total annual income of the undertaking realised in the business year preceding the year of the misdemeanour, shall be imposed against the legal entity, it has concluded prohibited agreement or has in other manner taken part in an agreement, decision or concerted practice which prevents, restricts or distorts competition. The Law also provides that besides the imposed fines, a misdemeanour sanction in a form of a temporary ban for performing certain business activity in duration between three to 30 calendar days may also be imposed against a legal entity that committed a misdemeanour. The same ban also applies to the individual with a capacity of an undertaking, but with duration of such sanction between three to 15 calendar days.

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17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

The basic criteria for setting the fine are gravity and duration of misdemeanour and degree of distortion of competition and the effects caused by the misdemeanour.

When setting the fine, the Misdemeanour Commission shall first determine a basic amount of the fine and shall then adjust it taking into consideration the mitigating or aggravating circumstances.

The basic amount of the fine shall as a rule amount up to 30 per cent of the revenue of the perpetrator of the misdemeanour generated from the activity carried out at the relevant market where the misdemeanour has been committed in the last complete business year in which the perpetrator of the misdemeanour participated therein. The amount determined in such a manner shall be multiplied by the number of years during which the misdemeanour lasted.

Such determined amount shall be adjusted by taking into consideration the mitigating or aggravating circumstances, as a result of which it may be reduced or increased.

Mitigating circumstances that are taken into consideration when setting the fine shall in particular include the cases when:

- the perpetrator of the misdemeanour has submitted evidence that its involvement in the misdemeanour is minimal and it proves that while being a participant in a prohibited agreement, it actually has avoided its application acting in a competitive manner on the relevant market; and
- the perpetrator of the misdemeanour has effectively cooperated with the Commission for Protection of Competition or the Misdemeanour Commission, regardless of the application of leniency.

Aggravating circumstances that are taken into consideration when setting the fine shall in particular include the cases when:

- the Misdemeanour Commission determines that a misdemeanour foreseen by the provisions of the law has been committed and the perpetrator of the misdemeanour continues to commit the misdemeanour or repeats the same or similar misdemeanour. In such a case, the basic amount may be increased by up to 100 per cent for each misdemeanour determined in such a manner;
- the perpetrator of the misdemeanour has refused to cooperate or has obstructed the Commission for Protection of Competition or the Misdemeanour Commission from conducting the procedure; and
- the perpetrator of the misdemeanour has had the role of a leader or instigator of the misdemeanour. The Misdemeanour Commission shall in particular take into consideration whether the perpetrator of the misdemeanour has taken activities directed at instigating other undertakings to take part in the misdemeanour and/or has taken any vindictive measures against other undertakings with the aim of forcing them to take activities that constitute a misdemeanour.

The Misdemeanour Commission may increase the basic amount of the fine to a perpetrator of a misdemeanour having particularly high revenues generated from other activities, and not only from the activity carried out on the relevant market where the misdemeanour has been committed in order to reach a deterrent effect of the fine.

The Misdemeanour Commission may increase the basic amount of the fine to a perpetrator of a misdemeanour in order for the fine to exceed the amount related with unfounded enrichment arising as an effect of the misdemeanour, provided that such an amount may be calculated.

The Misdemeanour Commission, on a request of the perpetrator of the misdemeanour, and when setting the fine, may take into consideration its insolvency in a specific social and economic context. The decrease of the fine on this ground cannot be made where the perpetrator of the misdemeanour has financial losses incurred for the purpose of avoiding the payment of the fine. The decrease of the fine can be made only if the perpetrator of the misdemeanour presents evidence that the fine set in accordance with these provisions could endanger the financial power of the perpetrator and could cause loss in value of its assets.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not provided as automatic or available as a discretionary sanction for cartels constituting a misdemeanour under the Law on Protection of Competition or the criminal offence of 'Preventing, limiting or causing distortion of competition' under the Criminal Code of the Republic of Macedonia. However, the Commission for Protection of Competition has the right to impose against the perpetuator certain structural or behavioural remedies in certain period of time.

19 Parallel proceedings

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

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions may be pursued in respect of the same conduct.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Any party that has suffered damages caused by illegal act, ie, under the prohibited agreement, decision or concerted practice may claim damages in a civil proceeding at the relevant court. Such damages may include cost awards as damages.

21 Class actions

Are class actions possible? If yes, 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 specific provisions have been implemented with regard to the class actions. Therefore, the same rule as under question 20 would apply.

Cooperating parties

22 Immunity

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

The Misdemeanour Commission can grant leniency under certain terms and conditions.

Misdemeanour Commission on a request of the undertaking having admitted its participation in a cartel shall grant full immunity from the fine which, as a rule, would otherwise be imposed on that undertaking if it:

- first presents evidence enabling the Misdemeanour Commission to initiate a misdemeanour procedure; or
- first presents evidence enabling the Misdemeanour Commission to complete the already initiated misdemeanour procedure with a decision establishing the existence of a misdemeanour if the existence of the misdemeanour could not be established without such evidence.

If the undertaking that has admitted its participation in a cartel that constitutes a misdemeanour fails to meet the requirements for full immunity from the fine, then there is a possibility for a fine to be reduced if it submits additional relevant evidence being of decisive

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importance for adoption of a decision establishing the existence of a misdemeanour to the Misdemeanour Commission.

The immunity, ie, the reduction of the fine shall apply if the undertaking requesting immunity cumulatively meets the following requirements:

- terminates its participation in the cartel immediately after the submission of the request for immunity from a fine;
- cooperates with the Misdemeanour Commission fully, on a continuous basis, and submits the necessary data in the shortest possible time;
- does not notify the other participants in the cartel about the submission of the request for immunity from a fine;
- prior to the submission of the request for immunity from a fine, does not disclose the existence or content of the request, except to bodies responsible for sanctioning the cartel outside the Republic of Macedonia; and
- does not destroy, conceal or falsify relevant evidence used to establish facts being of importance for making a decision by the Misdemeanour Commission.

The Misdemeanour Commission shall not grant full immunity from a fine to the undertaking that throughout the duration of the cartel has taken measures by which it has forced the other undertakings to participate or remain therein, but may determine a reduction of the fine if such undertaking meets the requirements.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, 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 would be undertakings that have admitted their participation in a cartel, but were not the first to present evidence enabling the Misdemeanour Commission to initiate a misdemeanour procedure or were not the first to present evidence enabling the Misdemeanour Commission to complete the already initiated misdemeanour procedure with a decision establishing the existence of a misdemeanour if the existence of the misdemeanour could not be established without such evidence. For such subsequent cooperating parties, fines which, as a rule, would otherwise be imposed on them will be reduced if they submit additional relevant evidence being of decisive importance for adoption of a decision establishing the existence of a misdemeanour to the Misdemeanour Commission. These subsequent cooperating parties must also comply with the cumulative requirements described above.

24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Second and subsequent cooperating parties may benefit from a reduction of the fine that would otherwise be imposed on them, as follows:

- a reduction of such fine in amount from 30 per cent to 50 per cent shall be afforded to the first undertaking that shall provide evidence with significant added value;
- a reduction of such fine in amount from 20 per cent to 30 per cent shall be afforded to the second undertaking that shall provide evidence with significant added value; and
- a reduction of such fine in amount up to 20 per cent shall be afforded to each subsequent undertaking that shall provide evidence with significant added value.

Evidence with significant added value is a reference to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Misdemeanour Commission's ability to prove the alleged cartel. In this assessment, the Misdemeanour Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence (such as statements and the like) which require corroboration if contested.

25 Approaching the authorities

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?

Prior to filing a request for initiating a procedure for release from a fine for a misdemeanour under the Law on Protection of Competition concerning cartels, the applicant may file to the Misdemeanour Commission a marker (ie, a notification may file a notification of the intention of filing a request for release from a fine).

For a filed marker, the Misdemeanour Commission shall issue a confirmation protecting the applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow the applicant to gather the necessary information and evidence.

In order to obtain such a confirmation, the applicant must state in the marker the following information: name and address of the person filing the marker; name and address of the parties to the alleged cartel; description of the goods and/or services affected by such cartel and of the territory where such cartel was active; estimate of the duration of the alleged cartel; description of the nature of the alleged cartel conduct; explanation on the reasons for filing the marker; information on other past or possible future requests to other authorities competent for sanctioning a cartel outside the Republic of Macedonia.

The Misdemeanour Commission shall determine in the confirmation the period within which the applicant must file a request for initiating a procedure for release from a fine for a misdemeanour under the Law on Protection of Competition concerning cartels (along with relevant information and evidence). If such request is filed within this period, it shall be deemed that the request has been filed on the date of issue of the confirmation. However, if such request has not been filed within this period, the Misdemeanour Commission may freely dispose with the data and evidence provided with the marker and shall notify the applicant thereof.

26 Cooperation

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?

The first cooperating party, as well as subsequent cooperating parties, are required to fully cooperate with the Misdemeanour Commission, on a continuous basis, and to submit the necessary data in the shortest possible time.

27 Confidentiality

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

Under the Law on Protection of Competition, the President and the members of the Commission for Protection of Competition, the President and the members of the Misdemeanour Commission, and the employees shall be obliged to keep the business or the official secret regardless of the manner of its acquisition. The obligation for keeping the business or official secret shall last five years following the termination of the employment in the Commission for Protection of Competition or following the expiry of the term of office as President or member of the Commission for Protection of Competition.

The persons referred to above must not give statements to the public which could harm the reputation of the undertaking, as well as statements on the measures they have taken, that is, the procedures they have initiated while carrying out the activities within their competence until they are legally valid, unless in the case of general information announcement.

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A 'business secret' is defined as something which by law or other regulations is determined as a business secret; and the undertaking determines that it constitutes a business secret if the Commission for Protection of Competition or the Misdemeanour Commission accepts such classification.

The Commission for Protection of Competition, that is, the Misdemeanour Commission shall accept the classification of data as a business secret, provided that the data have economic or market value and whose disclose or use may lead to economic advantage of the other undertakings. The following criteria shall in particular apply to the evaluation of the data: the extent to which the data is known outside the undertaking; the extent to which measures for protection of data secrecy have been taken in the undertaking; and the value of the data for the undertaking and its competitors.

The following, as a rule, shall not be deemed a business secret in terms of the provisions of this law: publicly available data, that is, data which are publicly announced on the basis of another regulation or decision of the managing bodies of the undertaking; data older than five years, regardless of whether they have been considered a business secret; the revenues contained in the annual financial and statistical reports which do not constitute a business secret because they have been publicly announced; and data and documents being of decisive importance for the decisions of the Commission for Protection of Competition, that is, the Misdemeanour Commission. When submitting data classified as a business secret, the undertaking shall be obliged to justify such classification of the data as a business secret by giving objective reasons.

In particular, within the framework of the procedure for release from a fine for a misdemeanour under the Law on Protection of Competition concerning cartels, access to the corporate statement (ie, the statement whereby the applicant admits admit its participation in the cartel and which is to be enclosed to the request) may be granted by the Misdemeanour Commission only to undertakings against which the procedure is initiated provided that they commit, together with the legal counsels getting access on their behalf, if any, not to make any copy by mechanical or electronic means of any information in the statement to which access is being granted. The corporate statement shall not enjoy special protection as from the moment when the applicant discloses to third parties the content thereof.

Information obtained from the corporate statement can be used only for the procedure in question. If the information is used for other purposes for the duration of the procedure, this can be deemed to be a lack of cooperation with the Misdemeanour Commission.

The Misdemeanour Commission will publish the decision finding that a misdemeanour has been committed once it is adopted. The decision will not include information that is deemed to be a 'business secret' as explained above.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The Misdemeanour Commission is not authorised to enter into plea bargains or settlements with respect to liability for misdemeanours under the Law on Protection of Competition concerning cartels.

29 Corporate defendant and employees

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

Employees of the corporate defendant have no misdemeanour liability under the Law on Protection of Competition concerning cartels. However, responsible persons in the legal entity – corporate defendant may be criminally liable for the offence of 'Preventing, limiting or causing distortion of competition'. Full or partial leniency granted to the corporate defendant for a misdemeanour under the Law on Protection of Competition would not affect any criminal liability of the responsible person in such corporate defendant.

Update and trends

The practice with regard to cartels is developing. Certain cartels established by the Commission for Protection of Competition in 2014 as misdemeanours are under review by the Administrative Court.

30 Dealing with the enforcement agency

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

As noted above, the first cooperating party, as well as subsequent cooperating parties, are required to fully cooperate with the Misdemeanour Commission, on a continuous basis, and to submit the necessary data in the shortest possible time.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

Pursuant to the publicly available sources, there is no ongoing or anticipated assessments or reviews of the immunity or leniency regime.

Defending a case

32 Disclosure

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

After the Misdemeanour Commission initiates the misdemeanour procedure by adopting a formal conclusion to that effect, the Misdemeanour Commission shall provide the defendant with its conclusion so that the defendant can reply to it. The conclusion shall contain a description of the facts and circumstances outlining why the Misdemeanour Commission initiated its procedure; including the supporting evidence, and may contain a request from the Misdemeanour Commission for the defendant to provide additional information.

During the course of the procedure, the Misdemeanour Commission shall, prior to scheduling the oral hearing, submit to the defendant a preliminary statement of objections raised against them and, prior to the adoption of the final decision, a final statement of objections to the participants in the procedure.

33 Representing employees

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

In general, the same counsel may represent multiple defendants if there is no contradictory defence between them. Representation by an attorney-at-law in misdemeanour procedures is not obligatory.

34 Multiple corporate defendants

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

As already stated above, in general, the same counsel may represent multiple defendants if there is no contradictory defence between them.

35 Payment of penalties and legal costs

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

In the case of cartels, there are no administrative fines against the individuals. The Criminal Code provides imprisonment as a sanction against the individuals found guilty.

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36 Taxes

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

Fines and private damages awards are not tax-deductible with respect to profit tax raised on legal entities.

37 International double jeopardy

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 no such express rule with regard to taking into account any penalties imposed in other jurisdictions. The same type of damage for same actions cannot be claimed under Macedonian contractual law.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The value of the fine for misdemeanour depends on the assessment of the Misdemeanour Commission of all relevant criteria for determination of the fine such as the nature and duration of the misdemeanour are considered. Please see the analysis under question 17 with regard to mitigating circumstances. The existence of a compliance programme is not stipulated expressly as a circumstance for decreasing the amount of the fine. However, the practice is developing and it cannot be excluded that such a programme would be accepted as mitigating circumstance.

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Malaysia

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Competition Act 2010 (the Competition Act), which came into effect on 1 January 2012, aims to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers, and to provide for matters connected therewith. The Competition Act has introduced general competition law for all markets in Malaysia, except those carved out for sector regulators under the Communications and Multimedia Act 1998 in relation to network communications and broadcast sectors, and the Energy Commission Act 2001 in relation to the energy sector. There has also been a further exclusion for upstream oil and gas activities, described in question 5.

In addition, although not expressly carved out from the application of the Competition Act, the Postal Services Act 2012, which came into force on 1 April 2013, has introduced general competition law which is applicable to the postal market. The recently passed Malaysian Aviation Commission Act 2015, which came into force on 1 March 2016, introduces competition provisions applicable to aviation services.

2 Relevant institutions

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

The Competition Act is enforced by the Malaysia Competition Commission (MyCC), a body corporate established under the Competition Commission Act 2010, comprising representatives from both public and private sectors. The Competition Act allows any affected enterprise to make written or oral representations concerning any proposed decision or finding of infringement by MyCC. MyCC is also empowered to conduct hearings for the purposes of determining whether an infringement has occurred. MyCC's decision is appealable to the Competition Appeal Tribunal (CAT). In certain circumstances, the decision by MyCC or CAT may be challenged in court by way of public law relief (judicial review).

Competition law in the communications sector and postal market are enforced by the Malaysian Communications and Multimedia Commission (MCMC), while the Energy Commission oversees competition in the energy sector. The newly established Malaysian Aviation Commission oversees competition in the aviation services sector.

3 Changes

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

The Malaysian Aviation Commission Act 2015, which came into force on 1 March 2016, introduces competition law provisions applicable to the aviation services sector.

Since then, there have been no changes. MyCC has proposed to review and amend the Competition Act and the Competition Commission Act 2010 and had carried out a public consultation on 16 May 2016 on the proposed amendments, but the proposed amendments have yet to be tabled in parliament.

In its early days of enforcement, MyCC has concentrated its efforts on competition advocacy and issuing guidelines to shape its interpretation of the substantive provisions of the Competition Act and procedural requirements. MyCC had issued the following guidelines following public consultation:

- Guidelines on Market Definition (published on 2 May 2012);
- Guidelines on Anticompetitive Agreements (published on 2 May 2012);
- Guidelines on Complaints Procedures (published on 2 May 2012);
- Guidelines on Abuse of Dominant Position (published on 26 July 2012);
- Guidelines on Financial Penalties (published on 14 October 2014); and
- Guidelines on Leniency Regime (published on 14 October 2014).

The guidelines are non-exhaustive and do not set a limit on MyCC's powers of investigation and enforcement under the Competition Act.

MCMC has also indicated that the Communications and Multimedia Act 1998 is being reviewed and amended, and these amendments are expected to be tabled in parliament by the end of 2016.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Cartel activities are prohibited under chapter 1 of the Competition Act (Chapter 1 Prohibition). Section 4(1) of the Competition Act provides:

> *A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.*

This prohibition is comparatively similar to article 101 of the Treaty on the Functioning of the European Union.

Section 4(2) of the Competition Act deems certain agreements between competing enterprises as having the object of significantly restricting competition. This means that MyCC need not examine the anticompetitive effect of horizontal agreements that:

- fix a purchase or selling price or any other trading conditions;
- share markets or sources of supply;
- limit or control production, market outlets or market access, technical or technological development or investment; or
- constitute bid rigging.

MyCC will not only examine the actual common intention of the parties, but will assess the aims of the agreement (ie, its object) by taking into consideration the surrounding economic context. If the agreement is highly likely to have a significant anticompetitive effect, MyCC may find the agreement to have an anticompetitive object.

Once an anticompetitive object is shown, MyCC does not need to examine the anticompetitive effect of the agreement. However, if the anticompetitive object is not found, the agreement may still infringe the Competition Act if there is an anticompetitive effect. Provisions in

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agreements which infringe the Competition Act will be unenforceable as they are considered illegal under the Contracts Act 1950.

The term 'agreement' has been widely defined in the Competition Act to include any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices. 'Concerted practice' has been defined, following EU case law, to mean any form of coordination between enterprises that knowingly substitutes practical cooperation between them for the risks of competition.

Broadly, section 5 of the Competition Act permits relief from liability for a Chapter 1 Prohibition where:

- there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- the benefits could not reasonably have been provided without the agreement having the anticompetitive effect;
- the detriment to competition is proportionate to the benefits provided; and
- the agreement does not eliminate competition in respect of a substantial part of the goods or services.

Although theoretically any Chapter 1 Prohibition may be capable of relief from liability under section 5, in practice it is unlikely that hard-core cartels will be able to fulfil the conditions in section 5.

MyCC has indicated that it is only concerned with agreements that have a significant impact (ie, more than a trivial impact). According to the Guidelines on Anticompetitive Agreements, MyCC will not generally consider agreements between competitors whose combined market shares do not exceed 20 per cent of the relevant market to have a significant effect on competition, provided that such agreements are not hard-core cartels. Under certain circumstances, an agreement between competitors below the threshold may nonetheless have a significant anticompetitive effect, and MyCC will have the power to take enforcement action against the parties to such agreement.

In MyCC's recent review of the Competition Act, which has yet to be finalised, MyCC has proposed that such significant identifiable technological, efficiency or social benefits directly arising from the agreement must also allow consumers a fair share of the resulting benefit.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

The Competition Act applies to any commercial activity both within Malaysia and outside that has an effect on competition in any market in Malaysia. The definition of 'commercial activity' does not include:

- any activity, directly or indirectly in the exercise of governmental authority;
- any activity conducted based on the principle of solidarity; or
- any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.

An enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly is excluded from the application of the Competition Act insofar as the Chapter 1 Prohibition and Chapter 2 Prohibition (with respect to an abuse of dominant position) would obstruct the performance, in law or in fact, of the particular task assigned to the enterprise.

Commercial activities regulated by the Communications and Multimedia Act 1998, Energy Commission Act 2001, the Petroleum Development Act 1974, the Petroleum Regulations 1974 and the Malaysian Aviation Commission Act 2015 are excluded from application of the Competition Act.

Under the Communications and Multimedia Act 1998, licensees must not engage in any of the following:

- conduct that has the purpose of substantially lessening competition in a communications market;
- agreements that provide for rate fixing, market sharing or boycotts; or
- tying or linking arrangements.

A licensee that has been determined to be in a dominant position can be directed to cease conduct that has the effect of substantially lessening competition in a communications market.

As stated in question 3, the new Competition (Amendment of First Schedule) Order 2016 provides further exclusion on any activities regulated under the Malaysian Aviation Commission Act 2015.

MyCC may grant individual or block exemptions where the criteria in section 5 of the Competition Act (see question 4) have been satisfied. Exemptions are made public. They will be made for a limited time period and may be subjected to conditions. MyCC has granted a conditional block exemption to liner shipping agreements in respect of voluntary discussion agreements and vessel sharing agreements made within Malaysia or have an effect on the liner shipping services in Malaysia. This exemption, which took effect from 7 July 2014, is valid for three years and will be reviewed after two years.

6 Application of the law

Does the law apply to individuals or corporations or both?

Both, insofar as they are engaged in commercial activity. The Chapter 1 Prohibition applies to agreements between enterprises. 'Enterprise' is defined as any entity carrying on commercial activities relating to goods or services. This would include, for instance, companies, partnerships, businesses, and state-owned corporations.

In its recent review of the Competition Act, MyCC has proposed to expressly describe the type of entity or person that falls under the scope of 'enterprise', ie, an individual, a body corporate, an unincorporated body of persons or other entity. MyCC has also proposed to expand the scope of an enterprise's activities to which the Competition Act would apply, to cover not only enterprises that carry on commercial activities but also economic activities.

When an employee engages in conduct that would infringe the Chapter 1 Prohibition, liability for such infringement may be imputed to his or her employers.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Yes. The Competition Act applies to commercial activity transacted outside Malaysia which has an effect on competition in any market in Malaysia. Since the Competition Act came into force, MyCC has not investigated any extraterritorial cartels.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Trigger

MyCC may conduct any investigation it thinks expedient where it has reason to suspect that any enterprise has infringed or is infringing any prohibition under the Competition Act. Investigations of cartels are usually triggered by a complaint or a participant in the cartel seeking a benefit under the leniency regime. MyCC encourages aggrieved parties to lodge complaints in accordance with the Guidelines on Complaint Procedures. If MyCC decides not to investigate a complaint, it must inform the complainant of the decision and reasons for the decision.

MyCC may, through inter-agency cooperation, work with other competition authorities in enforcement, investigations and other actions, and thus investigate international cartels.

Apart from MyCC's powers to initiate investigations on its own accord, the minister has powers to direct MyCC to investigate any suspected infringement.

Where markets are not competitive, MyCC may conduct a market review to determine if any feature or combination of features of the market restricts competition. This may include a study into the market structure, conduct of enterprises, supplies and consumers in the market. Information gathered from the review can trigger an investigation. By way of illustration, MyCC has conducted a review of the broiler market in Peninsular Malaysia that focused on the structure of the domestic broiler market; and the interactions of farmers, wholesalers and retailers across the broiler supply chain.

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Collection of evidence
MyCC has wide powers of investigation. It may request information by written notice and conduct dawn raids (see question 9).

Notice of proposed decision
If, after the completion of the investigation, MyCC proposes to take enforcement action, it must give written notice of its proposed infringement decision to each enterprise that may be directly affected by the decision. The notice will:

- set out the reasons for MyCC's proposed decision in sufficient detail to enable such enterprise to have a genuine and sufficient prospect of being able to comment on the proposed decision on an informed basis;
- set out the penalties or remedial action; and
- present an opportunity for the enterprise to make written or oral representations to MyCC and the deadline for such representations.

MyCC may also conduct hearings to determine whether an enterprise has infringed the Chapter 1 Prohibition.

In MyCC's recent review of the Competition Act, MyCC has proposed that instead of making it voluntary for the enterprise to make written or oral representations, enterprises which have been given a written notice of MyCC's proposed decision must be required to submit written representations and indicate whether it wishes to make an oral representation before MyCC.

Decision
If MyCC determines that there has been an infringement, it must notify the persons affected by the decision and require that the infringement be ceased immediately. It is empowered, inter alia, to impose a financial penalty of up to 10 per cent of the worldwide turnover during the period of the infringement.

If MyCC finds that there is no infringement, it must give notice of such decision and specify its reasons.

9 Investigative powers of the authorities

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

MyCC has wide powers to collect evidence and may direct a person to give MyCC access to his or her books, records, accounts and computerised data. However, these powers are subject to lawyer–client privilege and may, at the request of the person disclosing, be protected by confidentiality. As anticompetitive conduct is not a criminal offence, there is no privilege against self-incrimination.

Information requests
MyCC may, by written notice, require any person (not only those suspected of being in a cartel but also third parties) whom MyCC believes to be acquainted with the facts and circumstances of the case to produce relevant information or documents. MyCC may also require the person to provide a written explanation of such information or documents. Where the document is not in the custody of the person, he or she must, to the best of his or her knowledge and belief, identify the last person who had custody of the document and state where the document may be found. A person required to provide information has the responsibility to ensure that the information is true, accurate and complete, and may be required to provide a declaration that he or she is not aware of any other information that would make the information untrue or misleading.

Dawn raids
MyCC may search premises with a warrant issued by a magistrate where there is reasonable cause to believe that any premises have been used for infringing the Competition Act or there is relevant evidence of it on such premises. The warrant may authorise the MyCC officer named on the warrant to enter the premises at any time of day or night, and by force if necessary. During such searches, MyCC officers may seize any record, book, account, document, computerised data or other evidence of infringement.

The powers extend to the search of persons on the premises, and there is no distinction in these powers regarding business or residential premises. Where it is impractical to seize the evidence, MyCC may seal the evidence to safeguard it. Attempts to break or tamper with the seal may be prosecuted as a criminal offence.

Where the MyCC officer has reasonable cause to believe that any delay in obtaining a warrant would adversely affect the investigation, or the evidence will be damaged or destroyed, he or she may enter the premises and exercise the above powers without a warrant.

In addition to powers under the Competition Act, MyCC investigating officers have the powers of a police officer as provided for under the Criminal Procedure Code.

International cooperation

10 Inter-agency cooperation

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

Under the Competition Commission Act 2010, MyCC has the powers 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. However, the scope of such cooperation remains unclear. A number of cooperation initiatives that MyCC has undertaken include:

- East Asia Top Level Official's Meeting on Competition Policy;
- Malaysia – Japan International Cooperation Agency: Economic Partnership Program – Capacity Building for Competition Law;
- ASEAN-Australia-New Zealand Free Trade Area Economic Cooperation Work Programme; and
- Malaysia Competition Commission Attachment Programme to the Australian Competition and Consumer Commission, Australia.

11 Interplay between jurisdictions

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

The Competition Act came into effect on 1 January 2012 in Malaysia, so these are the early days of its implementation. Thus far, MyCC has been investigating cartels within Malaysia, but to date, no cross-border cases have been investigated by MyCC. However, it is highly likely to take note of investigations by other competition authorities, particularly in closely related markets.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel conduct is investigated and adjudicated by MyCC, which has the power to impose fines and give directions as it sees fit to bring the infringement to an end (see question 16).

13 Burden of proof

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

The burden of proof in establishing that an infringement has occurred lies with MyCC.

An enterprise that seeks to rely on any exclusion, exemption or other defence (ie, the criteria under section 5 of the Competition Act for relief of liability; see question 4) bears the burden of proving that such exclusion, exemption or other defence applies.

The standard of proof is a balance of probabilities (ie, the same evidential standard for civil claims).

14 Appeal process

What is the appeal process?

Appeals against MyCC's decisions are made to the CAT, which has exclusive jurisdiction to review on appeal any findings of infringement or non-infringement made by MyCC. The president of the 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.

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A person aggrieved by MyCC's decision may appeal to the CAT by filing a notice of appeal to the CAT within 30 days of the decision. This 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.

The CAT may confirm or set aside the decision being appealed against, or any part of it, and may:

- remit the matter to MyCC;
- impose or revoke, or vary the amount of, a financial penalty; and
- exercise MyCC's powers to make decisions, give directions or take such other appropriate actions.

The CAT's decision is final and binding on the parties to the appeal. Nonetheless, the CAT's decision may be subjected to judicial review by the High Court.

Sanctions

15 Criminal sanctions

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

Currently, cartel conduct under the Competition Act is not a criminal offence.

However, obstructing MyCC's investigation may lead to criminal sanctions. Among other things, it is an offence to:

- refuse to give access to documents when directed by MyCC;
- provide false or misleading information, evidence or documents;
- destroy, conceal, mutilate or alter any evidence with the intent to defraud MyCC or obstruct MyCC's investigation;
- tamper with or break a seal affixed to protect the integrity of evidence;
- tip off others in a manner that is likely to prejudice any investigation or proposed investigation; or
- threaten reprisals on persons who file complaints of infringements or cooperate with MyCC in its investigations.

On conviction of any of the above, the penalty for a body corporate is a fine of up to 5 million ringgit, and for subsequent offences up to 10 million ringgit. For individuals, the fine is up to 1 million ringgit or imprisonment of up to five years, or both; and for subsequent offences, a fine of up to 2 million ringgit and imprisonment of up to five years, or both.

To date, there have been no such criminal sanctions imposed under the Competition Act.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

On finding an infringement, MyCC may impose a financial penalty of up to 10 per cent of the worldwide turnover of an enterprise over the period during which the infringement occurred. There is no minimum financial penalty which MyCC may impose under the Competition Act.

The concept of a single economic unit is recognised under the definition of 'enterprise', and this may enlarge the turnover of the relevant enterprise to include parents with decisive influence, and subsidiaries that do not have autonomy to determine their actions on the market.

MyCC must require that the infringement be ceased immediately, and may specify steps to be taken to achieve this or give any other appropriate direction.

The financial penalty is potentially higher than that in other jurisdictions where the fine is limited to a specified number of years, whereas in Malaysia it may be for the entire duration of an infringement. However, the magnitude of this may not be felt for a while, as it applies only from 1 January 2012, the date on which the Competition Act came into force.

MyCC may bring proceedings before the High Court against any person who fails to comply with its directions.

To date, the financial penalties which have been proposed or imposed by MyCC ranged from 20,000 to 20 million ringgit. Although not all infringing enterprises have been fined with financial penalties, it appears from recent trends that MyCC is taking a stricter stance for deterrence.

The first cartel case in early 2012, investigated by MyCC involved the Cameron Highlands Floriculturist Association (CHFA). In this case, MyCC found CHFA to be liable for fixing the price of flowers sold to distributors and wholesalers in Malaysia. MyCC, which had initially proposed a financial penalty of 20,000 ringgit on CHFA in its proposed decision, removed that sanction in its final decision stating that CHFA had followed up with consultations with MyCC soon after receiving the proposed decision and exhibited exemplary cooperation in complying with the Competition Act. The final decision from MyCC required CHFA to:

- cease and desist the infringing act of fixing prices of flowers;
- provide an undertaking that its members shall refrain from any anticompetitive practices in the relevant market; and
- issue a statement on the above-mentioned remedial actions in the mainstream newspapers.

In January 2015, MyCC imposed fines totalling 252,250 ringgit on 24 ice manufacturers for allegedly fixing the selling prices of edible tube ice and block ice. The proposed financial penalties for each manufacturer ranged from 1,080 to 106,000 ringgit. Before issuing the proposed decision, MyCC had issued interim measures to the ice manufacturers seeking to prevent them from acting in accordance with their plan (which was advertised through local newspapers in December 2013) to collectively increase the price of edible tube ice by 0.50 ringgit per bag and 2.50 ringgit per block from 1 January 2014. In determining the level of financial penalty, MyCC stated that it took into account the seriousness of the infringement, duration of the infringement and mitigating factors such as being cooperative during investigation.

In another price-fixing case involving the Pan-Malaysia Lorry Owners Association (PMLOA), MyCC did not propose financial penalties but issued proposed interim measures to PMLOA and accepted an undertaking from PMLOA and related lorry enterprises that they will not engage in any future anticompetitive conduct such as price fixing and shall cease and desist from increasing the transportation charges of up to 15 per cent after MyCC stated that this action constitutes price fixing.

MyCC had also in 2014 found both Malaysian Airline System Bhd and AirAsia Bhd liable for market sharing where each party was fined 10 million ringgit for entering into a collaboration agreement which saw the two airlines sharing markets in the air transport services sector within Malaysia. The penalty is less than the maximum fine of 10 per cent of both airlines' respective worldwide turnovers between January and April 2012 (infringement period) as MyCC took into consideration the full cooperation of both parties in providing requested data and information. MyCC had also considered the voluntary action taken by both parties to remove reference to routes and market focus stated in the collaboration agreement as well as the fact that both parties have implemented competition compliance programmes. MyCC's final decision, however, was subsequently overturned on appeal by the Competition Appeal Tribunal on 4 February 2016 and the fines imposed on the airlines were set aside. MyCC has filed for an application for judicial review to the High Court against the Competition Appeal Tribunal's decision.

In March 2015, MyCC imposed fines totalling 247,730 ringgit on 14 members of the Sibu Confectionery and Bakery Association (SCBA) for their involvement in price fixing in December 2013, by increasing the prices of products of confectionery and bakery products between 10 per cent and 15 per cent in Sibu, Sarawak. In determining the level of financial penalty, MyCC took into account, among other things, the duration of the infringement, seriousness of the infringement and relevant turnover of the enterprises.

In June 2016, MyCC issued its decision against an information technology service provider to the shipping and logistics industry and four container depot operators for price fixing. The final decision states that Containerchain (M) Sdn Bhd (Containerchain), the information technology service provider, had engaged in concerted practices with the container depot operators resulting in the operators increasing the depot gate charges from 5 ringgit to 25 ringgit. MyCC also alleged that the concerted practice resulted in the container depot operators offering a rebate of 5 ringgit to hauliers on the agreed depot gate charges.

The financial penalties imposed on the operators and the information technology service provider ranged from 52,980 ringgit to 163,623 ringgit, with a combined total penalty of 645,774 ringgit. MyCC is

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expected to take a stricter stance when enforcing hard-core cartel cases and we expect higher fines to be used as part of MyCC's efforts to combat cartels.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

MyCC has issued guidelines on financial penalties with the aim of reflecting the seriousness of the infringement and deterring anticompetitive practices leading to an infringement of a prohibition under the Competition Act.

In determining the amount of financial penalty to impose, MyCC has indicated that it will take into account some or all of the following factors:

- seriousness (gravity) of the infringement;
- turnover of the market involved;
- duration of the infringement;
- impact of the infringement;
- degree of fault (negligence or intention);
- role of the enterprise in the infringement;
- recidivism;
- existence of a compliance programme; and
- level of financial penalties imposed in similar cases.

MyCC has also indicated that it will take into account aggravating factors, mitigating factors and the grant of leniency.

Aggravating factors

The aggravating factors may include:

- the role of the enterprise as an instigator or leader or having engaged in coercive behaviour with others;
- obstruction of or lack of cooperation in the investigation;
- the enterprise has a record of committing similar infringements or other infringements under the Competition Act (recidivism);
- continuance of the infringement after the start of investigation; and
- involvement of board members or senior management in the infringement.

Mitigating factors

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.

Leniency

If the enterprise has received leniency, then the amount of the financial penalty as determined above, including any reduction to comply with the legal maximum requirement, will be reduced by the amount stipulated in the grant of leniency. The Competition Act gives MyCC broad discretion on the amount of reduction, if any, of the financial penalty that it would have otherwise imposed on the enterprise receiving leniency.

The guidelines on the method of setting fines are not exhaustive and do not have the force of law.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

No.

19 Parallel proceedings

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

As stated in question 15, cartel conduct under the Competition Act is not punishable as a criminal offence. MyCC can impose civil penalties as provided for under the Competition Act.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Yes, any person who suffers loss or damage directly as a result of an infringement may bring a private action against the infringing parties in the civil courts regardless of whether such person dealt directly or indirectly with the enterprise. MyCC cannot award damages, and this right of private action is intended to enable an aggrieved person to obtain compensation.

Such civil action may be initiated even if MyCC has not conducted or concluded an investigation into the alleged infringement. However, in practice, the evidential burden on private parties makes this unlikely unless MyCC's investigation and adjudication process is slow.

21 Class actions

Are class actions possible? If yes, 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. However, it would be necessary for parties to establish that they have suffered direct loss and a commonality of interest in bringing the claim.

Cooperating parties

22 Immunity

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

Yes. This immunity, under section 41 of the Competition Act, is only available for a breach of the Chapter 1 Prohibition and particularly an admission of an infringement under section 4(2) which deems certain agreements between competing enterprises as having the object of significantly restricting competition (see question 4).

The Competition Act empowers MyCC to grant differing percentages of reductions and provide for reduction of up to a maximum of 100 per cent of any penalties, which would otherwise have been imposed (ie, full immunity). The reductions would depend on whether the enterprise was the first person to bring the suspected infringement to the attention of MyCC, the stage in the investigation at which it admits its involvement in the infringement as well as information or other form of cooperation to be provided and the information already in possession of MyCC.

The leniency regime is only available in cases where the enterprise has:

- admitted its involvement in an infringement of section 4(2) of the Competition Act; and
- provided information or other form of cooperation to MyCC which 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 Regime, what would be considered as 'significant assistance' will be determined by MyCC on the specific circumstance of the case under consideration. In relation to information provided, the information about a prohibition under section 4(2) provided by the enterprise should include the following:

- detailed description of the suspected infringement of a prohibition under section 4(2) including:

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Update and trends

MyCC's final decision in 2014 against Malaysian Airline System Bhd and AirAsia Bhd was overturned on appeal by the Competition Appeal Tribunal in February 2016 and the 20 million ringgit fine was set aside. MyCC has filed for a judicial review in the High Court to challenge the Competition Appeal Tribunal's decision.

In June 2016, MyCC issued its final 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. The concerted practice resulted in the container depot operators offering a rebate to hauliers on the agreed depot gate charges. MyCC imposed a total financial penalty of 645,774 ringgit on Containerchain and the four container depot operators and an additional penalty for any non-compliance with its directions on remedial actions.

Moving forward, the MyCC is likely to continue its enforcement actions against hard-core cartelists whose actions have significant impact on competition in Malaysia.

(i) objectives, activities and functioning of the cartel;
(ii) the products or services involved and their geographic scope;
(iii) activities of the cartel with dates, times, places, purpose, and content of any meetings, conversations or other contact;

- copies of documents such as minutes or notes of meetings or conversations, meeting agendas, price lists, etc;
- if the applicant no longer has a copy of a relevant document, the names and persons who may have copies of the document;
- name including full legal name, contact details and relevant office locations of the applicant and those of any subsidiary or related companies involved and names and positions of individuals of such enterprises who have participated in or have knowledge of the cartel activities;
- names and contact details of all enterprises involved and names and positions of individuals of the enterprises involved who have participated in or have knowledge of the cartel activities;
- name, contact details and relevant office locations of any trade association involved and names of employees and officers of the association who have participated in or have knowledge of the cartel activities;
- names of competition agencies/authorities to which the applicant has or is contemplating making a leniency application; and
- any other relevant information about the cartel and any other information that may assist MyCC in reviewing the leniency application.

The information or other form of cooperation provided by the enterprise may be about the infringement of which the applicant is admitting involvement. Such information or other form of cooperation may also be about another infringement of a prohibition:

- another infringement of a prohibition which satisfies section 4(2) (ie, another cartel);
- an infringement of a prohibition under section 4(1) which does not satisfy section 4(2); or
- an infringement of a prohibition under section 10 with respect to an abuse of a dominant position.

An applicant must admit involvement in a cartel infringing section 4(2) but may provide information or other form of cooperation about a different infringement of a prohibition under section 4 or a prohibition under section 10. To illustrate, an applicant admits involvement in a cartel and provides information or cooperation about a different infringement. The second infringement could concern a prohibition of section 10 with respect to an abuse of dominant position.

Note that leniency would not be able to protect a successful applicant from other legal consequences such as private actions brought by an aggrieved person who has suffered loss or damage directly caused by the infringement.

Thus far, no enterprise has benefited from full immunity since the Competition Act came into force in 2012.

23 Subsequent cooperating parties

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

There is no separate programme, and any subsequent leniency applicant may still benefit from the leniency regime. The percentage of reduction would depend largely on the stage in the investigation at which it admits its involvement in the infringement, and the value of the incremental information or other cooperation it is able to provide. Such percentage of reduction is expected to commensurate with the additional information and assistance such enterprise is able to provide MyCC.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The leniency regime is designed to encourage cartelists to be the 'first in' to supply as much information as possible in order to expedite MyCC's investigation. By being the second as opposed to third or subsequent cooperating party, the second cooperating party is more likely to receive a greater reduction if the application is made during the early stages of an investigation. Further, subsequent applications would be assessed in light of information that MyCC has in its possession including that received from leniency applicants who have received leniency.

Conceptually, the Malaysian leniency regime contains elements of 'amnesty plus' option comparatively similar to that applied in the EU. However, the scope and operational mechanism may differ. This is because the operational details for the Malaysian leniency regime have yet to be finalised by MyCC and remain unclear.

25 Approaching the authorities

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

Yes. Based on MyCC's Guidelines on Leniency Regime, an applicant has 30 days to complete its leniency application from the date he receives a 'marker' which gives the applicant priority in receiving leniency while his application is being prepared. Failure to do so will result in the applicant losing its priority position.

Parties would in practice consider:

- whether MyCC is already investigating the cartel that may affect its position in the leniency queue;
- the possibility that another cartelist has blown the whistle;
- the competition law implications in other jurisdictions, as MyCC is able to disclose the information to competition authorities in other jurisdictions, some of which may have criminal sanctions;
- whether concurrent leniency applications should be made in multiple jurisdictions; and
- whether the enterprise can offer an undertaking on acceptable terms to MyCC (see question 28).

The possibility of liability from follow-on actions should also be considered. MyCC cannot provide immunity from third-party damages actions.

26 Cooperation

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?

Only an enterprise that admits its involvement in any prohibited behaviour and provides information to MyCC that significantly assists in the identification or investigation of any prohibited behaviour by other enterprises may benefit from leniency. Different percentages of reductions of fines are available under the leniency regime, depending on whether the enterprise was the first person to bring the suspected

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infringement to the attention of MyCC and the stage of the investigation at which the enterprise provides information or admits involvement in the infringement.

27 Confidentiality

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.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

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 and can be enforced in the High Court. Offering a suitable undertaking is particularly useful to avoid a finding of infringement, which can trigger follow-on civil actions.

29 Corporate defendant and employees

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

There is no effect, as there is no liability for infringement of the Chapter 1 Prohibition on employees. Nor are there criminal sanctions on individuals involved in a cartel.

Note, however, that individuals can have personal liability for offences under the Competition Act (see question 15).

30 Dealing with the enforcement agency

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

It would be important for a leniency applicant to come forward at an early stage in the investigation as his or her application would be assessed in light of information that MyCC has in its possession including that received from leniency applicants which have received leniency.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

MyCC has issued guidelines on its leniency regime.

Defending a case

32 Disclosure

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

There is no automatic right under the Competition Act for disclosure of information or evidence by MyCC. However, MyCC may allow reasonable access to its investigation file, in the interest of procedural fairness and to ensure that the enterprise can properly defend itself against the allegations raised in a proposed decision and to enable the effective exercise of the rights of defence. Certain documents may not be disclosed on the grounds of confidentiality.

33 Representing employees

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

The Competition Act does not impose personal liability for employees involved in a cartel. Typically, therefore, representation is at the enterprise level.

34 Multiple corporate defendants

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

Counsel may represent multiple corporate defendants, subject to strict adherence to professional and ethical responsibilities. Conflicts of interest are likely to arise between the alleged parties to a cartel.

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35 Payment of penalties and legal costs

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

Not applicable. Financial penalties are only imposed on the infringing enterprise.

36 Taxes

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

No.

37 International double jeopardy

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.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Applications for leniency may result in full or partial immunity from fines. Based on recent cases, it is also particularly helpful for the enterprise to cooperate with MyCC in the investigation. MyCC's Guidelines on Financial Penalties state that MyCC may take into account existence of a compliance programme as a mitigating factor to reduce any potential fines to be imposed.

It is not clear whether compliance initiatives undertaken post-investigation would be considered by MyCC as a mitigating factor.

Given that competition law is only newly introduced in Malaysia, MyCC is keen to encourage compliance and is likely to take into account genuine efforts to comply with the Competition Act.

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Malta

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The regulatory system aimed at preventing cartels is established under the Competition Act, Chapter 379 of the Laws of Malta, which implemented the European Council Regulation (EC) No. 1/2003. Essentially Maltese cartel regulation mirrors the system found within the EU by virtue of article 101 of the Treaty on the Functioning of the European Union (TFEU) and also follows the definition provided by article 101 when prohibiting cartels.

2 Relevant institutions

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?

Malta has followed the example of the United Kingdom in combining the competition authority with the office responsible for consumer affairs. The Malta Competition and Consumer Affairs Authority (the MCCAA), as set up under the Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the Laws of Malta) was established to promote, maintain and enhance competition in Malta, and provide for any additional matters which are incidental or connected to such functions. The MCCAA is segregated into the Board of Governors, the Coordination Committee and the four respective entities, one of which is the Office for Competition.

The Office for Competition, headed by the Director General (Competition), is the national competition authority in Malta, and is the responsible entity which investigates and suppresses restrictive practices, and examines and controls concentrations between undertakings where such affect the structure of competition on the market. The Office also serves as an informal adviser on competition issues to the public authorities both in terms of the implications of existing legislation, policies, administrative practices, and even legislative proposals. However, it is the Board of Governors which draws up the policies to be followed by the MCCAA. The Inspectorate and Cartel Investigations Directorate within the Office is tasked to carry out inspections in order to detect and curtail cartels.

3 Changes

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

On the 3 May 2016, the Maltese Constitutional, in the judgment (*Federation of Estate Agents v Director General (Competition)* (Case C-87/2013) has conclusively determined that the present setup of the Office for Competition is in breach of the Constitution of Malta and that the Office for Competition does not have any authority to issue fines or penalties to any organisation found to be operating a cartel: The Constitutional Court, following the line of the European Court of Human Rights, found that the penalties issued by the Office for Competition were essentially criminal in nature. Under Maltese law only a court can impose criminal liability on any party and therefore the Office for Competition could not impose any liability.

This judgment has had the practical effect of freezing the work of the Office for Competition, since at this stage it is powerless to enforce any obligation. Changes to either the law or to the present structure of the Office for Competition will be needed to unblock this situation, however, none have been announced as yet.

It should also be noted that so far the Office for Competition has not finalised the leniency regulations, however, the matter at this point in time is moot.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 5 of the Competition Act implements article 101 of the TFEU prohibiting, in general terms, all forms of cartels and anticompetitive agreements having the aim or effect of preventing, restricting or distorting competition within Malta or any part of Malta. The act then proceeds to repeat article 101 in providing examples of what would be considered anticompetitive (hard-core restrictions).

All such anticompetitive agreements are prohibited, with two exceptions:

- where the agreements would have a negligible effect on the market (so called 'de minimis' agreements); or
- where the benefits to the consumer exceed the damage done to competition, with the proviso that the agreement must in any case not be needlessly restrictive or significantly reduce competition.

There are no specific provisions under Maltese legislation dealing with price fixing, market and customer allocation, group boycotts, output agreements, bid rigging or other types of competitor agreements. However, all relevant interpretative and legislative acts within the European Union are applicable and should be considered.

An accusation of anticompetitive behaviour brought by Office for Competition cannot be avoided by claiming that the undertaking was not aware of the anticompetitive nature of the acts. On the other hand, such a defence of genuine mistake would lie to a private action brought by injured persons for damages; however, the bar for showing a genuinely excusable error is high: 'a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.'

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are no industry-specific provisions; however, government-sanctioned or regulated conduct is exempt from the provisions of the Act in so far as the conduct relates to services of a general economic interest or which have the nature of a revenue producing monopoly – in the sense that the provisions of the Act can only apply if they do not obstruct or impede the performance, in law or in fact, of those tasks. All other government undertakings must conform to the provisions of the Competition Act.

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6 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Act applies to 'undertakings', which is understood to include all persons whether natural or legal carrying out an economic activity in the widest sense possible and includes 'groups of undertakings.' The terminology used is identical to that of relevant EU legislation, and any act of European Union institutions defining the term 'undertaking' will be binding on Maltese authorities.

The Competition Act also applies to government entities with the proviso that the workings of the Act must not obstruct or hinder the provision of services of a general economic interest or having the character of a revenue-producing monopoly.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Competition Act is territorial in nature such that it applies only to the conduct which takes place within Malta. That said, in the case of anticompetitive behaviour taking place overseas that appreciably affects the trade between Malta and other member states, the relevant articles of the TFEU apply, and the Director General will cooperate with the European Commission and National Competition Authorities (NCAs) in terms of Council Regulation (EC) No. 1/2003.

Furthermore, private citizens could have a right for damages in Malta, to the extent of the damage suffered by them in Malta (Brussels Regulation on jurisdiction and enforcement of foreign judgments 1215/2012).

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The Director General can open an investigation of his or her own motion, or at the request of at the request of the minister responsible for competition matters; a national competition authority of another member state; or at the request of the European Commission itself.

The Director General can also open an investigation on the request of a third-party, such as a consumer or a competing undertaking, raising serious allegations.

In carrying out its investigation, the Director General has wide powers to obtain information and can (i) receive written and verbal submissions from interested persons in the investigation; and (ii) may request an undertaking to provide all such information or documentation which it has reason to believe is relevant to the matter under investigation, and this within a specified but reasonable time limit. The time limit is to be established by taking into account all the circumstances of the investigation, and a person failing to respond within this period can face hefty fines.

It should be noted that when requesting such information, the Director General must state the legal basis of the request; its purpose; and the information required; furthermore, documents or information which may be subject to the duty of professional secrecy need not be disclosed.

Where the Director General finds or considers that anticompetitive behaviour has taken place, the undertakings concerned will be notified and given the opportunity to make written submissions and set out all the facts known to them which are relevant to their defence, including providing relevant documentation. A separate and individual meeting may be requested, and such meeting may be set if the Director General considers it appropriate whereby the parties who had submitted written observations may develop their arguments, make counter-submissions and reply to questions posed by the Director General. In reality, an undertaking whose operations are directly affected by the investigation may request to make submissions at any stage and such request must be acceded to if it is justified.

Following the final submissions, the investigation will be concluded with the Director General issuing a decision either finding an infringement of the relevant provisions of the Competition Act or the TFEU, and give reasons for such decision.

9 Investigative powers of the authorities

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

In carrying out its investigation the Director General has wide-ranging powers, including entering into and searching any premises, land and means of transport of an undertaking or an association of undertakings where it is believed that information relevant to the investigation may be found. In order to search the property of an undertaking no warrant is needed. The written authorisation signed by the Director General is sufficient.

However, if authorisation is obtained in the form of a warrant issued by a magistrate the search for documents may be extended to all other locations including the homes and property of representatives, members of staff of the undertakings concerned and other relevant persons. A magistrate's warrant will also be required if the police are requested to assist in the conduct of any search, which search can include a dawn raid on businesses.

During this search, the Director General is empowered to seize any object or document, take extracts or copies of documents, or order that an object or document is not removed from the premises, land and means of transport. Any or all parts of such premises, land or means of transport may be closed and sealed, and any object may be put under seal where the Director General so orders. A receipt is issued to a person who is on the premises or in control of the object which is seized, and there is no time limit for the retention of such or for any order given by the Director General.

While the Director General has no direct power to compel a testimony, any representative or member of staff of the undertaking or association of undertakings concerned may be asked to provide information or documents in their possession that are felt to be relevant.

The Director General may also issue interim measures in cases of urgency where there is a risk of series and irreparable damage to competition where a 'prima facie' infringement has been established.

International cooperation

10 Inter-agency cooperation

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

The Competition Act imposes upon the Director General the obligation to cooperate with the European Commission and NCAs in terms of Council Regulation (EC) No. 1/2003. The Regulation itself sets down the structure for cooperation between the Commission and the NCAs, and the NCAs themselves where there is a cross-border case. The cooperation extends to exchanging confidential information, and even suspending or terminating proceedings where one NCA would already be dealing with the case. The Commission Notice on cooperation within the Network of Competition Authorities [OJ C 101, 27.4.2004 p. 43] and the Commission Notice on the cooperation between the Commission and the courts of the EU member states [OJ C 101, 27.4.2004 p. 54] are to be read in conjunction with the Regulation. The Commission Notice on cooperation within the Network of Competition Authorities provides that the NCA which would have received the complaint or started the ex officio procedure would generally remain in charge of the case except where a re-allocation is necessary for the effective protection of competition and of the Community interest. Ideally, the re-allocation should be made within a period of two months, during which the relevant NCAs would discuss the possibility of a parallel action

The Competition Act further empowers the Director General to provide documents and disclose information to other non-EU member states on the basis of reciprocity agreements that may exist, but only insofar as these authorities would also be bound to treat the information provided confidentially.

11 Interplay between jurisdictions

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 also includes within its purview those agreements taking place outside Malta which would appreciably affect trade

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between Malta and any one or more member states. In such cases the EU rules for determining which authority and jurisdiction would regulate the matter would have effect.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

At present the Office for Competition is incapable of imposing any fines or to take other enforcement action against undertakings found to be operating a cartel. This is expected to be remedied in the near term, however, no details have as yet been provided to the new structure (if at all).

That said, it would still be possible for private parties to enforce a ruling if the Office for Competition find an infringement of competition law, and this in the form of an action for cartel damages provided under the Competition Act.

This private action can be instituted either in the absence of a decision from the Office for Competition as a stand-alone action; or following such a decision. In the former situation, the courts, will require the Director General to provide its input on the competition matters before reaching a decision.

13 Burden of proof

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

At present the burden of proof required is that of proof on the balance of probabilities. This burden is imposed at first instance on the Office for Competition to establish the existence of a cartel; subsequently on the undertaking attempting to raise a defence (such as that the agreement is beneficial to consumers) which will have to prove the existence for the preconditions required by that defence.

It must be pointed out that the finding by the courts that the penalties imposed are criminal in nature will give rise to the consequent requirement, on the Office for Competition, that the existence of a cartel is to be established beyond a reasonable doubt, unless this is modified in any amending legislation.

14 Appeal process

What is the appeal process?

An appeal may be filed before The Competition and Consumer Appeals Tribunal from any decision, order or fine handed down by the Director General, and such appeal must be filed within 21 days from the notification of such to the parties involved.

The appeal must be notified to the Director General, who must file a reply within 20 days from the notification of the appeal. The order, fine or penalty appealed from is not suspended except by order of the tribunal pending the final decision of the appeal.

The Appeals Tribunal is composed of the President, who is the judge, and two other members from a panel of ordinary members selected by the President. The panel is made up of six ordinary members appointed by the President of Malta on the advice of the Prime Minister.

A further appeal from the decision of this Tribunal on a point of law may be made to the Maltese Court of Appeal in its inferior jurisdiction within 20 days of the decision of the Appeals Tribunal.

Sanctions

15 Criminal sanctions

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

The only criminal sanction imposed is that for the failure to pay an administrative fine or daily penalty payment imposed by the Director General or the Appeals Tribunal and gives rise to a further fine of not less than €1,000 and not more than €20,000. It must be pointed out that in the case of an undertaking, all its officers would be personally exposed to that fine, subject to a limited defence.

Furthermore, the Criminal Code (Chapter 9 of the Laws of Malta) punishes, as a contravention, the act of conspiring to operate a cartel. With the maximum penalty being that of detention for a period of not more than two years.

It should be noted that following the judgment quoted above, all sanctions imposed by the Competition Act have been found to be criminal in nature, even though they are described by the act as being administrative sanctions. These are described below.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Where undertakings are found to have infringed the Competition Act they will be liable to take remedial action and to pay an administrative fine of up to 10 per cent of their total turnover in the preceding business year. In the case of an association of undertakings the fine is calculated on the basis of the total turnover of each member active in the affected market.

Daily penalty payments may also be imposed in order to enforce a number of orders (cease and desist order, compliance order, interim measure, commitment order, an order to provide documentation and/or to submit to an inspection). In such cases the penalty cannot exceed 5 per cent of the average daily turnover of the undertaking in question in the preceding business year for each day that the undertaking continues to be non-compliant.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

No fining guidelines have been issued. However, the law provides that the fine should reflect the gravity and duration of the infringement and other aggravating or attenuating circumstances.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

While debarment from public tenders is not automatic, this is a real risk since public procurement legislation provide that a bidder may be excluded from a tender where the bidder has been convicted of an offence concerning his or her professional conduct; or has been declared guilty of grave professional misconduct. It is for the government authority issuing the tender to determine the consequences of such a breach.

19 Parallel proceedings

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

Under Maltese law, the criminal/administrative action and the civil action are prosecuted independently of one another, thus private persons who were injured by the cartel can pursue a civil action to be indemnified independently of the proceedings undertaken by the Office for Competition.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

The Competition Act expressly contemplates private claims for damages: whereby a person may institute an action for damages, even where the person is not an immediate customer of the undertaking, before a court of civil jurisdiction. The compensation awarded would amount to the actual loss and loss of profit of the plaintiff, in conjunction with interest from the time the damage commenced until the sum awarded is paid by the undertaking. In order to calculate this, one would have to

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Update and trends

The decision by the Constitutional Court on 3 May 2016, detailed in question 3, appears to have had a paralytic effect on the Office for Competition.

perform an economic exercise in order to establish the factual scenario that would have prevailed had there been no infringement.

21 Class actions

Are class actions possible? If yes, 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 regulated by chapter 520 of the Laws of Malta – the Collective Proceedings Act, and the provisions which provide for private actions are also applicable in the case of a class action. The proceedings would be brought by a class representative authorised to bring the claim on behalf of a group of persons or undertakings with common issues or a similar claim. A class member may apply to the Court and ask that the conduct of the proceedings be determined, and the Court may issue a decree, if it considers it appropriate, for the fair and expeditious determination of the claim.

Cooperating parties

22 Immunity

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

Although draft leniency regulations, providing immunity to whistleblowers and leniency to subsequent cooperators, have been published they have not yet been confirmed and are still a draft.

23 Subsequent cooperating parties

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

Not relevant: the leniency regulations have not as yet entered into force. It should be noted, however, that the draft leniency regulations suggest that parties will be able to cooperate after the immunity application in order to obtain a reduction of the penalty even if not actual immunity.

24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Not relevant: the leniency regulations have not as yet entered into force. It should be noted, however, that in the draft regulations, the second cooperating party (or the 'first to provide significant added value') can expect a reduction of up to 50 per cent of the fine (from 30 per cent to 50 per cent); the third cooperating party can expect a reduction of between 20 per cent to 30 per cent; while all subsequent cooperators can obtain a reduction of up to 20 per cent. Again, these figures are only found in the draft and have not been made official.

25 Approaching the authorities

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

Not relevant: the leniency regulations have not as yet entered into force. It should be noted, however, that the draft regulations do provide for markers and a whole procedure for applying; however, yet again so far none of this is binding on the authority.

26 Cooperation

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?

Not relevant: the leniency regulations have not as yet entered into force.

27 Confidentiality

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?

Not relevant: the leniency regulations have not as yet entered into force.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The Director General may, prior to issuing a statement of objections, invite all or some of the undertakings forming part of the cartel to indicate in writing, within the time limit set by him, whether they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions. Where replies are received after the expiration of the time limit set, the Director may choose not to take these into account.

If two or more undertakings are willing to engage in settlement discussions, then a joint representative must be appointed to discuss with the Director General on their behalf. Where settlement discussions progress, the Director General may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the settlement discussions and acknowledging their participation in an infringement of article 5 and/or article 101 of the TFEU as well as their liability. The Director General may then proceed to the adoption of a decision, and the undertakings or association of undertakings concerned for the settlement may be rewarded by having their fine reduced by 10 per cent.

29 Corporate defendant and employees

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

Not relevant: the leniency regulations have not as yet entered into force.

30 Dealing with the enforcement agency

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

Not relevant: the leniency regulations have not as yet entered into force.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

In mid-2013, the Office for Competition published a draft of the Immunity from Fines and Reduction of Fines in Cartel Investigations Regulations for public consultation, which took into account the ECN Model Leniency Programme. However, there seems to have been no further developments in this field.

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Defending a case

32 Disclosure

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

The defendant in an alleged cartel generally has a right to access the file concerning its case, saving those documents and that information that is by the Director General, as containing business secrets or other confidential information, of internal documents of the Director General or of the Competition Authorities of other member states.

33 Representing employees

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

So long as there is no conflict of interest, legal counsel are not prohibited from representing both an undertaking and its employees. In practice, however, a counsel would have to tread carefully because there would generally be a substantial possibility of conflict.

34 Multiple corporate defendants

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

Similarly, there is no prohibition for a legal counsel to represent a number of undertakings. Again, care has to be taken to avoid conflicts of interest from arising.

35 Payment of penalties and legal costs

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

There are no restrictions prohibiting an undertaking for paying or reimbursing legal penalties imposed on its employees.

36 Taxes

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

As a rule, administrative and criminal fines or penalties are not tax-deductible.

On the other hand, private damages awards, since these have the nature of compensation for damages sustained in terms of actual loss and loss of profit, would generally be tax-deductible insofar as they are connected to the undertaking's trade.

37 International double jeopardy

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 rules requiring the Office for Competition to consider fines imposed in other jurisdictions when setting the administrative fine.

In the case of private damages, only damages that were factually suffered (actual loss and loss of earnings) can be awarded. Thus the courts would take into consideration any compensation already received, even in other jurisdictions.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Although the leniency publications have not yet been published, it is possible to collaborate with the Office for Competition in order to reduce one's liability. Although the existence of a compliance programme at law need not affect the level of the fine, in practice the Office will take such collaboration into consideration when setting the fine. Furthermore, prior to issuing a finding that a cartel situation exists, the Director General will invite all or some of the undertakings to enter settlement negotiations.

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The legal basis of competition policy and law enforcement is provided by article 28 of the Constitution, which prohibits monopolies and monopolistic practices.

The Federal Law of Economic Competition (LFCE) provides a detailed regulation on, inter alia, merger control, relative monopolistic practices (abuse of dominance practices and vertical restraints) and absolute monopolistic practices (cartel conduct) with the aim of promoting competition and preventing anticompetitive conduct.

Cartels are covered by article 53 of the LFCE, which prohibits absolute monopolistic practices. Criminal responsibility for a cartel is established in article 254-bis of the Federal Criminal Code and is prosecuted according to the National Code of Criminal Proceedings, while civil responsibility is regulated by the Federal Civil Code, the Federal Code of Civil Proceedings and article 134 of the LFCE.

2 Relevant institutions

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 (CFCE) enforces the LFCE and is in charge of preventing, investigating and sanctioning administrative infringements derived from cartel conduct. The CFCE has jurisdiction over all industries, with the exception of the broadcasting and telecommunications industries, where the Federal Telecommunications Institute (IFT) enforces the LFCE.

CFCE and IFT decisions may be challenged before competition, broadcasting and telecommunications specialised federal courts, through an *amparo* proceeding.

The CFCE and IFT may bring criminal charges before the public prosecutor. Criminal prosecution and adjudication correspond to the Mexican attorney-general and the federal criminal courts, respectively.

Federal specialised courts in competition, broadcasting and telecommunications have jurisdiction over individual and collective damages' claims.

Please note, except as mentioned otherwise, any references made in this chapter to the CFCE will also apply to the IFT in the context of the broadcasting and telecommunications industries.

3 Changes

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

Article 28 of the Constitution was amended on June 2013 (in force since 12 June 2013) to strengthen competition policy and law enforcement as well as to increase the effectiveness of the telecommunications regulatory framework. Derived from this constitutional amendment, a new LFCE was enacted and the Federal Criminal Code was amended. Both legislative changes were published in the Federal Official Gazette on 23 May 2014 and came into force on 7 July 2014.

Some of the relevant changes contained in these constitutional and legislative reforms are the following:

- executive branch agencies, the Federal Competition Commission (CFC) and the Federal Telecommunications Commission were replaced by new autonomous constitutional entities: the CFCE and the IFT, respectively;
- the five former commissioners were replaced by seven new commissioners for each entity;
- the power to apply the LFCE in the broadcasting and telecommunications industries was transferred to the IFT;
- the CFCE and the IFT are empowered to issue law regulations;
- new federal courts specialised in competition, broadcasting and telecommunications were created;
- the scope of exchanging information as a cartel conduct was extended. Under the former LFCE, the exchange of information was illegal only when its purpose or effect was to fix prices. Under the new LFCE, the exchange of information is illegal also when its purpose or effect is to commit any of the other absolute monopolistic practices (ie, restriction of output, allocation of markets or bid rigging);
- the minimum sanction for criminal offences increased from three to five years. Thus, cartel conduct may be sanctioned with five to 10 years' imprisonment;
- obstructing CFCE or IFT dawn raids is sanctioned with one to three years of prison whenever such obstruction consists of destroying information and documents; and
- CFCE and IFT decisions may be challenged only through an *amparo*, which is a proceeding followed before federal courts. *Amparos* against said authorities will be decided by the specialised district judges and circuit courts.

On November, 2014, the CFCE issued its Regulations of the LFCE. Also, the IFT issued its Regulations of the LFCE on January 2015. Mostly, the aim of the aforesaid regulations is to detail procedural aspects, but they also regulate cartel conduct indicia (see question 4).

In June 2015, the CFCE issued its guidelines regarding the Immunity and Reduction of Sanctions Programme and the initiation of investigations. Those guidelines are not binding; their purpose is to explain the proceedings to the public using practical and clear language. The IFT has published the draft of its guidelines on the Immunity and Reduction of Sanctions Programme, which are currently subject to public inquiry.

Also, by the end of 2015, the CFCE published its Guidelines for Information Exchange among Competitors and regarding the Cartel Investigation Procedure.

4 Substantive law

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);

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- to limit the production, processing, distribution, marketing or purchasing of goods, or to limit services, including their frequency (restriction of output);
- to divide, distribute, allocate or impose specific portions or segments of a current or potential market of goods or services by means of clients, suppliers, time spans or certain territories (allocation of markets);
- to establish, arrange or coordinate bids or abstentions in tenders, contests, auctions or purchase calls (bid rigging); or
- to exchange information having as a purpose or effect any of the above-mentioned conducts.

According to the LFCE, cartels are per se illegal. Thus, the authority does not need to assess market power or any adverse effect over the market. In other words, the restriction of competition is presumed whenever the above conduct takes place, without the opportunity to demonstrate efficiencies.

According to CFCE's Regulations, the following will be considered cartel conduct indicia and, as such, may be used for initiating a cartel conduct investigation:

- the invitation or recommendation addressed to one or more competitors to coordinate prices, output, or production, distribution and commercialisation terms and conditions, or to exchange information with the same purpose or effect;
- a situation where the price offered in Mexico by two or more competitors regarding internationally interchangeable goods or services is considerably superior or inferior to the international reference price, as well as a situation where the tendency of its evolution in a specific time span is considerably distinct to the tendency of international prices in the same period, except when such difference derives from the application of tax laws, or from transport or distribution costs;
- the instructions, recommendations or business standards adopted by chambers of commerce or professional associations to coordinate prices, output, or production, distribution and commercialisation terms and conditions of a certain product or service, or to exchange information with the same purpose or effect;
- a situation where two or more competitors establish the same maximum or minimum prices for certain good or service; as well as a situation where those competitors adhere to the prices issued by a competitor, certain chambers of commerce or associations; and
- regarding broadcasting and telecommunications industries, a situation where two or more competitors refrain from participating, or coordinate their bids in certain geographic areas.

Considering that all participants in a cartel have the incentive to hide or destroy any proof of their conduct, courts have established a binding criterion stating that there is no need to prove the arrangement through direct evidence. Accordingly, a presumption of the existence of a cartel is enough to sanction it under the terms of the LFCE, as long as such presumption relies on facts that have been proven through direct evidence; in other words, a cartel can be sanctioned under circumstantial evidence.

With respect to information exchange, the Guidelines for Information Exchange among Competitors establish some criteria under which such conduct will be assessed. First, the Guidelines point out the relevance of the nature and characteristics of the information to be exchanged: strategic, detailed and recent information, exchanged in a frequent basis, is more likely to restrain competition and, as such, the exchange of the aforesaid information is more likely to be investigated by the CFCE. Likewise, the Guidelines explain that the market structure is also a key element to take into consideration: concentrated and more static markets, with symmetric participants and homogeneous products, are more propitious to collusion and, as such, strategic information exchange in those markets is riskier and more likely to be investigated by the CFCE.

Also, the Guidelines for Information Exchange among Competitors include the following recommendations regarding information exchange in a due diligence process in the context of a horizontal concentration:

- each economic agent must identify the strategic information. Therefore, all non-public information that would not be shared normally with third parties regarding prices, discounts, sales and purchase terms and conditions, clients and suppliers, must be identified;
- the use of strategic information must be limited to indispensable matters and as long as it is strictly needed for an adequate evaluation of the transaction. Such an exchange is indispensable when the information is reasonably related to the parties' understanding of the future profits of the concentration and to determine the value of the transaction;
- when possible, the use of historic and aggregated information to evaluate the relevant aspects of the transaction and for planning the final integration should be preferred;
- the economic agents must establish protocols or strict rules regarding access to strategic information and sign a confidentiality agreement regarding such information. Such rules must:
  - limit the use of information only to previous audits; and
  - indicate that access to strategic information will only be granted to employees that must know such information and whose functions do not contemplate strategic operational decision-making and/or sales;
- the integration of an isolated and compact team in charge of the concentration. Such team will control the use and generation of the information. It is recommended for this team:
  - to be integrated by persons that do not work for the commercial areas of the economic agents and to avoid contact with such areas; and
  - to sign confidentiality agreements to oblige themselves to protect and maintain confidentiality of the information;
- if possible, delegate the collection, management and use of the strategic information to an independent third party that will evaluate such information in the most disaggregated level to then aggregate it for its analysis in the concentration;
- maintain real-time records of all information exchanges and contact between the parties. Such records must be sequential and detailed to the extent that it is possible to rebuild in a reliable way the source of information, the moment in which the information was sent and received by the parties, and the use that was given to the information;
- whenever it becomes necessary to impose restrictions regarding the use and disposal of certain assets or to increase liabilities, in the phase that goes from the execution of the purchase agreement to the closing of the transaction, restrictions shall be minimal to protect the value of the assets that will be transferred;
- parties must not coordinate prices, output, allocate markets or bid rig before closing, nor impose future decisions to the other party; and
- inform the individuals involved in the concentrations the legal framework regarding merger control and cartel conduct.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are no industry-specific infringements, defences or exemptions for cartel conduct. The LFCE has transversal effect and includes all branches of economic activity, whether regulated or not.

6 Application of the law

Does the law apply to individuals or corporations or both?

The LFCE applies to both individuals and corporations. Moreover, if the CFCE 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 mayor of Tuxtla Gutiérrez, in the southern state of Chiapas, was sanctioned by the CFC due to his alleged collaboration with tortilla producers and distributors in dividing the city into

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quadrants and in assigning exclusive territories to each producer for home tortilla delivery (CFC decision DE-014-2010).

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

This matter has been little addressed by Mexican authorities, but there are some precedents in which the CFC intervened with respect to conduct that took place abroad. In IO-09-99, the CFC learned that two foreign companies had pleaded guilty before a Texas court to participating in an agreement to fix the price of various types of vitamins, with international scope. Since the companies had affiliates and subsidiaries in Mexico, the CFC initiated a cartel investigation, given the possible extensive effects of the cartel in national territory.

In another precedent (IO-002-2009) the CFCE learned, through the leniency programme, that several non-Mexican companies fixed prices globally in the market of production, distribution and commercialisation of hermetic compressors through the information exchange between their executives in emails, telephone calls and meetings outside Mexican territory (Brazil and Europe). The CFCE determined that the Mexican hermetic compressors market was affected by the global cartel as such products were imported to Mexico for their commercialisation. The CFCE fined the non-Mexican companies and their Mexican subsidiaries.

In another recent pecedent (IO-001-2013) the CFCE learned, through the leniency programme, that several non-Mexican companies rigged bids globally in the market of production, distribution and integration of air conditioned compressors for automobiles. The CFCE determined that the Mexican air conditioning compressors for the automobile market was affeceted by the global cartel as such products were used in the manufacture of cars that were produced and sold in Mexico. The CFCE fined the non-Mexican companies.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

An investigation can be initiated by the investigative authority of the CFCE, ex officio or through a complaint that can be lodged by any person.

The investigation may last up to 120 business days. This period can be extended by the CFCE up to four times, but only for justified causes.

During this time, the CFCE can issue information requests as well as subpoenas and may practise dawn raids and obtain all the information it needs to prosecute a suspected infringer of the LFCE. During the investigation, case files may not be accessed.

Once the investigation has finished, if the CFCE's investigative authority considers there is enough evidence to presume the responsibility of a party, it submits to the CFCE's plenary a statement of probable responsibility (*dictamen de probable responsabilidad* – DPR) describing the charges. The defendant is summoned with the DPR and, thereafter, the proceeding follows the basic rules of a trial, in which the defendant has the constitutional rights of due process; the investigative authority acts as a prosecutor and the complainant may cooperate with the latter. The LFCE grants 45 business days to the defendant to respond to the DPR and enclose the proof in his or her possession to rebut the accusation. After all evidence is submitted, the defendant and the investigative authority may present written arguments in a 10-business-day term. Also, the defendant and the complainant have the right to ask for a hearing before the plenary of the CFCE. Once this proceeding is concluded, the CFCE's plenary issues its final decision.

At any time, the investigative authority may ask the plenary to issue a precautionary measure. The investigated party or defendant may ask the plenary to determine a caution to avoid the precautionary measure, and the amount should be enough to compensate for possible damages caused to the competition process by the anticompetitive conduct.

9 Investigative powers of the authorities

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

The CFCE is empowered to perform dawn raids which cannot last more than four months. If the implicated party is not at the corresponding place, these proceedings can be carried out with any person found at the premises; there is no need to leave any kind of subpoena.

It is also empowered to request any person to provide the information and documents deemed necessary to carry out the investigation. The authority can subpoena any person as well, to testify about facts under investigation. The implications of being requested or subpoenaed as the 'denounced agent', as a 'third adjuvant' or as a 'person related to the investigated market' are unclear, and thus it is unclear what rights these requested or summoned people have. There are no judicial binding specific criteria for competition and antitrust that suggests that requested or deponents' information may not be used to incriminate them. Notwithstanding, the Supreme Court determined that the principle of presumption of innocence is applicable to administrative sanctioning proceedings.

These investigative powers may be invoked by the CFCE's investigative authority without the CFCE's plenary or any court approval.

International cooperation

10 Inter-agency cooperation

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

Yes. Inter-agency cooperation usually takes place through provisions established in international free trade agreements or in cooperation agreements between agencies.

11 Interplay between jurisdictions

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, EFTA, the EU, Israel, Japan, North America, Uruguay and Venezuela). They are also contained in bilateral antitrust treaties with Canada, Chile, Korea and the US. Among these jurisdictions, the most significant interplay takes place with the US.

It is noteworthy that people cooperating under the amnesty programme established in article 103 of the LFCE are entitled to object to the CFCE about sharing their data and the information provided under this programme. CFCE may ask some economic agents under the leniency programme to grant an authorisation or waiver to share information with other agencies.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel cases are determined by the plenary of the CFCE. This body consists of seven commissioners, and decisions are taken by a simple majority. Damages and criminal responsibility are adjudicated under the terms mentioned in questions 1 and 2.

13 Burden of proof

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

A systematic interpretation of articles 73 and 79 of the LFCE indicates that the CFCE has the burden of proof in cartel cases. Indeed, the law empowers it to issue requests for information and documents, to perform dawn raids and to subpoena parties to testify with the purpose of gathering evidence to prove the responsibility of the alleged infringers. Moreover, article 79 establishes that the DPR shall contain the evidence that the CFCE considered to subpoena the party to the

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administrative trial. In short, the CFCE must not issue a DPR without sufficient evidence.

As explained in question 8, defendants have 45 business days to answer the DPR and submit the necessary evidence to rebut the accusation. It should not, however, be understood that the burden of proof is thus passed on to the defendant; rather, defendants have the opportunity to prove a different theory of the case.

Certainly, not presenting evidence does not entitle the CFCE 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.

The LFCE does not establish standards of proof to be satisfied by the CFCE. Nevertheless, there are precedents in which the CFC has acknowledged the existence of such standards (DE-22-2006 and IO-01-2007). In terms of these resolutions, the evidence contained in the file must dismiss any alternative hypothesis that could reasonably explain the situations observed in the market.

14 Appeal process

What is the appeal process?

Against the decision of the CFCE, the parties can initiate an *amparo* trial before a federal district judge, who will rule on violations to fundamental rights during the administrative proceeding or in the adjudication. The *amparo* ruling may be appealed before the circuit courts. Only after this latter decision can the cartel case be considered legally settled.

Sanctions

15 Criminal sanctions

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

According to article 254-bis of the Federal Criminal Code, individuals face sanctions between five and ten years in prison for entering, ordering or executing any contract or arrangement between competitors for one or more of the purposes or effects listed in question 4.

For a criminal action to be lodged, the CFCE must bring charges before the public prosecutor. Charges may be pressed with the DPR (see question 8). The term in which the criminal action expires is seven-and-a-half years.

Considering criminal sanctions for cartel conduct were enacted in 2011, and that the main procedural obstacle to press charges was recently removed (previous to 2014, in order for CFCE to press charges, a final judgement of administrative responsibility was needed), there is no experience in Mexico regarding criminal sanctions for cartel conduct.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Cartel conduct is sanctioned with a fine of up to the equivalent of 10 per cent of the infringer's income. In case of recidivism the CFCE may impose a fine of up to two times the applicable fine or order the divestiture of assets.

Individuals that represent or collaborate with the company in committing anticompetitive practices are liable to receive, respectively, fines of up to the equivalent of 14.6 million pesos. Such individuals 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 the equivalent of 13.14 million pesos.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

According to article 130 of the LFCE, when determining the fine to be imposed for anticompetitive conduct the CFCE must consider the infringer's economic capacity as well as the gravity of the conduct. In order to determine the latter, CFCE shall assess the following elements:

- the damage derived from the conduct;
- the indicia of intention;
- the defendant's market share;
- the size of the affected market;
- the duration of the conduct; and
- possible obstruction of the CFCE actions.

Criminal sanctions shall be imposed by the corresponding federal criminal judge. As provided by the Federal Criminal Code, prison punishments will range from five to 10 years, depending on the aggravating or mitigating circumstances of each case.

According to article 134 of the LFCE, monetary relief equivalent to the actual damages and losses caused by the defendants may be claimed by the affected parties before the specialised courts.

Consideration of the elements listed in article 130 of the LFCE is binding upon the CFCE, and the range of imprisonment time established by the Federal Criminal Code is binding upon the judge.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not explicitly covered by competition law. Notwithstanding, if cartel conduct (more likely bid rigging) is committed against government entities, the Ministry of Public Services may debar the infringers under article 60 of the Law of Procurement, Leasing and Services for the Public Sector.

19 Parallel proceedings

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

Yes. As stated in question 15, once the CFCE's investigative authority has issued the DPR, it may bring criminal charges before the public prosecutor.

According to article 134, administrative responsibility is a condition to initiate individual or class actions before civil courts, in order to claim compensation for the damages derived from the anticompetitive practice.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Yes, private damage claims are available under the terms mentioned above.

Damages claims for antitrust infringements have not been frequent in Mexico, since a decision from the competition authority judging a party to be responsible (as a legally settled matter) is necessary for initiating a civil process on the matter. Thus, private antitrust tort practice is still under development.

21 Class actions

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

As provided in article 585 of the Federal Code of Civil Proceedings, class actions can be lodged by:

- the CFCE;
- no fewer than 30 members of a class;
- not-for-profit civil associations whose purpose is the defence of rights and interests in antitrust matters; and
- the Attorney-General of Mexico.

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Update and trends

In November 2014, the CFCE issued the Regulations of the LFCE.

In January 2015, the IFT issued the Regulations of the LFCE.

In June 2015, the CFCE issued the guidelines regarding the amnesty programme and the initiation of investigations.

In December 2015, the CFCE issued guidelines for information exchange among competitors.

In September 2016, the IFT published the draft of its guidelines on the Immunity and Reduction of Sanctions Programme, which are currently subject to a public inquiry.

In July 2016, the CFCE determined, for the first time, to revoke the benefits of the leniency programme to an economic agent who failed to fully cooperate during the proceedings.

This regime came into force in February 2012, so the efficiency of its implementation, such as the balance of its advantages and disadvantages, is still pending.

Cooperating parties

22 Immunity

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

Article 103 of the LFCE, as well as articles 114 to 116 of the CFCE's Regulations contemplate the leniency, immunity or amnesty programme. On June 2015 the CFCE issued the Immunity and Reduction of Sanctions Programme Guidelines. These guidelines show the criteria upon which the CFCE applies the law and regulations regarding leniency.

Any corporation or individual who has been or is involved in cartel activity may apply for leniency.

In order to qualify for the programme, the applicant must submit evidence, fully and continuously cooperate with the CFCE during the corresponding proceeding, and cease its participation in the cartel activity.

One of the benefits of the programme consists of reductions in the applicable administrative fines. The fines may be fixed at the symbolic amount of one minimum wage (which in practice is equivalent to being awarded 'full immunity') for the first applicant or may be reduced by up to 50, 30 or 20 per cent for the second and subsequent applicants. The level of the reduction also depends on the sufficiency of the evidence provided to the CFCE and the cooperation during the proceedings.

Likewise, 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.

23 Subsequent cooperating parties

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

Yes. See question 22.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Second and subsequent applicants who provide the CFCE with additional evidence may get reductions of up to 50, 30 or 20 per cent of the applicable fine, considering the timing of the application and the sufficiency of the evidence they provide to the authority. Also, as previously stated, all qualified beneficiaries of the leniency programme will be exempted from criminal responsibility, notwithstanding the time in which they applied.

25 Approaching the authorities

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

Leniency may be sought at any moment before the CFCE has ended the cartel investigation proceeding. Since only the first applicant may obtain full immunity, and the order in which subsequent applicants approach the CFCE will be considered to fix the percentage of the fine reduction, time is crucial in applying for leniency. The CFCE uses markers in order to determine who the first applicant is and who the subsequent applicants are.

26 Cooperation

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?

The applicant must submit evidence, cooperate fully and continuously with the CFCE during the corresponding proceeding, and cease its participation in the cartel activity. All applicants, in order to qualify, must submit more information than the one that is available in the records of the investigation.

27 Confidentiality

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

The CFCE will keep confidential the identity of all (ie, first and subsequent) leniency applicants during the proceeding and even after the cartel is sanctioned. In addition, the CFCE will not share the identity of or the information provided by the applicants with other jurisdictions unless it is authorised to do so in writing by such applicant.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

If the requirements are fulfilled by the applicant, the CFCE issues a resolution expressing the applicant's place in line and the corresponding fine reduction. The benefit will be conditional upon the cooperation of the applicant during the investigation and sanction proceedings. If applicants fail to cooperate (eg, if the applicant destroys or hides evidence or alerts other cartel participants to the investigation), they will lose the benefits of the leniency programme (see question 22).

Also, the Plenary of the CFCE is entitled to request the dismissal of the criminal case if the administrative sanctions are complied with by the economic agent, as long as the following critieria are met: (i) absence of pending appeals against the CFCE's decisions; and (ii) 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.

29 Corporate defendant and employees

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

Leniency or immunity granted to a corporation is extended to its employees to the extent that they apply and qualify for the programme and provide full and continuous cooperation with the CFCE. If the corporation fails to provide full and continuous cooperation but the employees who received the extension provide such cooperation, such employees will remain protected as if they were the applicants themselves.

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30 Dealing with the enforcement agency

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

If a corporation detects potential cartel activity, it should conduct an internal investigation to assess the existence of enough elements to prove such activity. If so, it should move quickly to apply for the leniency programme. Since providing the CFCE with enough evidence is a requirement to qualify for the programme, in the absence of such evidence, it will be better to prepare a strong defence instead of applying for the programme.

According to the Immunity and Reduction of Sanctions Programme Guidelines, the following are examples of the information and documents that may be submitted during the application:

- detailed description of the good or service, including its use, characteristics and price;
- a narrative of the collusive agreement or information exchange, describing the conduct or conducts that are being performed or that were performed. In this narrative, it must be admitted that the applicant participated in such conduct. Also, to back up such narrative the applicant can provide agreements, memoranda, minutes, activity reports, correspondence, emails, telephone records, personal reports and signed testimonies of the participants, among other documents. When the applicant provides digital evidence from computers, laptops, smartphones and other electronic devices, the source and extraction method of the information must be provided;
- identification of the individuals and/or legal entities involved in the collusive agreement or in the information exchange;
- duration of the conduct, the geographical reach of such conduct and specific time of the agreements including the status of the applicant's participation (whether its participation has ceased or not);
- a narrative regarding how the agreements worked. In other words, how the participants communicated, the methods for the information exchange, etc;
- details of the meetings, communications and agreements, including dates, places, participants, objectives and the achieved results;
- actions taken to ensure, follow up and verify compliance of the agreements entered into by competitors;
- a statement about the existence of hard copies of information exchange or agreements, if applicable; and
- identification of the relevant information that is not available for the applicant and the reasons that explain its unavailability (eg, the company is not the owner or has been destroyed).

Likewise, the guidelines establish that cooperation during investigation proceeding includes:

- terminating the cartel conduct;
- keeping confidentiality regarding the information that was delivered to the CFCE during its application, at least until the publication of the investigation notice;
- delivering all requested information within the terms granted by the CFCE;
- cooperating during the investigation errands;
- implementing all possible actions in order to make the involved individuals to participate in the investigation (ie, when they are subpoenaed); and
- refrain from destroying, falsifying or hiding information.

Also, according to the guidelines cooperation during the sanction proceeding includes:

- refrain from denying, directly or through the submission of evidence, the participation in the cartel;
- submitting useful new evidence;
- refrain from destroying, falsifying or hiding information; and
- cooperating during the procedural errands.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

Considering the guidelines were issued in June 2015, we do not expect that the current CFCE's guidelines will be subject to any modification soon. Also, as previously stated, the IFT has published the draft of its guidelines on the Immunity and Reduction of Sanctions Programme, which are currently subject to public inquiry.

Defending a case

32 Disclosure

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

According to the article 79 of the LFCE, the following information or evidence should be contained in the authority's DPR:

- the identification of the economic agents under investigation and, if possible, the corresponding persons;
- the matter under investigation and the probable purpose or effects on the market;
- the evidence and other elements of conviction available on the file and its analysis; and
- the elements that support the DPR and the legal provisions that are considered infringed, as well as the consequences that may result of such infringement.

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33 Representing employees

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

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.

34 Multiple corporate defendants

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

Counsel may represent multiple corporate defendants to the extent a conflict of interest does not exist or a potential conflict of interest is not foreseeable. If evidence of the cartel activity exists, counsel should not represent multiple defendants, since each of them will be interested in applying for the leniency programme.

35 Payment of penalties and legal costs

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.

36 Taxes

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

Private damages awards are tax-deductible while fines are not.

37 International double jeopardy

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

Competition law does not contemplate cases of double jeopardy, and no administrative or judicial criteria have yet been issued on this matter. Notwithstanding, we consider that sanctions due to non-compliance of local legislation can coexist with sanctions imposed in other countries. Damages awarded and paid in another country should be taken into account whenever such damages include concepts that demand compensation in Mexico.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The optimal 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 CFCE during the investigation and sanction proceedings may lead the authority to consider a lower fine. The existence of a compliance programme may help, as one of the elements that the CFCE must consider when imposing a fine is the indicia of intention (see question 17).

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Netherlands

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Dutch Competition Act (the Act) entered into force on 1 January 1998 and is modelled closely on European Union competition law. The cartel prohibition contained in the Act is a copy of article 101 of the Treaty on the Functioning of the European Union (TFEU), excluding the effect on interstate trade criterion. An English-language version of the Act is available on the website of the Dutch Competition Authority.

2 Relevant institutions

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

In 2013, the Dutch Competition Authority merged with the Independent Post and Telecommunications Authority (OPTA) and the Consumer Authority (CA) into a single regulator, the Authority for Consumers and Markets (ACM). This organisation has the task of applying and enforcing the Act. The ACM also applies article 101 TFEU in relation to agreements and concerted practices affecting competition in the Netherlands. The ACM has over 500 employees.

The ACM has independent status from the Ministry of Economic Affairs. The Minister for Economic Affairs (the Minister) is empowered to set out general policy rules, and can instruct the ACM to undertake activities in relation to EU and international competition issues. However, the Minister is prohibited from giving instructions to the ACM with respect to any specific case.

3 Changes

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

As mentioned in question 2, the Dutch Competition Authority merged with OPTA and the CA to become a single regulator, the ACM. On 1 August 2014, the Streamlining Act came into force, harmonising the different powers, enforcement tools and procedures of the ACM's predecessors.

In July 2016, the maximum fine levels that can be imposed by the ACM for cartel infringements were increased. Instead of keeping pace with the European Commission's cap of 10 per cent of a company's total turnover in the preceding business year, the maximum fine is set by multiplying the cap of 10 per cent of a company's turnover by the numbers of years of the cartel infringement, subject to a maximum duration of four years. In the case of a repeated infringement, the maximum fine level will double. As a result, a maximum fine of 80 per cent of a company's turnover can be imposed on repeat offenders. Fines for individuals who oversaw and gave instructions regarding cartels have also increased from €450,000 to €900,000.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

According to article 6 of the Act, which, as noted above, mirrors article 101 TFEU, agreements, decisions and concerted practices are prohibited if they have as their object or effect the prevention, restriction or distortion of competition on the whole or a part of the Dutch market. Similar to the assessment under article 101 TFEU, the distinction between restrictions by object and restrictions by effect is important. For restrictions of competition by object, there is no need to look at any actual effects. The prohibition covers all types of behaviour, horizontal or vertical, irrespective of whether they are based on formal, oral or tacit agreements or concerted practices.

Article 6 does not provide specific examples of restrictive clauses. In practice, any agreement that fixes prices, limits output or divides markets, customers or sources of supply will almost inevitably be considered to infringe article 6. Horizontal price-fixing agreements, collective vertical price fixing, collective boycotts and horizontal agreements aimed at partitioning markets or quota schemes (including limitation of sales and prohibited tendering agreements – bid rigging) are regarded by the ACM as very serious infringements of the competition rules.

As in EU competition law, agreements restricting competition are only prohibited if they affect competition to an appreciable extent.

Article 7 provides for an exemption for restrictive agreements, including hard-core cartels, where no more than eight participants with an aggregate turnover of less than €5.5 million (for companies involved in the supply of goods) or €1.1 million (for other companies) are involved. An additional exemption is available for any restrictive agreement between (any number of) undertakings whose combined market share on any relevant market does not exceed 10 per cent and whose agreement does not appreciably affect interstate trade.

As noted above, article 101 TFEU also forms part of the substantive law on cartels in the jurisdiction, having direct effect in relation to agreements and concerted practices affecting competition in the Netherlands where there is also an effect on interstate trade.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are no industry-specific offences under the Act. The competition rules apply across the board, including in regulated sectors such as telecommunications. The Act provides for non-application of the cartel prohibition to collective labour agreements, sector agreements on pensions between employers' organisations and employees' organisations and (under certain conditions) agreements or decisions on occupational pension schemes by an association of practitioners of a liberal profession.

At present, there are various non-industry-specific exemptions from the cartel prohibition, such as agreements benefiting from an EU exemption (falling under a block exemption), which are exempt from the cartel prohibition. However, the ACM has the express power to declare an EU block exemption non-applicable in the Netherlands.

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In addition, various categories of agreement can be exempted from the cartel prohibition by general administrative order. Such national block exemptions have been issued for agreements offering temporary protection from competition to undertakings in new shopping centres and certain cooperation agreements in the retail trade.

Restrictive practices necessary for the operation of services of general economic interest may also fall outside the scope of the cartel prohibition.

Similar to the EU rules under Regulation No. 1/2003, companies must self-assess agreements in light of article 6(3) of the Act, which mirrors article 101(3) TFEU. In general, the ACM will not provide written opinions (comfort letters) as to whether an agreement fulfils the criteria of article 6(3). However, similar to the Commission, it will provide advice in 'novel' cases. More and more parties prefer an informal discussion with the ACM over informal opinions.

To assist companies in the self-assessment, the ACM has issued guidelines on, inter alia, the application of article 6(3), on the cooperation between companies and on competition in the healthcare sector. In January 2015, the ACM published a vision paper on the same subject to provide guidance on how sustainability arguments can play a role in the assessment under article 6 of the Act. In April 2015 the ACM published a guidance paper setting out its strategy and enforcement priorities with regard to vertical agreements. In this guidance, the ACM states that – in the absence of market power – vertical agreements are usually beneficial to consumers and that enforcement will focus on vertical agreements that negatively affect consumers. In addition, the Minister has published policy rules on competition and sustainability as well as policy rules on consortia arrangements. The policy rules on consortia arrangements are largely based on the Commission guidelines on horizontal agreements and on the application of article 101(3) TFEU. Further guidance as to how to apply these policy rules was published in May 2015.

The ACM issued two informal opinions on sustainability initiatives which were found in violation of the competition rules. The first sustainability initiative related to an agreement between energy companies to shut down five coal power plants, which was included in the Dutch Energy Agreement on energy sustainability. The ACM observed that the closure of these coal power plants would lead to reduced production capacity and increased electricity prices for consumers. The agreement's proposed environmental benefits were not sufficient to offset the price increase for consumers, and thus anticompetitive, according to the ACM. In January 2015, the ACM applied its vision paper to the so-called 'Chicken of Tomorrow', a sustainability arrangement between producers and retailers to completely replace regularly-produced broiler chicken meat, currently part of the standard product range of supermarkets, by 2020. The higher animal welfare-friendly standards in the plans for the Chicken of Tomorrow included slightly more space and slightly more litter on the floors, an extension of the chickens' life by a couple of days, and a number of environmentally friendly measures. The ACM concluded that the sustainability arrangements resulted in a restriction to competition in the consumer market for broiler chicken meat. It subsequently examined whether the arrangements could fulfil the four criteria laid down in article 6(3). The ACM analysed the costs and benefits with regard to animal welfare, the environment and public health and examined how much value consumers attach to the measures for the improvement of animal welfare of broiler chickens. The ACM's analysis revealed that the benefits of these sustainability arrangements did not offset the costs and that less far-reaching measures, such as improved consumer education about the options with regard to sustainable chicken meat, are available. These two informal opinions led to discussions whether the policy rules on competition and sustainability needed to be revised to provide sustainability initiatives more leeway under the competition rules. In a letter of 23 June 2016, the Minister indicated to amend the policy rules on competition and sustainability to include further clarifications on sustainability options admissible under the competition rules. In addition, the Minister intends to introduce a bill to facilitate sustainability initiatives.

6 Application of the law

Does the law apply to individuals or corporations or both?

The cartel prohibition applies to undertakings and associations of undertakings. The term 'undertaking' is construed broadly and – in accordance with the case law of the Court of Justice of the European Union – is generally defined by the ACM as 'every entity engaged in economic activity, regardless of its legal status and the way in which it is financed'. Therefore, the Act may also apply to individuals running an unincorporated undertaking. Publicly owned entities may also qualify as undertakings. Intention to make profit is not required.

Agreements concluded between undertakings belonging to the same group of companies are, for the purposes of the Act, considered as agreements within one single economic entity and are in principle not subject to the cartel prohibition.

In December 2014, the ACM, for the first time in its history, imposed fines on a number of investment companies because their former portfolio company engaged in cartel conduct. The ACM seems to follow the European Commission's approach of holding private equity funds liable for cartel infringements by current or former subsidiaries. But the ACM appears to have introduced a new element by imposing individual fines on the investment companies, rather than fining them jointly with the portfolio company. Pursuant to the Act, principals and de facto managers can be made subject to fines of up to €900,000 for involvement in a cartel. In addition, maximum fines of €900,000 can be imposed on individuals for non-cooperation with the ACM's investigations. Similarly, maximum fines of €900,000 or 1 per cent of turnover can be imposed on companies for non-cooperation. The ACM has stated that, as a matter of policy, it will investigate the possibility of imposing fines on individuals in every cartel case. In November 2010, the ACM for the first time used its power to impose personal fines on individuals for a cartel infringement. Personal fines varying between €10,000 and €250,000 were imposed on three executives of two construction companies for their involvement in a cover-pricing cartel. In March 2016, the ACM imposed a fine of €12.5 million on four companies in the cold storage industry. Five executives each received personal fines, the highest of which was €144,000. The cold-storage companies were involved in merger talks between 2006 and 2009 and during these talks, exchanged competitively sensitive information with each other, shared customers and made price arrangements. One of the cold-storage companies admitted to having been 'too open, too soon' when holding merger talks. As a result, it implemented structural changes to its corporate culture and structure to prevent it from happening again. The ACM used a procedure similar to the European Commission's cartel settlement regime to lower the fine imposed on this cold storage company by 10 per cent in return for an acknowledgement of its involvement in and its liability for the infringement. The cold storage company's executives made use of the same procedure to have their personal fines reduced.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Act applies to all conduct that affects competition on part or the whole of the Dutch market. The place of establishment of the undertakings is not relevant. With respect to restrictive practices, the decisive factor is the place where the agreement, decision or concerted practice is implemented, not where or by whom it is agreed.

In 2004 (*Shrimps*, No. 2269), the ACM decided it had jurisdiction to impose fines on Dutch, Danish and German undertakings that participated in a cartel that concerned a relevant market comprising Denmark, Germany and the Netherlands. The Danish and German undertakings did not achieve the relevant turnover in the Netherlands. The ACM held that undertakings do not need to have activities in the Netherlands for their restrictive agreements to produce effects on the Dutch market and therefore to be caught by the cartel prohibition. The ACM's decision was upheld by the District Court of Rotterdam. It follows that the ACM does not necessarily require an undertaking to have direct sales in the Netherlands for its agreements to be subject to the cartel prohibition. There have been no decisions (yet) in which the ACM based its jurisdiction on the basis of indirect sales in the sense of cartelised intermediate products that were sold outside

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the Netherlands and were incorporated into (final) products sold to customers in the Netherlands. In March 2016, the Trade and Industry Appeal Tribunal upheld how the ACM calculated the fines imposed on a number of companies for participating in a silver skin onion cartel. The cartel participants generated 60 per cent of their combined turnover within the European Union. For the first time, the ACM based the fines imposed on the cartel participants' EU-wide turnover instead of national turnover. The Tribunal held that the ACM was right to do so, since EU Regulation No. 1/2003 authorises the ACM to apply EU competition rules and impose fines.

The ACM also takes account of fines imposed or to be imposed by national authorities of other member states. After consulting with the French and German competition authorities, it adjusted the fine imposed on the Grain Millers group for participating in a flour cartel, as the total of fines to be imposed by the three competition authorities would lead to its bankruptcy.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Akin to investigations under EU law, investigations are initiated on the basis of third-party complaints, requests for leniency by a party to an agreement or concerted practice, or ex officio on the initiative of the ACM. Investigations start with fact-finding, by making requests for information to parties possibly involved in a suspected infringement or carrying out on-the-spot inspections (either announced in advance or in the form of dawn raids).

If, on the basis of the information gathered, the ACM has a reasonable suspicion that an infringement has occurred, it will normally pursue a case. Having said this, the ACM has repeatedly emphasised its discretion to prioritise and is encouraging the use of civil law tools by third parties. In March 2016, the ACM published its prioritisation policy on how it prioritises enforcement requests. In this prioritisation policy, the ACM has set the following three criteria to determine which requests will be given priority:

- to what extent does the identified behaviour in the request harm consumer welfare;
- what is the magnitude of the public interest when the ACM takes action; and
- to what extent will the ACM be able to act effectively and efficiently?

According to the ACM, enforcement requests do not need to score high on all three criteria in order to be followed up by an enforcement investigation. In cases where more than one criterion has a high score, there is often sufficient reason to launch a full investigation.

The ACM will send a report (comparable to a statement of objections under EU competition law) to the undertakings concerned. The addressees of the report have access to the (non-confidential) documents contained in the ACM's files and may submit a written reply concerning the contents of the report to the ACM. In practice, addressees of the report are also invited to present their views in an oral hearing before the ACM. The legal department of the ACM subsequently reassesses the case and the ACM issues a decision within approximately seven to eight months of sending the report.

9 Investigative powers of the authorities

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

Broadly speaking, the powers of the ACM are the same as the powers provided to the Commission under EU Regulation No. 1/2003. The powers given to the ACM may only be used insofar as they are reasonably required.

The ACM's surveillance officials are authorised to enter all premises, with no prior judicial authorisation being required. Private homes are an exception, in that the ACM is not allowed to enter without prior authorisation by the Rotterdam District Court. In the case of a Commission inspection, prior authorisation is required from the Rotterdam District Court if a company withholds permission for an extensive inspection of business premises or if a private home or vehicle is to be inspected.

During the dawn raid, the ACM's inspectors may interview one or more employees. If there is a reasonable suspicion of a violation by the company, the inspectors must inform the company that it is not obliged to answer questions. The ACM generally accepts that all employees of the company may invoke the right not to answer questions. However, for former employees the right to remain silent is limited to cases in which they can be held personally liable for an infringement.

Surveillance officers are also authorised to request information, to examine books and other business records, and to make copies, although attorney–client privilege exists. It should be noted that – as opposed to EU case law – in the ACM's dawn raids based only on Dutch competition law, attorney–client privilege also exists in relation to in-house lawyers who are admitted to the bar. The ACM is of the view that without attorney–client privilege, an in-house lawyer would no longer qualify as a viable competitor for external lawyers, and therefore has retained attorney–client privilege for in-house lawyers. As a result, conflicting regimes remain depending on the capacity in which the ACM conducts an investigation. If the ACM officials conduct investigations on the basis of Dutch competition law, Dutch national rules apply and the correspondence with both in-house and external counsel is covered by attorney–client privilege. The same applies to investigations by the ACM at the request of the Commission or a competition authority of another member state. However, if the ACM inspectors only assist the Commission officials, EU rules apply and correspondence with in-house counsel has no legal privilege coverage.

The ACM is focusing increasingly on searches of computer records during dawn raids. The standard procedure for investigations is laid down in the '2014 ACM Procedure for the inspection of digital data' and the '2014 ACM Procedure regarding the legal professional privilege of lawyers'. This Procedure is partly the result of a ruling in interim relief proceedings, in which the District Court of The Hague ruled that the procedure of the digital logbook laid down in the previous ACM guidelines, Digital Procedure 2007, was an insufficient safeguard against fishing expeditions, since it only provided insight into which files had been opened during the investigation without specifying how long for and how thoroughly the files were examined. As a remedy, the Court ordered the ACM to invite an authorised representative of the parties to be present during its investigation of the digital copies to make sure that no copied data beyond the purpose and subject matter of the investigation would be examined. The Procedure takes account of this ruling by providing the relevant company the opportunity to be present during the examination of the digital copies it claims are outside the scope of the ACM's investigation. Interesting to note is that, the Court of Appeal of The Hague ruled in April 2013 that the ACM can order a forensic IT firm to produce a list of companies active in the sector under investigation by the ACM for which the IT firm carried out competition compliance audits. According to the Court of Appeal, the ACM has a legitimate interest in obtaining this list, since the results of these audits could be used by the audited companies to destroy evidence of possible anticompetitive conduct.

In addition, the ACM has a 'sealed envelope' procedure similar to that known under EU case law to further safeguard legally privileged documents during ACM dawn raids. If a company refuses to allow the ACM officials to take a cursory look at a document because it considers it to be covered by legal privilege, the ACM inspector will place the document in a sealed envelope without having examined it and hand it to an independent ACM official: the legal professional privilege officer. The company subsequently has 10 business days to substantiate its legal privilege claim in writing to the legal professional privilege officer. This procedure – although an improvement – still remains controversial, as the legal professional privilege officer is not independent, as prescribed by the General Court in the *Akzo* case. The ACM contends that a company's employees are obliged to answer questions, although they have the right not to answer questions that could incriminate their employer. The Streamlining Act, which entered into force on 1 August 2014, clarifies that only a company and its current employees have a right to remain silent. Contrary to an earlier ruling by the Trade and Industry Appeals Tribunal, former employees cannot invoke the right to remain silent when questioned by the ACM in connection with an investigation against their former employer. In September 2010, the ACM imposed a fine of €51,000 on the Dutch National Association of General Practitioners (LHV) for breaking a seal. This fine was quashed in appeal. According to the Trade and Industry Appeals Tribunal, LHV

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could not be held responsible for the seal break because a security guard at LHV's shared office building broke the seal during his rounds. The guard was not directly employed by LHV and LHV had taken all the necessary steps to inform the persons who could possibly enter the room of the affixed seal. It informed the cleaning staff as well as the facilities manager of the shared office building and had affixed yellow tape across the door as an extra precaution. The Tribunal did not consider it necessary for LHV to have instructed the security guard directly, because contact with the security staff usually ran through the facilities manager. As of 1 July 2016, a clause is included in the Establishment Act of the ACM to clarify that a company will also be sanctioned for the breakage of an affixed seal if it has not taken all the necessary precautions to prevent a seal break.

In July 2015, the Dutch Trade and Industry Appeals Tribunal clarified that the ACM can use evidence obtained through telephone taps installed by other agencies for its own competition law investigations. The ACM itself is not authorised to tap phones when investigating suspected anticompetitive practices.

International cooperation

10 Inter-agency cooperation

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

The ACM is an active member of various fora for international cooperation:

- the European Competition Network (ECN) provides for formal cooperation between the Commission and EU member state competition authorities;
- the European Competition Authorities Association, which facilitates informal cooperation between the European Economic Area (EEA) national competition authorities, the Commission and the European Fair Trade Area Surveillance Authority;
- the ACM is also part of the International Competition Network and is involved in competition work undertaken by the Organisation for Economic Co-operation and Development.

The ACM can supply information obtained in the course of the application of the Act to foreign competition authorities. This is an exception to the general rule that information collected about companies should remain confidential and is for internal use only for performance of the tasks entrusted to the ACM. However, such information may only be transferred by the ACM if the confidentiality of the information (where relevant) is sufficiently protected, adequate assurances are given that the information will not be used for purposes other than the enforcement of foreign competition law and the provision of such data is in the interests of the Dutch economy.

Similar provisions allow the exchange of information collected under the Act with national administrative agencies authorised to enforce competition rules under different statutes. There are cooperation protocols between the ACM and a number of other regulators, including the Dutch Inland Revenue, the public prosecutor and the Netherlands Authority for Financial Markets.

11 Interplay between jurisdictions

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

Aside from the allocation of cases within the ECN, international inter-agency cooperation does not formally affect the investigation, prosecution and sanctioning of cartel activity in the jurisdiction. Of note, however, is an investigation of a public bid-rigging cartel in the painting business, in which the ACM requested that the Belgian competition authority search the home of a manager who resided in Belgium. The evidence was used by the ACM, even though the case was solely based on an infringement of Dutch competition law and not on article 101 TFEU. In addition, in late 2010 the ACM imposed fines, (largely) upheld by the Trade and Industry Appeal Tribunal in 2016, on Dutch, Belgian and German flour producers for their participation in a cartel. The ACM closely cooperated with other European competition authorities in this investigation (see question 7).

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The ACM both investigates and adjudicates on cartel matters in the public interest on the basis of administrative law procedures. There is, however, a separation (Chinese walls) between the ACM's staff who carry out investigations and prepare the statement of objections, and those who decide on a possible sanction. In 2011, the Trade and Industry Appeals Tribunal confirmed that high standards apply to the interdepartmental Chinese walls within the ACM. The Tribunal upheld the Rotterdam District Court's earlier ruling that the ACM legal department's meddling in the investigation of an alleged competition law infringement was contrary to the Chinese walls set up between the legal department, responsible for levying sanctions, and the competition department, responsible for conducting investigations. The ACM's statutory Chinese walls go one step further than the traditional all-in-one system according to which the European Commission and many other antitrust regulators seem to be organised. The European Court of Human Rights has confirmed that all-in-one systems of investigation and fining comply with the fundamental right to a fair trail, provided they are safeguarded by sufficiently extensive review of the sanctioning decision by an independent court.

In addition, private parties may initiate civil procedures, for example, for interim relief (under article 3:296 of the Civil Code) and damages. Actions for damages are based on article 6:162 of the Civil Code (unlawful act) or article 6:212 of the Civil Code (concerning unjust enrichment). Actions can be brought by parties to a contract seeking rescission or suspension of terms and conditions. Such civil procedures are now being used more frequently in relation to cartel cases (see question 20). Furthermore, civil procedures can be initiated with respect to breaches of article 101 TFEU.

13 Burden of proof

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

The burden of proof for showing that the cartel rules have been infringed lies with the ACM. The District Court has full jurisdiction to establish whether the ACM has proved to the requisite legal standard that an infringement has occurred, and that the infringement affected competition to an appreciable extent.

The Act includes a provision expressly stating that the company claiming the benefit of article 6(3) of the Act – which is similar to article 101(3) TFEU – shall bear the burden of proving that the conditions of that paragraph are fulfilled.

The Trade and Industry Appeal Tribunal ruled in July 2016 that the question whether certain evidence can be used to back up other evidence depends on its credibility. As a result, leniency statements do not necessarily have to be supported by evidence different to other leniency statements. In October 2009, the District Court of Rotterdam ruled that two general statements of leniency applicants, supported solely by written evidence provided by the same applicants, provided insufficient evidence of a construction company's participation in public bid rigging. The ACM had imposed a fine on the company on the basis of two statements of leniency applicants that the company had participated in a system of public bid rigging. These statements were supported by written evidence on four projects that derived from the same leniency applicants. The evidence of three projects originated from one applicant. The Court held that, in view of the company's denial of having participated in the public bid rigging, the statements constituted insufficient proof of the infringement. The ACM was consequently not authorised to impose a fine. This judgment was confirmed by the Trade and Industry Appeals Tribunal in April 2012. In May 2014, the District Court of Rotterdam overturned the fines on Pilkington and Scheuten for their participation in a double glazing cartel. The ACM had based its decision entirely on the leniency statements by rival companies AGC and Saint Gobain. According to the Court, the companies' confessions were based on leading questions by the ACM, which affected their reliability. Without any further supporting evidence, the ACM had failed to prove that Pilkington and Scheuten participated in the cartel. This ruling has far-reaching consequences for how the ACM should accumulate evidence based on leniency statements. The ACM

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should limit itself to what leniency applicants can state by their own account. 'Refreshing' their memory by confronting them with statements of other leniency applicants will not be tolerated by the court.

In December 2014, the Trade and Industry Appeals Tribunal ruled that the ACM did not provide conclusive evidence of an infringement of the cartel prohibition in regard of a non-compete clause between two home care providers. According to the Tribunal, the ACM did not prove beyond dispute that the home care providers agreed to a non-compete clause which was actually applied. Even though the evidence could point to the existence of a non-compete at the time of the alleged infringement, it could not be ruled out that the alternative explanation by the home care providers that they had only been exploring the possibility of cooperating within a franchise formula, was valid. The ACM therefore did not provide conclusive evidence of the alleged infringement.

14 Appeal process

What is the appeal process?

Decisions of the ACM in cartel cases are subject to a three-stage appeal process. The first stage is carried out by the ACM, with the possibility of advice by an independent advisory committee. The second and third stages are before specialist administrative law courts.

First, an addressee of a decision (and other interested parties) can file for administrative review with the ACM. Such an appeal must be lodged within six weeks of the notification of the decision. In this first stage of the appeal process, the ACM reviews its decision on the basis of the appeal. The review is not handled by the initial case handlers. In cases where a sanction has been imposed, an advisory committee of independent experts can advise the ACM. Since 1 August 2014, it is no longer statutorily required to set up an advisory committee on administrative appeals. The administrative review decision may itself be appealed against to the Rotterdam District Court (administrative law chamber), again within six weeks of the notification of that decision.

Further appeal is possible against this judgment to the Trade and Industry Appeals Tribunal.

Since 1 September 2004, it is possible to dispense with the administrative review stage on the basis of the Direct Appeal Act 2004. When filing an administrative review application with the ACM, an applicant can request that the ACM allow a direct judicial appeal to the Rotterdam District Court. It is for the ACM to decide, depending on whether the case is suitable for direct appeal and subject to certain other rules, whether to grant the request.

Sanctions

15 Criminal sanctions

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

There are no criminal sanctions under the Act.

In criminal law cases published in June 2005, the Rotterdam District Court discussed the relationship between Dutch criminal and competition law. These cases related to criminal charges brought concerning alleged widespread fraud in the Dutch construction sector. (Reference was also made in these cases to the European Commission's 1992 SPO decision concerning a Dutch association of joint price-setting organisations.) However, these criminal cases are separate from (administrative law) competition cases before the ACM. The Court held that Parliament intended sanctions under the Act to be administrative, not criminal. It held that in practice, the ACM can better deal with most infringements of the Act than the public prosecutor, as competition law is a complicated field of law and distinct from typical criminal cases. Furthermore, it noted that the involvement of just one agency removes possible double jeopardy problems. A distinction was made, however, for criminal sanctions relating to facts prior to 1998. The ACM had no power to impose fines for this period prior to the entry into force of the Act. The previous Act (the WEM) provided for criminal sanctions, including imprisonment for economic delicts, with the public prosecutor responsible for prosecution. In May 2008, the District Court of The Hague confirmed that competition law is an exclusive matter for the ACM; moreover, it noted that criminal prosecution is barred for facts that are an infringement of both criminal law and competition law, because it considers the Act a lex specialis of the general Criminal Law Act.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Agreements prohibited by the cartel prohibition laid down in article 6 of the Act are null and void. The consequences of this are governed by civil law. In accordance with article 3:41 of the Dutch Civil Code, an agreement can be partially null and void. The Dutch Civil Code's statutory conversion provision converts invalid clauses into valid ones that correspond as much as possible to the original clause. The Supreme Court ruled in December 2009 that the cartel prohibition's absolute nullity sanction prevents the statutory conversion provision from applying to clauses with an anticompetitive object. In a ruling of December 2013, the Supreme Court made clear that the same goes for clauses with an anticompetitive effect. As noted earlier, article 101 TFEU has a direct effect in relation to agreements and concerted practices affecting competition in the Netherlands, where there is also an effect on interstate trade.

Under its powers of enforcement under the Act and under EU Regulation No. 1/2003, the ACM can impose administrative fines for infringements of the cartel prohibition in the Act and of article 101 TFEU. Such fines are imposed on the natural or legal person to whom the infringement can be attributed. If this person can show that he or she cannot be held responsible for the infringement, no fine will be imposed. The Act enables the ACM to fine directors of legal persons personally for breach of the cartel rules (fines can also be imposed for non-cooperation with an ACM investigation). Pursuant to the Act, fines of up to €900,000 can be imposed on principals and de facto managers for breach of the cartel prohibition. In Wegener (September 2012), the District Court of Rotterdam held that a member of the supervisory board of an undertaking can qualify as a principal or de facto manager only in exceptional circumstances, because the powers and influence that a supervisory board member is generally able to exercise are limited to supervising the company. According to the court, a supervisory board member's role in a company must have been atypical for him or her to be held personally liable as principal or de facto manager.

In determining the fine, the ACM must take the statutory limits and the policy rule on fines into account (see question 17).

In addition to the imposition of administrative fines, the ACM can impose an order under threat of periodic penalty payments. Such an order is designed to lead to the quick termination of an infringement, and therefore serves a different purpose from a fine. Both a fine and an order under threat of periodic penalty payments can be imposed for the same offence. Furthermore, the ACM can impose a binding order to comply with the Act on the undertaking or individual acting in violation of the cartel prohibition or impose a periodic penalty payment in the form of a structural measure (similar to article 7 of EU Regulation No. 1/2003). The ACM can also issue binding instructions on an undertaking to behave in a particular way to comply with the cartel prohibition, without the ACM having to establish that the undertaking has committed an infringement. The ACM can impose fines of up to €900,000 or 1 per cent of turnover for non-compliance with the binding instructions it has issued.

Alongside fines or penalties, or both, for infringement of the cartel prohibition in the Act, significant administrative fines can also be imposed for certain other forms of conduct (referred to as non-cooperation). The ACM can impose fines of up to €900,000 or 1 per cent of turnover (in line with EU No. Regulation 1/2003) for non-compliance with the duty on undertakings to cooperate with an investigation, and a maximum of €900,000 on individuals. The Act also enables the ACM to impose fines for breach of the duty to cooperate if companies do not make their accounts available to the ACM when it is setting fines.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

In July 2014, the Minister for Economic Affairs published a new policy rule on fines to be applied by the ACM. This policy rule is binding on the ACM in determining the fine to be imposed. According to the policy rule the basic fine is calculated as a percentage (0–50 per cent) of a company's sales of products or services covered by the infringement

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during the last full year of the infringement multiplied by the number of years and months the infringement lasted. In setting the fine, the ACM will take account of aggravating or mitigating factors. As stated in question 3, the maximum fine levels that can be imposed by the ACM for cartel infringements were increased in July 2016. As a result, the maximum fine that can be imposed for a cartel infringement is 10 per cent of a company's turnover multiplied by the number of years the cartel infringement lasted, subject to a maximum duration of four years.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

No; debarment from government procurement procedures is not included as a sanction for cartel infringements in the fining guidelines or in the Competition Act.

19 Parallel proceedings

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

Cartel activity cannot lead to both criminal and civil or administrative sanctions. The Act does not provide for criminal sanctions. Behaviour that could lead to criminal sanctions based on the Criminal Law Act is barred from prosecution by the public prosecutor if that behaviour also infringes competition law (District Court of The Hague, as noted in question 15).

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

The cartel prohibition has a direct effect in the sense that private parties can commence legal proceedings to obtain injunctive relief or to recover actual (but not punitive) damages (see question 12). The same applies in respect of article 101 TFEU.

The use of civil proceedings is being encouraged by the Minister and the ACM, in line with similar promotion of the use of civil procedures at EU level.

The rules of the Civil Procedure Code apply. The burden of proof rests with the claimant unless any special rule or the requirement for reasonableness and fairness prescribes otherwise. (The chair of the ACM board has advocated ACM decisions being made binding on Dutch courts as evidence of a competition law infringement in civil proceedings. This would ease the burden of proof on claimants.)

In January 2013, the District Court East Netherlands ruled that ABB must compensate TenneT, the Dutch electricity grid operator, for the damages it suffered as a result of the *Gas Insulated Switchgear* (*GIS*) cartel. The District Court found that, even though the Commission decision on the *GIS* cartel does not explicitly mention the Dutch GIS projects, it does establish that ABB participated in a worldwide cartel that had a particular impact on the EEA and thus, according to the Court, also on the Netherlands. This, in combination with the fact that ABB failed to substantiate why the cartel would not apply to the Dutch project, made it safe to assume that the price paid by TenneT for the GIS installation was affected by the cartel. Although the exact amount of damages still needs to be established in follow-up proceedings, the District Court dismissed ABB's defence argument that TenneT did not suffer any loss because it had passed on the overcharge to its customers. But on appeal, the Arnhem-Leeuwarden Court of Appeal did not agree with the district court's dismissal of this defence. Referring to earlier EU case law as well as the Directive on damages, the Court of Appeal concluded that invoking the passing-on defence should be possible. The District Court Gelderland ruled in a parallel case (June 2015) that Alstom should pay €14.1 million – the full amount of cartel damages claimed – to TenneT. The District Court dismissed Alstom's defence that TenneT had passed on the overcharge resulting from the cartel to its customers. The Court did not consider it 'unreasonable' for TenneT to be potentially overcompensated. Because Alstom neglected to provide insight into its pricing policy, the Court compared the prices of fellow cartel participant ABB during and after the cartel to calculate the overcharge paid by TenneT. The Court rejected Alstom's argument that TenneT did not suffer any loss because it had passed on the overcharge to its customers. Potential 'benefits' gained by a cartel victim – TenneT in this case – may only be offset against the damage sustained 'in so far as this is reasonable'. According to the Court, a cartel participant should not be required to pay for the same damage more than once. But no such risk existed in this case, since it was highly unlikely that Alstom would face cartel damages claims by TenneT's customers. Moreover, TenneT's customers were likely to ultimately benefit from the damages awarded to TenneT through lower energy prices. Under these circumstances, the Court did not consider it unreasonable for TenneT to be potentially overcompensated. In July 2016, the Dutch Supreme Court ruled in *TenneT/ABB* on the question whether the passing-on defence is a defence that disputes the amount of the damage or whether it must be characterised as a deduction of collateral benefits from the amount of the damage. In the latter case, it must be established that there is a causal link between the harmful event and the benefits and that deduction of the benefits is reasonable. The Supreme Court held that a court may choose between these approaches. According to the Supreme Court, the requirements are on balance the same in both approaches, especially that in both approaches the deduction must be reasonable. Also, the Supreme Court held that the burden of proof that part or all of the price overcharge has been passed on is with the liable party. With this ruling, the Supreme Court anticipates the implementation of the Damages Directive (2014/104/EU). Member states have until 26 December 2016 to implement the Damages Directive. On 7 June 2016, a bill to implement the Damages Directive was submitted to the Second Chamber.

21 Class actions

Are class actions possible? If yes, 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?

Article 3:305a of the Civil Code allows class actions. However, the practical relevance of this provision in the context of claims based on infringements of the Act is fairly limited, as it is not possible to institute a class lawsuit to obtain damages. In July 2014, the Minister of Security and Justice started a consultation on a draft bill on a Collective Damages Action. Current Dutch law does not provide for a collective damages action. At the moment, more relevant for cartel cases with mass exposure is probably the possibility of declaring a settlement binding on all injured parties. According to article 7:907 of the Civil Code, a settlement reached by the defendant and a foundation or association with a statutory goal to represent the injured parties can be declared binding on all injured parties by the Amsterdam Court of Appeal. Pursuant to the Dutch Act on the Collective Settlement of Mass Claims, the parties to a settlement agreement may request the court to declare the settlement agreement binding on all persons to which it applies according to its terms (the interested persons). The settlement agreement must have been entered into between one or more potentially liable persons and one or more foundations or associations that, pursuant to their articles of association, promote the interests of the interested persons. If the court declares the settlement agreement binding, all interested persons are bound by its terms. There is an exception for interested persons that timely submit an opt out notice, which can only be submitted after the binding declaration has been issued. Being bound by the terms of the settlement agreement basically means that interested persons who do not opt out have a claim for settlement relief and are bound by the release in the settlement agreement. On 12 November 2010 and 17 January 2012, the Amsterdam Court of Appeal delivered important decisions regarding an international collective settlement of mass claims. The Court assumed jurisdiction and declared an international collective settlement binding in a case where none of the potentially liable parties and only a limited number of the potential claimants were domiciled in the Netherlands. The decision will have to be recognised in all European member states, Switzerland, Iceland and Norway under the Brussels I Regulation and the Lugano Convention. The Netherlands is the only European country

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where a collective settlement of mass claims can be declared binding on an entire class on an opt-out basis. This makes the Netherlands an attractive venue for settling international mass claims, irrespective of whether any (class action) litigation has taken place in the Netherlands. In addition, Dutch courts seem to seize jurisdiction quite easily and legal costs are capped, making it a popular country for assigned claims.

Cooperating parties

22 Immunity

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

A leniency programme has been in place since 2002. A new policy rule on leniency applicable to companies as well as individuals wishing to confess to involvement in a cartel was published in July 2014. The policy rule provides that immunity from fines is available for the first party to present information to the ACM about a cartel prior to the start of an investigation which enables the ACM to carry out a targeted inspection or, in the event the ACM has already initiated an investigation, the first to provide information that was not yet in the ACM's possession enabling the ACM to prove the cartel infringement. In addition, the party should not have compelled other companies to take part in the cartel agreement and should continue to comply with its duty to cooperate. Not only companies, but also individuals, can apply for leniency. An individual can apply for leniency independently or jointly with other individuals, on the condition that these individuals at the time of the leniency application are all employees of the same company involved in the cartel. Individuals may also be granted leniency if a company applies for leniency. If a company does so, current employees can benefit from the same leniency if they declare to the ACM that they want to be considered as leniency co-applicants of the company and they individually comply with the leniency requirements. Former employees can benefit from a company's leniency application in the same manner, but only if the ACM determines that there is no conflict with the interest of the investigation.

23 Subsequent cooperating parties

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

If immunity from fines is no longer available, parties can still apply for leniency by way of fine reduction if they supply information to the ACM that has significant added value to the investigation and provided they cooperate fully with the ACM's investigation. The duty to cooperate includes the obligation to:

- refrain from any practice that may obstruct the ACM's investigation;
- provide the ACM with all documents in its possession as soon as it obtains those documents or can obtain them;
- immediately terminate its involvement in the cartel, unless otherwise agreed with the ACM; and
- keep its employees and – insofar as is possible – former employees available for statements.

Parties that have not applied for leniency but cooperate with the investigation beyond the legal requirements may also obtain a fine reduction. The policy rule on fines provides that such cooperation qualifies as a mitigating factor when setting the fine.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The second cooperating party can obtain a fine reduction between 30 and 50 per cent for providing the ACM with information that has significant added value. A fine reduction between 20 and 30 per cent is available to the third party submitting information of significant added value. Subsequent parties can obtain fine reductions up to 20 per cent. All leniency applicants will have to continue to comply with their duty to cooperate in order to qualify for leniency. The Dutch rules do not provide for 'amnesty plus'.

25 Approaching the authorities

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

Whether it is advisable for a company to apply for leniency depends on the specific circumstances of the situation, but although there are no deadlines for applying for leniency, once the decision to apply for leniency has been taken, it is advisable to present the information as soon as possible.

It is also possible to obtain a marker for an incomplete leniency application, if the information provided by the leniency application offers a concrete basis for a reasonable suspicion of the applicant's involvement in a cartel. In most cases, it may prove time-consuming and burdensome to gather all the evidence on the cartel agreement. The marker secures the leniency applicant's position in relation to other possible applicants during a time period that is determined by the ACM's Leniency Office on a case-by-case basis.

26 Cooperation

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?

The same level of cooperation applies to all leniency applicants, in that from the moment a company submits its leniency application, it should:

- refrain from any practice that may obstruct the ACM's investigation (such as destroying evidence, or any action that would result in the (future) leniency application becoming public knowledge;
- provide the ACM with all documents in its possession as soon as it obtains those documents or can obtain them;
- immediately terminate its involvement in the cartel, unless otherwise agreed with the Leniency Office; and
- keep its employees and – insofar as is possible – former employees available for statements.

27 Confidentiality

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

The candidate leniency applicant can contact the ACM's Leniency Office anonymously or through an authorised representative to discuss the applicability of the policy rule to a 'hypothetical' case. Prior to applying for leniency, the candidate applicant can also – through an attorney – (anonymously) contact the Leniency Office by telephone to determine whether it can still qualify for full immunity. If the Leniency Office confirms the availability of full immunity, the candidate applicant is obliged to immediately apply for leniency.

Corporate statements containing incriminating information do not have to be provided in writing but can be provided orally. Further, any information presented to the ACM by a company in the context of an application for leniency should not be made public to the extent that the information qualifies as confidential information (eg, business secrets) within the meaning of the relevant article of the Dutch Act on transparency in public administration. The identity of the applicant for leniency is not made public before the ACM has issued its report (comparable to the Commission's statement of objections).

However, confidentiality of information contained in leniency applications in respect of exchange of information between agencies remains a controversial issue (see question 11).

Moreover, the policy rule on leniency also covers breaches of article 101 TFEU with effect in the Netherlands. Rules for exchange of leniency application information and cooperation with the Commission and other EU member state competition authorities are included. The policy rule refers to the Commission's Notice on cooperation within the

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Update and trends

In 2013, the Dutch Competition Authority merged with the Independent Post and Telecommunications Authority and the Consumer Authority into a single regulator, the ACM. New policy rules on fines and leniency entered into force in 2014. As of 1 July 2016, the maximum fine for cartels is set by multiplying the cap of 10 per cent of a company's turnover by the duration of the cartel infringement, subject to a maximum duration of four years. In the case of a repeated infringement, the maximum fine level will double. As a result, a maximum fine of 80 per cent of a company's turnover can be imposed on repeat offenders. Fines for individuals who oversaw and gave instructions regarding cartels have also increased from €450,000 to €900,000.

ECN and states that the ACM will follow the Notice with regard to the position of applicants claiming the benefit of a leniency programme and exchange of information (in relation to article 101 TFEU).

The policy rule on leniency states that the identity of the leniency applicant will remain confidential until the ACM has issued a report, unless there is a legal obligation to do so earlier or the leniency applicant agrees to earlier disclosure of its identity. Addressees of the report will be allowed to inspect the leniency statements (without being able to photocopy or photograph it) but can only use it within the context of the administrative procedure relating to the cartel at hand. This current practice may however be subject to modification due to recent case law (see question 32).

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The ACM is willing to consider settlement of competition infringements by alternative means (to refrain from imposing substantial fines to competition law infringements). In August 2015, the ACM for the first time applied a procedure similar to the European Commission's cartel settlement regime and lowered by 10 per cent cartel fines imposed on two natural vinegar producers in return for an acknowledgement of their involvement in and their liability for the cartel. The vinegar producers' employees made use of the same procedure to have their personal fines reduced.

The ACM may further decide to refrain from sanctions if companies pledge in writing to refrain from certain behaviour, which enables the ACM to adopt a commitments decision (comparable to a commitments decision under article 9 of Regulation No. 1/2003). If the commitments are broken, the ACM can – without further investigation – impose a fine amounting to the higher of 10 per cent of turnover or €450,000. The ACM cannot accept a pledge if it intends to impose a fine, which will be the case with hard-core cartels.

According to the ACM, compliance programmes are particularly relevant to sectors in which the ACM's enforcement policy has been successful (eg, the construction industry and insurance sector).

29 Corporate defendant and employees

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

If a company applies for leniency, individuals can benefit from the same leniency if they declare to the ACM that they want to be considered as a leniency co-applicant of the company and they individually comply with the leniency requirements. Individuals can also apply for leniency by themselves, expressly stating that they do not act on behalf of the company of which they are (former) employees. Individuals can also apply for leniency jointly on the condition that at the time the leniency application is made they are all employees of the same company involved in the cartel.

30 Dealing with the enforcement agency

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

Applications for leniency must be lodged with the ACM's Leniency Office. Leniency officers are officials of the ACM who are not entrusted with surveillance or investigative duties. The Leniency Office has its own telephone and fax numbers and email address. It will notify a company of the date and time that its application for leniency has been received by the Leniency Office.

The order of applications is determined by the date and time of the initial telephone call or other oral or written contact between the undertaking and the Leniency Office when a company has unequivocally requested leniency on the basis of the policy rule.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As of 1 August 2014, the current policy rule with regard to leniency is in force. There are currently no changes or amendments foreseen to these guidelines.

Defending a case

32 Disclosure

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

A defendant has a right to access to its file. As a result, the ACM will need to provide it with access to all documents in its case file on which the ACM's decision to impose a fine are based, but also all information that could be to the benefit of the defendant's defence that are in the ACM's case file. In December 2015, the Trade and Industry Appeals Tribunal ruled that transcripts of oral leniency statements should be disclosed. In appeal proceedings against a cartel decision, the ACM had requested that copies of the transcripts of the oral leniency statements be disclosed only to the Trade and Industry Appeals Tribunal, not to the cartel participants appealing the ACM's decision. Counsel for these cartel participants had earlier obtained access to the transcripts at the ACM offices (without being allowed to make copies). The Trade and Industry Appeals Tribunal rejected the ACM's request for restricted disclosure. According to the Tribunal – that appeared to act on its own initiative without any defendant having protested against non-disclosure – a balance should be struck between the interests of the cartel participants in having access to all relevant evidence for a proper defence against their cartel fine and, on the other hand, the interest of the leniency applicants not to be disproportionately harmed by disclosure and the importance of effective ACM enforcement. In this particular case, the interests of a proper defence outweighed the success rate of the ACM's leniency programme. The content of the leniency statements was known to the other cartel participants and the involvement of the leniency applicants in the cartel could also be derived from other, non-confidential documents. The Tribunal therefore ruled that the ACM should submit copies of the transcripts.

33 Representing employees

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

According to the Rules of Conduct of Members of the Bar, members may not represent the interests of two or more parties if the interests of those parties conflict or if subsequent developments are likely to bring them into conflict. If counsel represents employees as well as the corporation, and a conflict of interests arises, it should withdraw as counsel for one of the parties. It is subsequently barred from acting in that case against the party it no longer represents. Subject to these Rules of Conduct, counsel may represent both a corporation and its (former) employees.

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34 Multiple corporate defendants

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

See question 33. There is no absolute prohibition on defending multiple corporate defendants. However, since a company's leniency application covers its employees but hurts its competitors, conflicts of interest are more likely to arise when defending multiple corporate defendants.

35 Payment of penalties and legal costs

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

Yes, although the ACM has stated to take account of the corporation's payment of the employees' fine when calculating the fine to be imposed on the corporation.

36 Taxes

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

In January 2011, the Dutch Supreme Court ruled that cartel fines imposed by the ACM are not deductible for corporate tax purposes. The Supreme Court's ruling confirmed the earlier rulings by the District Courts of Haarlem and Breda on the non-deductibility of fines imposed by the ACM. Both courts had concluded that Dutch corporate income tax legislation explicitly excludes the possibility to deduct fines imposed by the ACM as a result of competition law infringements. There is no case law as of yet on the tax deductibility of private damages.

37 International double jeopardy

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

The ACM does take into account fines imposed by other national authorities. It, for instance, adjusted the fine imposed on the Grain Millers group for participating in a flour cartel due to its imminent bankruptcy if it were to pay the fines imposed by the ACM and the French and German competition authorities.

There is no case law as of yet on whether overlapping liability for damages in other jurisdictions is taken into account in private damage claims.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

In the policy rule on fines, the ACM notes that a mitigating factor includes the fact that the company identified the infringement itself, terminated the infringement of its own accord and notified the ACM before the ACM initiated an investigation.

Note also the importance of turnover calculations for forming the basis of the fine calculation. This has been shown in the ACM's administrative review decision concerning mobile telephone network operators and dealer bonuses, where reductions in fines of more than 50 per cent were accorded by the ACM on review.

Aside from the leniency programme, there is no standard separate procedure for reducing the amount of a fine prior to its imposition in a decision.

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Nigerian law recognises historical common law causes of action that are quasi-competitive in nature. These are essentially the economic torts of conspiracy, unlawful interference with contract or economic relations and passing off. There are also specific statutes that, to a limited extent, prohibit anticompetitive practices, such as dumping, passing off, false or misleading advertisement and other measures that are aimed at preventing abusive conduct in the market. These pieces of legislation or common law-evolved causes of action, however, are not similar, nor comparable, to the modern-day competition legislation that is becoming prevalent in both developed and emerging markets. Although there is no distinct and multi-sector competition law in Nigeria, the Investments and Securities Act 2007 (ISA) contains expansive competition provisions in respect of merger control. There are also relevant competition provisions within sector-specific legislation that regulates sectors such as communications, civil aviation and electricity.

There is currently a Competition Bill before the National Assembly of the Federation (NASS). It is highly probable that the final Act will retain much of the form and substance of the Bill as it stands. It should be noted, though, that every reference to the Bill in this chapter is strictly an indication of how the law is expected to be modelled when enacted: it is not intended to be construed as the final and exhaustive view on the issues dealt with, except if so indicated. The final authority to determine and enact the Bill into law and decide the form the law takes remains with the NASS.

2 Relevant institutions

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 investigation and adjudication of cartel matters is currently industry and sector specific. Under the Nigerian Communication Act (NCA), the Nigerian Communications Commission (NCC) is required to deal with cartel arrangements within the communications sector. However, under the National Broadcasting Commission Act, the National Broadcasting Commission (NBC) is responsible for regulating and controlling all types of broadcasting businesses, which includes the regulation of cartel arrangements or practices. The same is applicable to the Nigerian Electricity Regulatory Commission (NERC) under the Electricity Power Sector Reform Act, and the Nigerian Civil Aviation Authority (NCAA) under the Civil Aviation Act. Where there is cartel activity within merged entities, the Securities and Exchange Commission has authority under the ISA. In broader terms, however, the proposed Competition Act explicitly provides for cartel regulation. The proposed Act will establish the Federal Competition Commission (FCC), which will be responsible for competition law enforcement.

3 Changes

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

See questions 1 and 2.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Under the NCA, a telecoms operator shall not enter into any understanding, agreement or arrangement, whether legally enforceable or not, which provides for:

- rate fixing;
- market sharing;
- boycott of another competitor;
- boycott of a supplier of apparatus or equipment; or
- boycott of any other licensee.

Pursuant to the Civil Aviation Act, the NCAA issued new regulations in October 2012. The new Nigerian Civil Aviation Regulations (NCAR) prohibit concerted practices in restraint of competition. As such, any contract, arrangement or understanding that has any of the following elements is prohibited:

- those that directly or indirectly fix a charge, fee, fare or tariff, or any other trading condition;
- those that divide markets by allocating customers, passengers, suppliers, slots, territories or specific types of products or services;
- those that involve collusive action;
- those that limit or control development or investment in capacity, slots, and any other market or operational factor;
- those that apply dissimilar conditions to equivalent transactions with other service providers, thereby placing the other party at a competitive disadvantage; and
- those that make the conclusion of an arrangement, understanding or contract subject to acceptance by the other parties of supplementary obligations and that, by their nature or according to commercial usage, have no connection with the subject of the contract.

In addition, the Nigerian Electricity Regulation Commission (NERC) established by the Electric Power Sector Reform Act 2005 regulates the electricity sector in Nigeria. The NERC is empowered to regulate the activities within the electricity sector including preventing any mergers or acquisitions that it determines would have an anticompetitive effect on the market. Specifically, any proposed merger must be approved by the NERC before it can come into effect. Sections 25 and 26 of the Act provide for structures that will preserve competition in the electricity industry.

In the petroleum industry, the Department of Petroleum Resources and the Petroleum Products Pricing and Regulatory Authority are two bodies empowered to regulate downstream pricing and distribution of resources. Under the regulating activities of these two bodies, acts that are likely to be anticompetitive or result in a cartel are checked.

Broadly speaking, under the proposed Competition Act it will be unlawful for two or more parties within Nigeria (or one or more in Nigeria, and one or more outside Nigeria) to enter into a contract, arrangement, understanding or combination where such arrangement

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has the characteristics of trust or otherwise consists of a conspiracy in restraint of trade or commerce.

Under the Bill, specific conduct deemed in restraint of trade includes:

- price fixing;
- market allocation;
- collusive tendering;
- bid rigging, or such conditions that limit or control production, marketing, technical development or investment;
- the application of dissimilar conditions to comparable transactions; and
- concluding a contract subject to the acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The applicability of the provisions of the law on such restrictive practices extends to both vertical and horizontal arrangements. Liability for cartel-like practices is defined not just in civil terms but in criminal terms as well. It is useful to point out that the per se illegality of such practices is stressed under the proposed Act, as such practices are not only expressly prohibited but also void.

The law would also presume the existence of certain conditions as depicting the existence of cartel activity between two or more parties. These include cases where any one of the parties owns a significant interest in the other, or where they have at least one director or substantial shareholder in common, and any combination of the parties is engaged in that cartel activity.

In addition, there could be additional instances of liability arising from cartel activity under common law. Nigerian law recognises historical common law causes of action that are quasi-competitive in nature. These are essentially the economic torts of conspiracy, unlawful interference with contracts or economic relations and passing off.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

Under the proposed Act, exemptions may be afforded to certain agreements, which include agreements between partnerships (where such partners are non-corporate bodies), employment contracts and intellectual property contracts made pursuant to the Copyright Act, Patent and Designs Act and Trade Marks Act.

Any cartel agreement that would ordinarily be classified as such but that contributes to the improvement of the production or distribution of goods and services or the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefits, would also be broadly exempted. In addition to this, on the advice of the National Economic Council and upon consultation with the FCC, the president of the federation may determine, if it is deemed reasonable or desirable for the development and growth of the Nigerian economy, special exemptions for any sector of the economy, and such exemptions shall be published in the Federal Government Gazette.

Under the proposed law, industry-specific defences are permissible where such contravening conduct by the firm acting or operating within any regulated industry designated under the Act can be proved to have been ordered or required by any regulatory agency possessing jurisdiction over the relevant industry.

In the communications sector a licensee may, prior to engaging in any conduct that may be construed to have the purpose or effect of substantially lessening competition, apply to the NCC for authorisation for the conduct.

For civil aviation, the following exemptions apply:

- a contract or an arrangement where the only parties are or will be wholly-owned subsidiary and holding companies;
- a contract of service or a contract for the provision of services insofar as it contains provisions by which a person, not being a body corporate, agrees to accept restrictions as to the work, whether as an employee or otherwise, in which that person may engage during or after the termination of the contract;
- a contract for the sale of a business or shares in the capital of a company carrying on business insofar as it contains a provision that is solely for the protection of the purchasers in respect of the goodwill of the company;
- a contract or an arrangement insofar as it contains a provision that relates to the remuneration, conditions of employment, hours of work or working conditions of employees;
- any act done otherwise than in trade, in concert by passengers, consumers of products and services against the suppliers of those products and services;
- any act done to give effect to a provision of a contract or an arrangement referred to in the foregoing paragraphs; and
- any act done to give effect to any intellectual property right, which shall mean a right, privilege or entitlement that is conferred as valid by or under any enactment in force.

6 Application of the law

Does the law apply to individuals or corporations or both?

The operation of the law is applicable to both natural and corporate persons within and outside Nigeria to the extent that such conduct substantially affects a market in Nigeria.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The operation of the law extends to conduct within and outside Nigeria to the extent that such conduct substantially affects a market in Nigeria.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

In communications, an interested party (that is, a complainant) who wants the NCC to investigate submits a written request (a complaint or request for investigation) to the NCC. The complainant must deliver a copy of the request for investigation to the other party (the responding party) on the same day that the request is submitted to the NCC. In its request for investigation, the complainant must summarise the nature of the complaint and the desired outcome, including a summary of all relevant events or circumstances and any related correspondence or other supporting materials. The responding party has 10 days from the day on which the request for investigation is delivered by the complainant to provide its comments (if any) on why the NCC should not investigate, or otherwise respond to the complaint (comments). The responding party must deliver a copy of the comments to the complainant on the same day that the comments are submitted to the NCC.

Thereafter, the NCC will consider whether it will undertake an investigation or take any other action in response to the complaint. Within 60 days from the date of receipt of the request for investigation, the NCC should notify the parties, in writing, identifying whether it will take action, the specific action to be taken and the basis for its decision.

Under the Bill, where the FCC is of the view that there has been a contravention of the provisions prohibiting cartels, it may commence an investigation that would be initiated through a notice served to the errant party requiring such party to do one or all of the following: furnish information in writing regarding the alleged breach; produce documents regarding the breach; or appear before the FCC to give evidence regarding the breach. The FCC may make its determination without a formal hearing, but where a hearing is required, it should be in public, although it is acceptable to conduct such hearings in camera where the circumstances so warrant.

Where the FCC comes to a determination that any agreement or trade practice promotes the existence of a cartel and is anticompetitive, it shall serve an order on the parties stating the reasons for the determination and requiring them to either cease the practice or terminate such an agreement. It is proposed that detailed provisions on the procedure and timing that would apply to the investigatory process

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carried out by the FCC will be contained in subsidiary legislation made to that effect.

9 Investigative powers of the authorities

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

The Investment and Securities Tribunal is also empowered to investigate mergers for the purpose of investigating the possibility of a cartel formation. However, the empowering law does not specify any method by which said investigations should be conducted.

The NERC, which regulates the power sector, is also empowered to receive information from licensees and establish independent bodies to monitor and control service provision.

Upon contravention of the proposed law regarding cartels or in anticipation of contravention, the FCC is empowered under the proposed law to perform its investigative functions by entering any premises and carrying out a search of such premises. This is, however, subsequent to obtaining a warrant duly authorised by a chief magistrate or a judge of the High Court. The Commission may also seize any document or article that may prove useful in its inquiry. However, the custody of such seized items with the FCC should not exceed seven days, after which it should be returned.

The ambit of the FCC's powers in relation to the use of documentary evidence is extensive, as it may receive in evidence any statement, document, information or matter that may in its opinion assist it in dealing effectively with the matter before it, whether or not the same would be inadmissible in the regular courts. Besides hard copies of documents, soft copies forming computer records would fall under this category of admissible documents before the Commission. It is also within the precincts of the law for the FCC to take depositions on oath from witnesses appearing before it. Physical evidence (as opposed to documents) may also be tendered by witnesses.

The NCAA has extensive investigative powers over anticompetitive conduct in the aviation sector. This includes initiating discovery, interrogatories, searches and conducting oral interviews.

International cooperation

10 Inter-agency cooperation

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

Nigeria is a signatory to the Cotonou Agreement between the African, Caribbean and Pacific group of states, and some articles of this multilateral treaty make provision for cooperation between states on competition policy. Since the establishment of the FCC is yet to happen, it remains to be seen with which other international and local agencies it may have cooperative arrangements.

11 Interplay between jurisdictions

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?

An apposite response may only be given when the competition law regime becomes extant in Nigeria.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The NCC commences a proceeding by notifying a licensee or any other person who is the subject of the proceeding (a proceeding notice) identifying the nature of the proceeding, including a summary of the events, circumstances, conduct and provisions of the law, licence conditions or any regulations, decisions, directions, rules or other actions of the NCC relevant to the proceeding, and the potential outcome or practical effects of the proceeding.

The proceeding notice shall also specify any additional or other procedures applicable to the proceeding, including the timing for the delivery of submissions, by persons receiving the proceeding notice or any other interested persons, and the further actions to be taken by the NCC in concluding the proceeding. The NCC will generally complete the proceedings, and issue a decision resolving the issues either or a notice specifying any other actions to be taken in connection with the proceeding, within 60 days of receiving all necessary information, subject to any extensions.

Under the proposed law, the process of adjudication lies squarely with the FCC. It would be begun by a complaint filed by any aggrieved person with the FCC. In determining the merits of the appeal, the FCC would utilise an administrative hearing proceeding presided over by a hearing officer appointed by the executive chairperson of the Commission. At each such hearing, the Commission shall provide for as little formality and technicality as the requirements of the law and a proper consideration of the application may permit. The hearing officer will be required by law to make a determination within 45 days of the conclusion of the hearing.

There is, however, a provision for recourse to the Federal High Court. Where, in the opinion of the hearing officer, the interests of justice demand that the person whose complaint is pending before the Commission should be granted leave to file a prompt application with the Court prior to the termination of the administrative hearing, the hearing officer may, in writing, grant such leave. Where such leave is granted, the hearing officer shall suspend the administrative hearing pending the outcome of the application before the court, and shall terminate the same when and if all the issues raised in the complaint are fully resolved by the Court.

13 Burden of proof

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

The applicable principle is that the person who alleges must prove. Generally speaking, the initial burden of proof rests with the complainant, but this burden swings from complainant to respondent as with the typical evidentiary pattern in civil cases. The standard of proof is that of a balance of probabilities or the preponderance of evidence. Where, however, a defendant who is alleged to be involved in a cartel activity owns a significant interest in another respondent company, or shares a common director or a substantial shareholding in that other company, or both, a presumption of the existence of an agreement to be engaged in a restrictive practice is triggered. In this regard, the initial onus of proof to rebut this lies with the respondent. Again, this is subject to the doctrine of shifting burdens in civil cases.

14 Appeal process

What is the appeal process?

Decisions of the NCC and NCAA are subject to judicial review by the Federal High Court.

Under the proposed law, cartel matters do not fall within the range of matters that are subject to the judicial review process of the Federal High Court, the direct implication being that an appeal of a determination of the FCC lies with the Court of Appeal. The usual timeline under the Court of Appeal Rules for filing an appeal is within three months of the decision sought to be appealed. Upon a determination of the appeal, one way or the other, there lies a further right of appeal at the Supreme Court.

Sanctions

15 Criminal sanctions

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

Under the proposed law, any person who makes or enters into any contract or engages in any arrangement, conspiracy or combination shall be guilty of an offence and on conviction shall be liable to two years' imprisonment, or a fine of at least six times the amount of profit the person would have made, or both. If the offence is committed by a body corporate, the body corporate shall be guilty of an offence, and on conviction liable to a fine of not less than 1 million naira, and each director, manager or officer of the body corporate shall be proceeded against and punished as if they themselves committed the offence.

In addition, in the event that the FCC makes an order upon a determination requesting the termination of a cartel agreement or

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practice within a specified time frame, and there is a failure to comply with this order, any such person who fails to terminate the anticompetitive agreement or trade practice within the period agreed with the Commission shall be guilty of an offence and liable to imprisonment of two years or payment of a fine of 200,000 naira, or both.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The administrative sanctions permissible under the proposed law are that the FCC, upon reaching a determination on alleged cartel activity, may order specific parties to either cease a particular practice or to terminate any agreement, or both. In the aviation sector, the sanction regime is a recommended fine of 5 million naira for each violation.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Not applicable.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Not applicable.

19 Parallel proceedings

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

It is quite conceivable that criminal and administrative sanctions for cartel activity may be pursued concurrently. Generally, Nigeria's legal system permits that criminal sanctions and civil or administrative actions may be undertaken at the same time.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

With reference to question 12, it can be seen that the process of adjudication will be with the FCC except where, in the interest of justice, leave to make an application before the Federal High Court is granted by a hearing officer. In any case, the remedy for any loss suffered by any person with respect to a cartel activity as stipulated by the law is limited to a compensatory award.

Where a person claims to have suffered a loss as a result of any cartel agreement or practice, such a person may apply to the FCC for compensation and the Commission may, if it is satisfied that the circumstances of the case so warrant, order the parties engaged in the cartel activity to pay the applicant such compensation as the Commission may determine. It is important to point out that the proposed law does not make a distinction between the classes of person who may apply for compensation. It should also be noted that the proposed law is silent on what criteria the FCC should take into account in making an award.

21 Class actions

Are class actions possible? If yes, 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?

Not applicable.

Cooperating parties

22 Immunity

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

The establishment of an immunity programme can only be determined subsequent to the implementation of the proposed competition law.

Under the current regulatory framework, there is not much to suggest the existence of an immunity programme.

23 Subsequent cooperating parties

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

Not applicable.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The NCAR does not specify any benefit for going in second. Where, however, the first party to apply under any of the programmes fails to meet the requirements, a subsequent party that does meet the requirements qualifies to participate.

25 Approaching the authorities

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 NCAR does not stipulate a deadline.

26 Cooperation

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?

Throughout the course of the NCAA's investigation and subsequent prosecutions, a party involved in a leniency, concession or immunity process must provide complete, timely and ongoing cooperation. The party must reveal any and all conduct of which it is aware, or becomes aware, that may constitute a violation of the law and in which it may have been involved. The party must provide full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located. Companies must take all lawful measures to secure the cooperation of current directors, officers and employees for the duration of the investigation and any ensuing proceedings.

27 Confidentiality

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, there is statutory confidentiality protection afforded to information obtained under the NCAA's regulatory process. This applies to both cooperating parties and those who apply for immunity. The leniency procedure is confidential, requires full disclosure and is conducted with the understanding that the Authority will not use information obtained during the procedure against the party, unless the party fails to comply with the relevant programme agreement

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executed prior to the full disclosure and investigations. The applicant is required to keep its application for leniency confidential, unless the prosecuting authority makes it public.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Not applicable.

29 Corporate defendant and employees

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

If a company qualifies for any programme, all current directors, officers and employees who admit their involvement as part of the corporate admission, and who provide complete, timely and ongoing cooperation, also qualify for the benefits under the programme. If a company does not qualify for any programme, current or former directors, officers, employees or agents may nonetheless be considered under a programme as though they had approached the NCAA individually. To qualify, they will be required to admit their involvement in the unlawful activity and provide complete, timely and ongoing cooperation with the NCAA's investigation and any subsequent proceedings.

30 Dealing with the enforcement agency

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

Because leniency or immunity will be relinquished if there is no frank and full disclosure of information, it is important that an extensive internal investigation precedes an approach to the NCAA. This could also facilitate the initial engagement process with the regulator.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

The regime is nascent and yet to be tested or implemented.

Defending a case

32 Disclosure

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

Until the Competition Bill becomes law, sector specific procedures apply. Under the NCA, NCAA, ISA, and EPSRA, enforcement authorities are required to notify interested parties of hearings and decisions with regard to a complaint or investigation. Such notices would include the subject of investigation or hearing as well as alleged facts.

33 Representing employees

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

Any party participating in a hearing is entitled to have another person, who may be a legal practitioner, or other persons, present to assist him or her at the hearing. As a matter of course, the right to counsel of choice is guaranteed under the Constitution. However, in cases where the positions of the past or present employees conflict with that of the corporation, the ethical rules of professional conduct require that separate counsel conduct representation.

34 Multiple corporate defendants

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

Counsel may represent multiple corporate defendants, as there are no restrictions to this under the proposed law or any other Nigerian law.

35 Payment of penalties and legal costs

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

It would appear that the principle of vicarious liability would apply in cases where legal costs are payable by employees of a company or penalties are imposed on them on account of actions carried out by them in the normal course of their employment, or both. The corporation would usually be liable to pay these costs or penalties, or both, except where the employee was acting outside the scope of his or her employment.

36 Taxes

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

Fines and penalties are generally not tax-deductible. Pursuant to section 36 of the Capital Gains Tax Act, personal damages awarded for personal injury will not be considered as 'chargeable gains'.

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37 International double jeopardy

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.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Until the law comes into existence, and appropriate subsidiary legislation to give direction to its enforcement is passed, the position on this point is indeterminate.

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Norway

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The antitrust rules applicable to cartels are laid down in the Norwegian Competition Act (the Act), which entered into force 1 May 2004. Certain amendments to the Act were introduced in March 2016 and entered into force on 1 July 2016. An English version of the Act is accessible on the Norwegian Competition Authority's (NCA) website, but this version may not have been updated to reflect all recent changes.

Section 10(1) of the Act prohibits all 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 10(2) of the Act renders such agreements void, unless they satisfy the conditions for exemption under section 10(3).

The provision in section 10 of the Act is the Norwegian equivalent to article 101 of the Treaty on the Functioning of the European Union (TFEU) and article 53 of the EEA Agreement. According to the preparatory works of the Act, section 10 shall be interpreted and applied in accordance with the relevant case law of the European Court of Justice, the EFTA Court, as well as the case law and guidelines of the European Commission and the EFTA Surveillance Authority.

If a cartel affects trade between the EEA states, both article 53 of the EEA Agreement and section 10 of the Act will apply. Pursuant to section 7 of the Norwegian EEA Competition Act, the NCA and the Norwegian courts shall apply article 53 of the EEA Agreement in addition to section 10 if the cartel in question may affect trade between the EEA states.

There are also several Regulations relevant to cartels. These are:

- Regulation No. 570 of 22 June 2012 concerning exceptions from the Competition Act;
- Regulation No. 1716 of 19 December 2014 concerning fixed prices in the book sector;
- Regulation No. 651 of 23 April 2004 concerning exceptions from the Competition Act in the agricultural and fishery industries;
- Regulation No. 343 of 20 April 2012 concerning specialisation agreements;
- Regulation No. 342 of 20 April 2012 concerning research and development agreements;
- Regulation No. 733 of 31 May 2010 concerning the insurance sector.
- Regulation No. 1491 of 11 December 2013 concerning disclosure requirements and the securing of evidence; and
- Regulation No. 1465 of 11 December 2013 concerning the calculation of, and leniency from, fines.

The abovementioned regulations are accessible from the NCA's website, in Norwegian only.

During the past three years the NCA has published four general guidelines relevant for cartels. These are:

- Guidelines on restrictions on a buyer's ability to determine its resale prices.
- Guidelines on project cooperation.
- Guidance on information exchange, which is based on the NCA's recent investigations in the Norwegian fuel market, but which also contain guidance relevant to the competition law on information exchange in general; and
- Guidance on criminal sanctions for individual offenders.

The guidelines are accessible on the NCA's website, in Norwegian only.

2 Relevant institutions

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?

Although both the NCA and the Authority for Intervention and Prosecution of Economic and Environmental Crime (ØKOKRIM) may impose sanctions in cartel cases, cartel matters in Norway are primarily investigated and determined by the NCA. Cartel matters affecting trade between the EEA states may also be investigated by the EFTA Surveillance Authority (ESA) pursuant to the EEA Competition Act. If an agreement affects trade between the EEA states, both article 53 of the EEA agreement and section 10 of the Act will apply (see the above-mentioned reference to section 7 of the Norwegian EEA Competition Act).

The ESA may furthermore investigate matters in Norway on behalf of the European Commission, for example by performing unannounced inspections (dawn raids). ESA may request that the NCA takes enforcement action and assists ESA in its enforcement actions.

According to section 8 of the Act the competition authorities are the King in Council, the Ministry, the Competition Appeals Tribunal and the NCA. The Competition Appeals Tribunal is a result of the March 2016 revision of the Act and will be operative from 1 January 2017.

The NCA and the Competition Appeals Tribunal will be the main bodies responsible for the enforcement of section 10 of the Act, and may not be instructed as to decisions in individual cases. However, the King in Council may order the NCA to deal with a case.

From 1 January 2017 decisions made by the NCA, including decisions on the imposition of administrative fines, may be appealed to the Competition Appeals Tribunal. The Competition Appeals Tribunal may not on its own initiative reverse decisions of the NCA, but may overturn its own decisions if they are considered invalid. Prior to 1 January, the Ministry of Trade, Industry and Fisheries (the Ministry) will continue to hear appeals on decisions by the NCA (excluding appeals relating to administrative fines, which must be brought before the courts). Once the Appeals Tribunal is operational the Ministry's role will be to hear appeals regarding first instance decisions by the Tribunal. In regards to decisions imposing administrative fines, undertakings may – instead of filing an appeal with the Appeals Tribunal – bring an action against the state to contest such decision. The court may try all aspects of the matter. Actions relating to other decisions of the NCA may not be brought before the courts unless the undertaking first has exhausted its right of appeal in the Appeals Tribunal.

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3 Changes

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

The Act has recently undergone an extensive revision, and the new amendments to the Act entered into force 1 July 2016, with the new Competition Appeals Tribunal coming into force 1 January 2017. The aim of the revision was to simplify the Act by streamlining the processes for both industry players and the NCA and to further harmonise the Act with the legislation in the EU.

The most notable changes relevant for cartel matters are:

- From 1 January 2017 a new Competition Appeals Tribunal will be established. The Tribunal shall review the decisions of the NCA that today are dealt with by the Ministry and the NCA's decisions relating to the imposition of administrative fines that today are tried directly before the courts. The Tribunal will be located in Bergen and will be set up as an independent administrative body.
- Section 29a of the Act contains a new settlement procedure in cartel cases, inspired by the settlement procedure in the EU. The procedure allows the NCA to settle cartel cases through a simplified procedure. Under this procedure, parties, having seen the evidence in the NCA's file, may choose to acknowledge their involvement in the cartel and their liability for it. In return for this acknowledgement, the NCA can reduce the fine imposed on the parties by 10 per cent. The NCA retains a broad margin of discretion to determine which cases may be suitable for settlement.
- In June 2016 the NCA published new guidelines relating to criminal sanctions for individual offenders in competition law matters. Pursuant to the Competition Act, individuals who are found guilty of having acted in breach of the prohibition against anticompetitive agreements may face a fine or up to six years' imprisonment. However, since 2004 the NCA has never sought criminal sanctions against individuals, but rather focused on imposing administrative fines on the companies involved. Both Parliament and the Ministry have recently called for a tougher approach, and this is reflected in the new guidelines. As a result, it is likely that the number of criminal procedures taken against individual offenders and senior management in companies found to have engaged in anticompetitive practices will increase significantly in the near future. The guidelines state when the NCA is likely to file criminal complaints against individuals and under what conditions the NCA may provide individuals with a declaration of non-report. The guidelines are accessible on the NCA's website, in Norwegian only.
- In December 2015 the Ministry proposed further amendments to the Norwegian Competition Act as a result of the implementation of Directive 2014/104/EU on private actions for damages for infringements of competition law provisions. The deadline for transposition into national law is 27 December 2016. The proposal-hearing was completed on 11 March 2016, and the Ministry is currently in negotiations with both the EEA and the EU Commission on how the implementation is to take place. The Ministry does not expect that the Directive will be implemented within the transposition deadline set in the Directive, and at the earliest within one to two years.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

As described in question 1, section 10(1) of the Act prohibits agreements between undertakings that have as their object or effect the prevention, restriction or distortion of competition. Section 10(2) of the Act renders such agreements void, unless they satisfy the conditions for exemption under section 10(3).

The provision in section 10 of the Act is the Norwegian equivalent to article 101 TFEU and article 53 of the EEA Agreement. According to the preparatory works of the Act, section 10 shall be interpreted and applied in accordance with the relevant case law of the European Court of Justice, the EFTA Court, as well as the case law and guidelines of the European Commission and the EFTA Surveillance Authority.

Section 10 of the Act applies to both vertical and horizontal agreements, and provides a non-exhaustive list of prohibited agreements and practices (eg, price fixing, market sharing and output restrictions). The Act does not, therefore, contain provisions dealing exclusively with cartel arrangements.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

There are several specific exemptions provided for in the Act and in the Regulations implementing the Act.

Pursuant to section 3 of the Act, there is a general exemption from the Act for terms and conditions of work or employment.

Furthermore, there are specific exemptions provided for in Regulations (see question 1), for example concerning cooperation for the sale and distribution of books and cooperation with regards to the production and distribution of agricultural and fishery products.

6 Application of the law

Does the law apply to individuals or corporations or both?

Section 10 of the Act applies to 'undertakings', a concept that according to the preparatory works have the same meaning in Norwegian and EU antitrust law. Section 2 of the Act states that 'an undertaking means any private or public entity that exercise commercial activities'. It follows from this that public entities may also qualify as undertakings if they are carrying out commercial activities.

According to section 32 of the Act, criminal sanctions may be imposed on individuals who commit an infringement of the Act (eg, because of their involvement in cartel activity). As mentioned in question 3, the NCA recently published new guidelines relating to criminal sanctions for individual offenders in competition law matters. The guidelines are accessible on the NCA's website, in Norwegian only.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

According to section 5, the Act applies to terms of business, agreements and actions that are undertaken, have effect, or are liable to have effect in Norway.

The King in Council has by Regulation No. 1126 of 17 October 2008 decided that the Act shall apply to Svalbard, and may also by regulation decide that the Act shall govern terms of business, agreements, and actions that have effect, or are liable to have effect, exclusively outside of Norway.

The Act has to our knowledge not been applied extraterritorially.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Cartel investigations by the NCA can either be initiated on the NCA's own initiative, on the basis of a complaint to the NCA or as a result of a leniency application.

The first step in the NCA's investigation usually consists of the gathering of information, either by requests of information pursuant to section 24 of the Act, or by carrying out surprise inspections (dawn raids) at the premises of the undertakings or in private homes pursuant to section 26 of the Act.

If the NCA considers that the gathered information contains enough evidence to prove the relevant infringement, the cartel participants will be informed in a reasoned statement of objection. The parties will then be given some time to comment on the NCA's preliminary decision. After receiving the parties' comments the NCA will make a fresh assessment of the case, based both on its preliminary findings and on the parties' comments. Sometimes the NCA will gather more information from the parties or other sources at this point.

If the NCA considers that section 10 of the Act has been infringed, it will make an infringement decision. An infringement decision concerning cartels will most often require the cartel participants to bring

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the infringement to an end. As cartels are amongst the most serious of competition law infringements, such decisions will normally also impose administrative fines on the infringing parties.

According to section 12(3) of the Act the NCA has the power to negotiate with the cartel participants and to adopt a settlement decision with commitments from the parties. The result is that the NCA may end the case at an early stage if the parties commit to adhere to specific conditions eliminating the competition law concerns. A settlement decision may in principle be adopted at any stage of the NCA's investigation. However, in its settlement decision the NCA shall consider the anticompetitive behaviour of the undertaking, as well as substantiating why the settled conditions will remedy the identified competition law concerns.

As mentioned in question 3, a new cartel settlement procedure entered into force on 1 July 2016. Pursuant to section 29a of the Act, if the parties accept liability for the illegal behaviour and certain other conditions are met, the NCA may reduce the parties' administrative fines by 10 per cent. The NCA will only invite parties to participate in settlement negotiations if it considers that the case is suitable for settlement.

There are no time frames applicable to cartel investigations, and the length will, inter alia, depend on the complexity of the case, the number of parties, the cooperation of the parties during the investigation and the prospect of reaching a settlement during the procedure.

9 Investigative powers of the authorities

What investigative powers do the authorities have (eg, search and seizure/dawn raids, subpoenas or production orders, power to compel testimony, wiretapping)? Is court approval required to invoke these powers?

When investigating potential cartel activity, the NCA may request from any party the written or oral information, or tangible items (documents, computers), it deems necessary to perform its duties under the Act or to fulfil its obligations towards antitrust enforcers in other jurisdictions (section 24 of the Act).

Furthermore, pursuant to section 25 of the Act the NCA may conduct surprise inspections (dawn raids) when authorised by a court finding a 'reasonable suspicion' of an infringement. Such dawn raids may be carried out in both business properties, private dwellings and other places where evidence may be obtained.

During a surprise inspection, the NCA has wide authorities to confiscate items that may be found to be evidence as well as to seal business properties, books or documents, as long as this is deemed necessary during the investigation.

The leniency scheme must also be considered an investigative tool for the NCA. The NCA received 14 leniency applications between 2012 and 2016. Entities that apply for full immunity from fines may under the Act be granted priority (a so called 'marker'), which will preserve and protect the applicant's place in a leniency queue for a definite period of time, until sufficient evidence is collected. Through the recent revision of the Act it has been made clear that the marker system applies equally to entities which do not qualify for full immunity, but are instead granted partial leniency. This may lead to an increase in the number of whistle-blowers in the future.

The investigative powers are subject to various limitations (eg, legal privilege and the protection from self-incrimination). The European Convention on Human Rights is incorporated into Norwegian law and takes precedence over conflicting competition law legislation.

International cooperation

10 Inter-agency cooperation

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

The NCA cooperates closely, and meets regularly with the competition authorities of the other Nordic countries. The Nordic cooperation is formalised in an agreement between the competition authorities of Denmark, Iceland, Sweden and Norway. The agreement provides, inter alia, for the exchange of information between the authorities.

The NCA is also active within the OECD, the European Competition Network (ECN) and the International Competition Network (ICN).

11 Interplay between jurisdictions

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 NCA may exchange information with competition authorities of other jurisdictions, and information obtained from other competition authorities may be used by the NCA to obtain a court order to initiate unannounced inspections or to otherwise launch an investigation. The NCA furthermore cooperates with ESA in applying article 53 of the EEA agreement to agreements that affect trade between the EEA states.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Investigations and proceedings that may result in an administrative fine are handled by the NCA. If the NCA in the process of its investigation finds that a criminal sanction is more appropriate than an administrative fine, the case may be reported to the Authority for Intervention and Prosecution of Economic and Environmental Crime (ØKOKRIM). ØKOKRIM only has the power to impose criminal sanctions. As the NCA can only impose administrative fines on undertakings, and not the individuals engaged in the cartel activity, criminal prosecution will be necessary in order to penalie such individuals.

13 Burden of proof

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

The burden of proof lies with the NCA and ØKOKRIM, in civil and criminal matters respectively.

In civil matters the Supreme Court has in its ruling in the *Tine* judgment stated that the standard of proof is one of clear predominance (ie, higher than the simple balance of probabilities), whereas in criminal matters breaches will have to be proved beyond all reasonable doubt.

14 Appeal process

What is the appeal process?

Decisions by the NCA imposing administrative fines may not be appealed. If the undertaking does not accept the fine, it will have to appeal before the district court by initiating civil proceedings. However, from 1 January 2017, when the new Competition Appeals Tribunal is established, undertakings can appeal all decisions by the NCA to the Tribunal.

If the case is reported to ØKOKRIM, and ØKOKRIM issues a fine which is not accepted, ØKOKRIM may bring criminal proceedings before the district court.

Both in the civil law track and in the criminal law track, a judgment by the district court may be appealed to the appeals court and, provided certain conditions are met, to the Supreme Court.

Sanctions

15 Criminal sanctions

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

In accordance with section 32 of the Act the sanctions for criminal cartel activity are fines and imprisonment. There are no minimum sanctions, but the maximum sanction is three years' imprisonment. If there are severely aggravating circumstances imprisonment of up to six years may be considered.

As mentioned in question 3, the NCA recently published new guidelines relating to criminal sanctions for individual offenders. There is thus an increased focus on the imposition of criminal sanctions in the NCA. Although all types of infringements of the prohibition against anticompetitive agreements are subject to the threat of fines and imprisonment, the guidance makes clear that the NCA will focus on pressing charges against individuals involved in the most serious cases involving agreements which have an anticompetitive object.

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16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

If there is reasonable suspicion that an infringement has been committed, and there are risks of lasting and irreparable damage to competition, the NCA may order interim measures.

The NCA may demand the discontinuation of an ongoing infringement and impose any measure necessary to bring an infringement to an end. Structural measures may only be ordered if there are no equally effective behavioural measures, or if a behavioural measure will be more far-reaching and burdensome than a structural measure.

Furthermore, the NCA may impose administrative fines of up to 10 per cent of the undertaking's annual turnover during the preceding financial year.

The different sanctions may be used in combination.

The settlement procedure (as described in question 8), which may end with the adoption of a settlement decision with commitments from the parties, should also be regarded as an administrative sanction.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

In line with EU Regulation 1/2003 administrative fines are decided at the NCA's discretion – upwards limited to 10 per cent of the undertaking's annual turnover during the proceeding financial year, depending on the circumstances of the infringement. It follows from section 29 of the Act that when calculating the administrative fine the NCA shall particularly take into account the undertaking's turnover, the gravity and duration of the infringement, as well as possible leniency pursuant to the leniency scheme.

With regard to administrative fines, sentencing guidelines exist in the Regulation concerning the calculation of, and leniency from, fines, which lays down detailed rules on the method of calculating administrative fines.

In assessing the gravity of an infringement, particular consideration will be given to the nature of the infringement, the actual effect of the infringement on the market, the size of the affected market, the undertaking's profits, the degree of guilt and whether the person infringing the Act played a leading or passive role in the infringement.

Other elements that can influence the calculation of the fine are, inter alia, whether the arrangement or action was actually carried out, whether the undertaking through guidelines, instruction, training, supervision or other actions could have prevented the infringement, whether the undertaking has assisted the NCA in its investigations, and the financial position of the corporate group in which the undertaking is a part.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Regulation No. 402 of 4 July 2006 on public tenders implements EU Directive 2004/18/EC into Norwegian law. The rules of article 45 of the Directive regarding the personal situation of the candidate or tenderer are found in section 20-12 of the Norwegian administrative Regulation on public tenders.

It follows from section 20-12, paragraph 1, of the Regulation that a bidder for public tenders shall, inter alia, be excluded from the tender if the bidder has participated in a criminal organisation or has been found guilty of corruption, fraud or money laundering.

Following section 20-12, paragraph 2, of the Regulation bidders for public tenders may, inter alia, be excluded from the tender if the bidder has been convicted by a judgment which has the force of res judicata of any offence concerning his or her professional conduct, or if the bidder has been found guilty of grave professional misconduct proven by any means which the authorities can demonstrate.

It is the body announcing the tender that will exclude the bidder if any of the above provisions apply.

Section 20-12, paragraph 2 of the Regulation has, inter alia, been used to exclude the two contractors – NCC and Veidekke – from participating in public tenders for the maintenance of public roads in Norway after the two contractors had been found guilty of price fixing, bid rigging and illegal collusion.

19 Parallel proceedings

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

Please see question 12. The European Convention on Human Rights will prevent a situation where both criminal and administrative sanctions regarding the same conduct is imposed on the same undertaking.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Private damage claims are available, and not uncommon. Under Norwegian law, the purpose of the remedy of damages is to compensate for the loss actually suffered. The level of damages will therefore usually amount to the demonstrable loss suffered by the party seeking compensation. There is consequently no punitive element that may lead to an increased level of compensation. The successful litigant is, as a main rule, allowed to recover costs connected with the lawsuit from the unsuccessful party. In principle, no aggrieved party is excluded from seeking compensation for loss suffered as a result of a competition law infringement. However, the further removed from the actual infringement and infringer a party is, the harder it will be to sustain a claim for damages.

There are anticipated changes to the rules on private damage claims as a result of the implementation of Directive 2014/104/EU. The object of the Directive is to remove practical obstacles to compensation for all victims of infringements of EU antitrust law, hereunder the facilitation of easier access to evidence, the establishment of a rebuttable presumption that cartels cause harm etc. Due to ongoing negotiations between the Norwegian Ministry and the EU/EEA regarding the manner of implementation, the Directive will not have been implemented within the deadline for transposition into national law, which is 27 December 2016. The Ministry expects transposition to take place at the earliest within one to two years.

21 Class actions

Are class actions possible? If yes, 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 in accordance with chapter 35 of the Norwegian Civil Procedure Act. The main class action procedure is described in section 35-6 and is an 'opt-in' alternative, whereby litigants with a claim covered by the class may join the lawsuit within a stipulated deadline. However, in section 35-7 the Act also establishes an 'opt-out' alternative for certain types of claims.

Cooperating parties

22 Immunity

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

Leniency may be granted pursuant to sections 30 and 31 of the Act to undertakings that assist the NCA by revealing an infringement of the prohibition against anticompetitive agreements in section 10 of the Act. Undertakings can receive immunity (full leniency; section 30) or a reduction of the financial penalty (partial leniency; section 31) by contributing to the detection of an infringement. The purpose of the leniency programme is to increase detection of and eliminate infringements of the prohibition against anticompetitive agreements and practices. Immunity from administrative fines is only possible for

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the first undertaking that fulfils the requirements for full leniency set out in section 30 and the corresponding Regulation No. 1465/2013. In principle, leniency granted under the Act only covers the administrative sanctions administered by the NCA and not the criminal sanctions against individuals administered by the public prosecuting authority. However, under section 33 the public prosecuting authority will in most cases refrain from taking actions against individuals unless required to do so by the NCA. Involved individuals may also as part of a leniency application ask the NCA for a declaration that no criminal filing will be issued.

23 Subsequent cooperating parties

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

Undertakings that do not meet the conditions for full leniency may still be granted partial leniency if the evidence submitted significantly strengthens the NCA's ability to establish an infringement of section 10 of the Act. In addition, the undertaking must end its participation in the infringement no later than the time of submitting the evidence. Whereas this allows for leniency also for those undertakings that were not granted full leniency, the conditions for partial leniency will in general be more difficult to fulfil as the NCA's investigation progresses.

The extent to which evidence strengthens the ability of the NCA to establish an infringement depends upon an objective assessment of the nature and content of the evidence, along with the evidence the NCA already possesses at the time when the undertaking submits its evidence. Written evidence that can be linked to the time of the infringement will generally have greater evidentiary value than post-infringement evidence. Similarly, evidence that is directly connected to the current case is generally regarded as having greater evidentiary value than evidence with an indirect connection.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

If the undertaking fulfils the requirements for partial leniency, the administrative fine will be reduced according to the following rules:

- The first undertaking that fulfils the conditions is granted a reduction of 30 to 50 per cent.
- The second undertaking that fulfils the conditions is granted a reduction of 20 to 30 per cent.
- Any subsequent undertaking that fulfils the conditions is granted a reduction of up to 20 per cent.

In order to determine the level of reduction within each of these categories the NCA will take into account how timely the evidence was submitted, the extent to which the evidence strengthened the case and the extent to which the undertaking has cooperated with the NCA.

25 Approaching the authorities

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 undertaking may choose to submit the evidence immediately or initially submit the evidence in hypothetical terms. The undertaking may also be given a marker at the time an application for leniency was filed, which will only be sustained if sufficient evidence of an infringement is submitted within a deadline set by the NCA.

If the undertaking chooses to submit the evidence immediately, it must submit all evidence regarding the infringement in its possession. If it is later discovered that the undertaking has not submitted all evidence in its possession, full leniency will usually be withdrawn.

In cases where the evidence is submitted in hypothetical terms, the undertaking shall give a clear description of the nature and content of the evidence so that the NCA has a sufficient basis on which to assess whether the evidence fulfils the requirements for granting full leniency. The NCA will set a final date for submission of the evidence. An undertaking that chooses to submit evidence in hypothetical terms carries the risk that the description is not in accordance with the underlying evidence.

Entities that apply for full immunity from fines may thus, under the current legal framework, be granted a marker, which will preserve and protect the applicant's place in a leniency queue for a definite period of time, until sufficient evidence is collected. The amendments to the Act that entered into force on 1 July 2016 make clear that the marker system will apply equally to entities that do not qualify for full immunity, but are instead granted partial leniency.

26 Cooperation

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?

For both full leniency and partial leniency applicants, there is a requirement to cooperate in full with the NCA during its investigation of the matter. The requirement to cooperate implies both an obligation to actively participate in the NCA's investigation by, inter alia, producing all available evidence and answer all questions posed by the NCA. In addition, the requirement pertaining to cooperation obliges the undertaking to refrain from actions that may hamper the NCA's investigation such as revealing the existence of the leniency application or destroying evidence. Cooperation deemed unsatisfactory by the NCA may lead to revocation of the leniency granted or rejection of an application for leniency.

27 Confidentiality

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 starting point, the ordinary rules granting public access to documents in the possession of public authorities do not cover applications for leniency (full or partial). Request for access to such documents will therefore ordinarily be declined, even after the infringement has been terminated and the case is closed. In this context a case is deemed closed when the NCA has made an infringement decision pursuant to section 29, or a decision that imposes an order on the parties to cease the illegal conduct pursuant to section 12. A case will also be deemed closed if the NCA decides not to proceed with the case. When a case is reported to the public prosecuting authority, it is not considered closed until the prosecuting authority has concluded its proceedings. In addition, employees of the NCA have an extended confidentiality obligation with regard to admissions of guilt, submitted by an undertaking as part of an application for leniency. Nevertheless, parties to an ongoing investigation by the NCA may have access to leniency applications as part of their right to challenge the allegation against them. However, such access is also subjected to limitations in order to protect the integrity of the investigation. Applications may also under certain limitations be disclosed in civil proceedings.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The NCA may close infringement proceedings against an undertaking by accepting and making legally binding commitments offered by the undertaking under investigation. Such commitments may be either of a structural or behavioural nature. The legislation is on this point modelled on commitment decisions pursuant to Regulation 1/2003. Such decisions may be challenged by a complaint to the Ministry or through court proceedings. Following the establishment of the Competition Appeals Tribunal in January 2017, commitment decisions must instead be challenged by a complaint to the Tribunal.

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Update and trends

The most notable recent developments in Norway is the establishment of an independent appellate body for competition law cases, including cartel cases, which will be effective from January 2017, as well as a new settlement procedure in cartel cases which came into force on 1 July 2016.

Moreover, there appears to be an increased focus on the imposition of criminal penalties on individuals involved in illegal cartel activity. This is evidenced by the NCA's recently published guidelines on criminal sanctions for individual offenders. Since 2004 the NCA has never sought criminal sanctions against individuals, but rather focused on imposing administrative fines on the undertakings involved. Over the past couple of years, however, there seems to have been a growing realisation that criminal sanctions are necessary in order to create a maximum deterrent effect against offenders and calls for tougher sanctions against individuals have been voiced by both the Minister of Trade, Industry and Fisheries and by members of Parliament.

In the *Asphalt* case, the Oslo District Court found in February 2014 that NCC Roads AS had been engaged in illegal cartel activity and imposed a fine of 40 million kroner. Borgarting Court of Appeal found in June 2015 that NCC AB had also infringed the Act. NCC AB and NCC Roads AS were fined 150 million kroner.

In March 2015, Borgarting Court of Appeal made a judgment in another controversial competition law case. The Appeal Court concluded that the joint tender submitted by Ski Follo Taxidrift AS, a joint venture established by Follo Taxisentral BA and Ski Taxi BA, was an illegal bid rigging contrary to section 10 of the Act. The judgment raised several competition law issues, in particular on the boundaries between illegal bid rigging and lawful project agreements. Not surprisingly, the case has been appealed to the Supreme Court. In February 2016 the Supreme Court sent a request for an advisory opinion from the EFTA Court and written observations from the EFTA Court were served in May 2016. The Supreme Court is yet to give its judgment in the case.

In 2015, the NCA has also imposed fines in two minor cartel cases. V2015-25 ES-Kjeden concerned the exchange of prices within a trade association for repair shops directed at household appliances. In this case the NCA reduced the fine from 11.7 million kroner to 250,000 kroner due to the financial situation of the trade association. V2015-28 Arro, Caverion and Ivar Pettersen concerned bid rigging and exchange of sensitive information between three electrician suppliers to the health sector. The NCA imposed fines of 2.88 million kroner, 1.87 million kroner and 1.44 million kroner. One of the companies was granted partial leniency (40 per cent).

The NCA's priorities for the coming years is, among others, to ensure that individual criminal sanctions pose a real threat to would-be offenders in competition law cases and to continually assess markets that are particularly exposed to competition concerns, including the need for special monitoring arrangements within such markets.

As of 1 July 2016 a new settlement procedure in cartel cases was introduced in section 29a of the Act. Under this procedure the NCA may, if it considers the case suitable for the settlement procedure, invite one or more undertakings to participate in settlement negotiations. The NCA will present the case, the available evidence, its preliminary assessment of the possible infringement and inform the parties of the expected level of administrative fines. The parties, having seen the evidence in the NCA's file, may then choose to acknowledge their involvement in the cartel and their liability for it. In return for this acknowledgement, the NCA can reduce the fine imposed on the parties by 10 per cent.

29 Corporate defendant and employees

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

In principle, grants of immunity or leniency cover only the corporate defendant (ie, the undertaking). Individuals, typically employees, may in principle still be charged by the public prosecuting authority. This places the individuals in possible legal jeopardy and may as a consequence make it impossible for undertakings to fulfil their obligation to cooperate. In order to remedy this situation, section 33 of the Act states that in general the public prosecuting authority will only charge individuals following a request to do so from the NCA, the implication being that the NCA will not request the prosecution of employees of an undertaking having received leniency or immunity.

30 Dealing with the enforcement agency

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

Please see questions 25 and 26.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As mentioned in question 3, the Act has recently undergone revision and the new amendments to the Act, which included a clarification to the leniency regime, entered into force as of 1 July 2016.

As far as we are aware there are no ongoing or anticipated reviews of the leniency regime.

Defending a case

32 Disclosure

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

Pursuant to section 26 of the Act, undertakings or individuals being investigated by the NCA for infringement of the Act, shall upon request be permitted to familiarise themselves with the documents relevant to the particular case, provided this may be done without damaging or risking the integrity of the investigation or of a third party. If the request for information is denied, the undertaking or individual involved may challenge the decision through the district courts, and from January 2017 – by filing a complaint with the Competition Appeals Tribunal.

33 Representing employees

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

Counsel may normally represent both the undertaking and its employees. However, an employee should consider seeking independent counsel if there is a risk that the undertaking and the employee may have conflicting interests.

34 Multiple corporate defendants

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

Counsel may normally represent multiple undertakings. However, the different undertakings will often have conflicting interests and separate counsel is usually either required or recommendable.

35 Payment of penalties and legal costs

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

Yes.

36 Taxes

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

Fines may not be deducted for tax purposes. There are no special tax rules governing damage awards pursuant to competition law, and they must as a consequence follow ordinary principles regarding

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tax-deductibility. In principle, this means that damage awards may be deductible.

37 International double jeopardy

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

Sanctions imposed in other jurisdictions are, as a general rule, not taken explicitly into account by the NCA. However, fines imposed for the same infringement in other jurisdictions may implicitly impact on the assessment of the NCA. In addition, the rules preventing double jeopardy in the European Convention on Human Rights may have an impact on the degree to which an infringer may in full be subjected to fines for the same infringement. In damages claims, the aim under Norwegian law is to compensate for the actual loss suffered. As such, any loss suffered by other actual or potential claimants will not lead to a deduction of the award.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The most optimal way of reducing the fine is by applying for full or partial leniency. According to section 3 of Regulation No. 1465 of 11 December 2013 concerning the calculation of and leniency from fines, a relevant factor when calculating the fine is whether the undertaking by instruction, training, control or other measures could have prevented the infringement.

Moreover, participation in settlement negotiations with the NCA after the investigation has commenced may result in a 10 per cent reduction of the administrative fine, but a prerequisite here is that the NCA consider the case suitable for the settlement procedure.

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Portugal

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Legislation and institutions

1 Relevant legislation

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 went through a significant reform in 2012 with the adoption of a new Competition Act, Law No. 19/2012 of 8 May (the Act), which superseded the previous regime put in place by Law No. 18/2003 of 11 June 2003 (the former Competition Act).

The Act largely follows the rules established at EU level, and addresses agreements between undertakings, decisions of associations of undertakings and undertakings' concerted practices (as well as the abuse of a dominant position, the abuse of economic dependence, concentrations and state aid). The Act also includes the leniency regime for immunity or reduction of fines imposed for breach of competition rules, which was formerly set forth in a separate statute (Law No. 39/2006 of 25 August).

Decree-Law No. 125/2014 of 18 August adopted and approved the new statutes of the Competition Authority (the Authority), superseding Decree-Law No. 10/2003 of 18 January, which created the Authority and approved its former statutes.

As regards appeals, Law No. 46/2011 of 24 June 2011 determined the creation of a specialised court to handle competition, regulation and supervision matters (the Specialised Court), which was established in the town of Santarém as of 30 March 2012. The new Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Authority.

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; and
- the Civil Code and the Civil Procedure Code regarding civil liability for anticompetitive infringements.

2 Relevant institutions

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 Authority. There is no separate prosecution authority.

According to its statutes the Authority is an independent administrative entity endowed with administrative and financial autonomy, management autonomy and organic functional and technical independence and with own assets. As per the statutes, the Authority'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 Authority include:

- ensuring compliance with national and EU competition laws, regulations and decisions;
- implementing practices that may promote competition and develop a competition culture among economic operators and the public in general;
- establishing priority levels as regards matters which the Authority is called to assess, under the competition legal regime;
- releasing, notably among the economic operators, guidelines deemed relevant for the competition policy;
- following the activity of, and establishing cooperation links with, the EU institutions, national, foreign and international entities with responsibilities in the area of competition;
- promoting research in the area of competition law;
- contributing to the improvement of Portuguese legal regimes in all areas relevant to competition;
- carrying out the tasks conferred upon member states' administrative authorities by EU law in the field of competition; and
- ensuring the technical representation of the Portuguese state in EU or international institutions in competition policy matters, without prejudice to the powers of the Foreign Affairs Ministry.

The Authority is composed of two bodies: the Board of Directors and the Sole Supervisor, supported by the organisation required for the performance of the Authority's responsibilities, established in an internal regulation.

The Board of Directors is the highest body of the Authority and is responsible for the definition of the Authority's action and by the management of the Authority's services. The Board of Directors consists of a chair and up to three other members. A vice president may also be appointed as long as in total an odd number of members is maintained. The members are appointed by the Council of Ministers upon the proposal of the minister for economic affairs and pursuant to the hearing of the competent Parliament commission.

The Sole Supervisor is responsible for the control of the legal, regular and sound management of the Authority's assets and financial management, and also carries out an advisory role to the Board of Directors. The Sole Supervisor is a chartered accountant or a chartered accountancy firm appointed by joint decision of the ministers responsible for

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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.

3 Changes

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

Following a long-awaited reform of the competition regime, Law No. 19/2012 of 8 May 2012 superseded the previous regime put in place by Law No. 18/2003 of 11 June 2003 (see question 1). Pursuant to the Act, the current regime should be reviewed in accordance with the evolution of the EU competition regime. Meanwhile, Decree-Law No. 125/2014 of 18 August has enacted the Authority's statutes, superseding Decree-Law No. 10/2003 of 18 January.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 9 of the Act, in line with article 101(1) of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, in whatever form, having as their object or effect to prevent, distort or restrict competition in the whole or part of the national market to a considerable extent. It then lists some of the behaviour that may be prohibited, including:

- directly or indirectly fixing purchase or sale prices or any other transaction conditions;
- limiting or controlling production, distribution, technical development or investments;
- sharing markets or sources of supply;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making a condition of the signing of contracts the acceptance, by the other parties, of additional obligations that, by their nature or according to commercial usage, have no connection with the subject of the contracts.

Cartels are likely to correspond to one or more of these situations. Furthermore, acts not listed under article 9 may naturally fall within its scope, provided that the conditions for its application are fulfilled.

Only significant restrictions of competition are relevant, excluding de minimis infringements.

The Authority has already interpreted article 9 of the Act in the sense that infringements the object of which is to prevent, distort or restrict competition (as opposed to infringements the effects of which are to prevent, distort or restrict competition) are infringements per se, insofar as they are prohibited because they represent a danger to competition whether or not they produce the effects that they potentiate (see, for instance, the Authority's decision in case 1/2011 regarding competitive restrictive practices in the production, processing and marketing of flexible polyurethane foam).

Infringements to article 9 of the Act constitute quasi-criminal minor offences and are punished as either intentional (cases where undertakings act intentionally and aware of the unlawfulness of their conduct) or negligent (violation of duties of care) behaviours (see articles 67 and 68 of the Act).

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

Under the Act, undertakings legally charged with the management of services of general economic interest or that benefit from legal monopolies are subject to competition provisions, as long as the application of these rules does not impede, in law or in fact, the fulfilment of their mission.

According to article 10(1) of the Act, agreements, decisions and practices prohibited under article 9 may be considered justified, provided that they contribute to improving the production or distribution of goods and services or to promoting technical or economic development. Similarly, to the provisions of article 101(3) TFEU, this exemption will only apply when, cumulatively, they:

- allow the consumers of those goods and services a fair share of the resulting benefit;
- do not impose on the undertakings concerned any restrictions that are not indispensable for attaining these objectives; and
- do not afford such undertakings the possibility of eliminating competition in a substantial part of the product or service market in question.

Undertakings that invoke the above justification bear the burden of proof of the aforesaid conditions.

Agreements, decisions or practices are also deemed justified when, though not affecting trade between member states, they satisfy the remaining application requirements of a block exemption regulation adopted under article 101(3) TFEU. This benefit may be withdrawn by the Authority if the behaviour covered leads to effects incompatible with the provisions of article 10(1) of the Act.

As far as regulated sectors are concerned, the Authority's responsibilities are to be carried out in cooperation with the corresponding regulatory authorities. The Act establishes a mutual information obligation regarding possible anticompetitive behaviour in those sectors (see question 8) establishing the terms of their reciprocal cooperation.

6 Application of the law

Does the law apply to individuals or corporations or both?

The notion of 'undertaking' adopted in the Act is very broad and in line with EU case law. It covers any entity exercising an economic activity that involves the supply of goods and services in a particular market, irrespective of its legal status or the way it is financed. Groups of undertakings are treated as a single undertaking where they make up an economic unit or maintain ties of interdependence or subordination among themselves. See question 16 regarding the liability of individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Act applies to restrictive practices occurring in Portugal or that may have an effect within it.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Proceedings regarding infringements of article 9 of the Act, as well as infringements of article 101 TFEU that the Authority initiates or in which it is called to intervene, are governed by the Act and, on a subsidiary basis, by the quasi-criminal minor offences regime (see question 1). The most relevant steps are as follows.

Inquiry

Initiating an inquiry: principle of opportunity

Under the Act, the Authority may initiate an inquiry ex officio or upon a complaint. In this respect, it should be noted that the Act has adopted the principle of opportunity, pursuant to which, in exercising its powers, the Authority 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 Authority shall take into account:

- the competition policy priorities;
- the elements of fact and of law that are submitted to the Authority;
- the seriousness of the possible infringement;
- the likelihood of proving the existence of the infringement; and

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- the scope of the investigation activity required to perform the mission of ensuring compliance with national and EU competition rules.

The Authority has meanwhile adopted the guidelines on the priorities in exercising sanctioning powers and on the investigation in proceedings regarding competition restrictive practices.

As regards processing of complaints, the Authority shall register all complaints received and initiate the corresponding proceedings. However, if on the basis of the information available the Authority considers that there are no sufficient grounds for acting, it shall inform the complainant granting 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 Authority does not change its position, declaring that the complaint has no grounds or should not be granted priority, such decision may be appealed to the Specialised Court (see question 14). Conversely, in the absence of the timely submission of the observations, the case is closed.

Scope

Within the framework of the inquiry, the Authority shall carry out all the investigation actions required to establish the existence of an infringement and of the corresponding infringers, and to collect evidence.

Settlement proceedings

During the inquiry phase, the Authority may fix a deadline to the concerned undertaking of no less than 10 working days to express in writing its intention of participating in discussions with the Authority aiming at a possible submission of a settlement proposal. During the inquiry phase, the concerned undertaking may also submit in writing to the Authority its intention of initiating the said discussions.

A concerned undertaking participating in settlement discussions shall be informed, 10 working days before the start of such discussions, of the facts that are attributed to it, of the evidence supporting the application of a sanction and of the limits of the fine.

At the end of the discussions, the Authority notifies the concerned undertaking to submit a settlement proposal within a deadline of no less than 10 working days. The Authority may either reject the proposal (a decision that cannot be appealed) or accept it. In this latter case, the Authority 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 Authority, confirm that the draft settlement document reflects the settlement proposal. In the absence of such confirmation:

- the draft settlement document becomes ineffective;
- the infringement proceedings shall continue; and
- the settlement proposal is deemed revoked and cannot be used as evidence against any undertaking involved in the settlement proceedings.

The draft settlement document is converted into a definitive sanctioning decision upon the above confirmation by the concerned undertaking and upon payment of the applied fine. Facts included in the decision can no longer be used in other infringement proceedings and the facts confessed by the concerned undertaking cannot be rebutted in an appeal. Furthermore, a reduction of fine granted in leniency proceedings is added to the reduction granted in the settlement proceedings.

Closure with conditions

The Authority 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 Authority 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 Authority may, within two years, reopen the case closed with conditions attached if:

- a substantial change in the facts on which the decision was grounded has occurred;
- the conditions attached to the decision are not complied with; or
- the closure decision was grounded on false, inaccurate or incomplete information.

Decision

The inquiry must be concluded within a maximum deadline of 18 months. However, if such deadline cannot be met, the Council of the Authority (the Authority'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 Authority may:

- start the investigation phase notifying the concerned undertaking of the statement of objections, when the Authority concludes that, on the basis of the findings, there is a reasonable possibility of adoption of a sanctioning decision;
- close the case when the findings do not allow for the conclusion that there is a reasonable possibility of adoption of a sanctioning decision;
- put an end to the proceedings adopting a sanctioning decision within settlement proceedings; or
- close the file with conditions attached, under the terms referred to above.

If the inquiry has been initiated following a complaint and the Authority considers, on the basis of the findings, that there is no reasonable possibility of adoption of a sanctioning decision, the Authority informs the complainant thereof, fixing a deadline of no less than 10 working days for the submission of observations. If such observations are submitted and the Authority's position remains unchanged, the latter shall adopt an express closure decision, which may be appealed to the Specialised Court (see question 14).

Investigation

Scope

In the statement of objections, the Authority shall fix to the concerned undertaking a deadline of no less than 20 working days to submit written observations on the matters that may be relevant to the decision and on the evidence gathered, and to request complementary evidence it may deem convenient. In the observations submitted, the concerned undertaking may request an oral hearing. Upon reasoned decision, the Authority may refuse to undertake additional action with regard to complementary evidence if it considers that the request has mere delaying purposes. The Authority may also carry out additional collection of evidence, even after the submission of the written observations by the concerned undertaking and its oral hearing. In this latter case, the Authority shall notify the concerned undertaking of the evidence gathered, fixing a deadline of no less than 10 working days for submission of observations. Furthermore, whenever the new evidence substantially changes the facts initially attributed to the concerned undertaking, the Authority shall issue a new statement of objections, the above applying mutatis mutandis. Pursuant to the Act, the Authority has adopted guidelines on the investigations and procedural steps.

Settlement proceedings

In its observations regarding the statement of objections, the concerned undertaking may also submit a settlement proposal, in which case the proceedings shall be suspended for a period established by the Authority that cannot exceed 30 working days. The remaining steps of the settlement proceedings are largely similar to those indicated above in respect of the submission of a settlement proposal during the inquiry phase.

Closure with conditions

During the investigation phase, the Authority may also close the case with conditions attached, under the same terms as those referred to above.

Decision

The investigation must be concluded within a maximum deadline of 12 months from the notification of the statement of objections. However, if such deadline cannot be met, the Council of the Authority shall inform the concerned undertaking thereof, indicating the period required for the completion of the investigation. Upon completion of the investigation, the Authority may:

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- declare the existence of a restrictive practice and, if applicable, consider such practice justified under article 10 of the Act;
- adopt a sanctioning decision within settlement proceedings;
- close the case with conditions attached, under the terms referred to above; or
- close the case without conditions.

Decisions declaring the existence of a restrictive practice may include the admonition or the application of fines and other sanctions set in the Act and, if required, the imposition of behavioural or structural remedies indispensable to put an end to the restrictive practice or to the effects thereof. Structural remedies may only be imposed in the absence of a behavioural remedy equally effective, or, if such remedy exists, it is more costly to the concerned undertaking than the structural remedy.

Interim measures

The Authority may, at any time during the proceedings, order the suspension of a restrictive practice or impose other interim measures required to restore competition, or indispensable to the effectiveness of the final decision to be adopted, if the findings indicate that the practice in question is about to cause a serious damage that is irreparable or difficult to repair. The interim measures may be adopted by the Authority ex officio or upon request by any interested party, and shall be effective until they are revoked and for a period of up to 90 days, extendable for equal periods within the time limits of the proceedings. Imposition of interim measures is subject to a prior hearing of the concerned undertaking, except if such hearing puts at risk the effectiveness of the measures, in which case the concerned undertaking is heard after the measure is adopted. Whenever a market subject to sectoral regulation is concerned, the opinion of the corresponding sectoral regulator shall be requested.

Liaison with sectoral regulators

Whenever the infringement occurs in a sector subject to specific regulation, the Authority shall immediately inform the corresponding regulatory authority so that the latter may submit observations. Furthermore, prior to the adoption of the final decision, the Authority shall obtain a prior opinion from the relevant regulatory authority, except in the case of a decision of closure of the case without conditions. Likewise, when a sectoral regulatory authority assesses a practice that may amount to a violation of competition rules, it shall immediately inform the Authority. In this latter case, the sectoral authority, before issuing a final decision, shall submit a draft thereof to the Authority to obtain its opinion.

9 Investigative powers of the authorities

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

The Act enhanced the extensive powers of investigation already granted to the Authority by the former Competition Act. Under the Act, in investigating restrictive practices the Authority may, notably:

- question the concerned undertaking and other persons involved, personally or through their legal representatives, and request from them documents and other data deemed convenient or necessary to clarify the facts;
- question any other persons, personally or through their legal representatives, whose statements are considered relevant, and request from them documents and other data;
- carry out searches, examine, collect and seize extracts from accounting records or other documentation at the premises, land or transportation means of the undertakings or associations of undertakings (this action requires a decision from the competent judicial authority, issued upon an Authority's substantiated application);
- during the period strictly required for the foregoing measures, seal the premises and locations of the undertakings or associations of undertakings where accounting records or other documentation, as well as supporting equipment, may be found or are likely to be found (this action requires a decision from the competent judicial authority, issued upon an Authority's substantiated application); or
- request from any public administration services, including police authorities, the assistance that may be required for the performance of the Authority's functions.

In addition, in the case of a grounded suspicion that, in the domicile of shareholders, board members or employees, or other workforce of undertakings or associations of undertakings, evidence of infringements to article 9 of the Act or to article 101 TFEU may be found, the Authority may, upon decision by the competent judge issued upon an Authority's substantiated application, carry out searches in such domiciles. A search in an inhabited house, or in a locked part thereof, may only be carried out from 7am to 9pm, otherwise being null and void. Searches in the office of an attorney-at-law or doctor may only be carried out in the presence of a judge, who shall previously inform the chair of the local attorneys' bar or doctors' association, as applicable, so that he or she, or a delegate thereof, may be present. These rules apply, mutatis mutandis, to searches elsewhere, including vehicles of shareholders, board members or employees or other workforce of undertakings or associations of undertakings.

Seizure of documents must be authorised, ordered or confirmed by a decision of the judicial authority. Seizure of documents in the office of an attorney-at-law or doctor, which are subject to professional secrecy, is not permitted unless such documents are the object or an element of the infringement, otherwise being null and void. Seizure of documents in a credit institution, which are subject to banking secrecy, is carried out by the competent judge when there are grounded reasons to believe that such documents are related to the infringement or are of great interest to establish the facts.

International cooperation

10 Inter-agency cooperation

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

Following the decentralisation carried out under Council Regulation No. 1/2003, cooperation between national competition authorities, including the Authority and the European Commission, takes place in the framework of the European Competition Network. Besides such cooperation, the Authority is also a member of the ECA (European Competition Authorities Association). Furthermore, at a multilateral level, the Authority cooperates within international organisations, including the OECD and the UNCTAD. The Authority also participates in multilateral cooperation networks, such as the International Competition Network, the Portuguese Speaking Countries Competition Network and the Iberian-American Competition Network. At a bilateral level, the Authority cooperates through technical cooperation protocols and projects of mutual interest with other competition authorities (Brazil, China, Mozambique, Singapore, Spain, Turkey, France and Austria). According to the last Activities' Report available, in 2015 the Authority participated in 45 European and international meetings. In the same Report the Authority underlines the cooperation with the Spanish Authority and the organisation of the seventh edition of the Iberian Competition Forum, held in Lisbon in October 2015.

Furthermore, under Council Regulation No. 1/2003, the following EU competences were taken up by the Authority at the national level:

- the investigation of infringements of articles 101 and 102 TFEU;
- the withdrawal of the application of EU block exemption regulations to acts leading to effects incompatible with article 101(3) TFEU within the national territory, or in a section of it presenting all the characteristics of a separate geographical market;
- the rejection of infringement claims or the suspension of procedures when the alleged infringement is being investigated by the European Commission or another member state's competition authority;
- assistance with the European Commission's inspections of undertakings or associations of undertakings within the national territory; and
- inspections or other investigative measures in the national territory, applying the respective national legislation, on behalf of another member state's competition authority or on request from the European Commission, to determine the existence of a violation of articles 101 or 102 TFEU.

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11 Interplay between jurisdictions

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

See question 10 as regards the interplay between the Portuguese and the EU jurisdictions. According to the Authority's public records, within the framework of Council Regulation No. 1/2003, in 2004 one case was referred to the Authority within the European Competition Network (see the Authority's 2004 Activity Report, page 25).

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

See question 8.

13 Burden of proof

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 Authority. However, exemptions such as those mentioned in question 5 must be proved by the alleging parties. As regards the level of proof at the end of the enquiry phase (see question 8), the decision to start the investigation phase is taken on the basis of a balance of probabilities, conversely, taking into account criminal procedure principles, such as the in dubio pro reo principle, which apply to quasi-criminal minor offences by virtue of the general regime on quasi-criminal minor offences (see question 1), the level of proof required for the final decision is the procedural certainty that without any reasonable doubt is formed by the decision maker.

14 Appeal process

What is the appeal process?

As stated above, Law No. 46/2011 of 24 June determined the creation of the Specialised Court to handle competition, regulation and supervision matters, as of 30 March 2012. The new Specialised Court is now the exclusive first instance for review of all the decisions adopted by the Authority.

Under the current regime, the Authority's sanctioning decisions (typically involving anticompetitive agreements, decisions and practices, abuses of economic power and infringements of the merger control rules) may be appealed to the Specialised Court under the rules established in the Act and, on a subsidiary basis, under the quasi-criminal minor offences regime. The appeal shall not suspend the effects of the Authority's decision, except for decisions that impose structural remedies as established in the Act. Appeals that refer to decisions applying fines or other penalties may suspend the enforcement of such decisions only if the party concerned requests it on the basis of the allegation that the enforcement of the decision may cause it considerable harm and if such party offers a guarantee, and provided such guarantee is submitted within the time limit set by the court. The Specialised Court shall have full jurisdiction in the case of appeals lodged against decisions imposing a fine or a periodic penalty payment, and can reduce or increase the corresponding amounts.

As regards an appeal of the Authority's final decision condemning the concerned undertaking, it must be lodged within a non-extendable deadline of 30 working days. During a (also non-extendable) deadline of 30 working days, the Authority shall forward the file to the public prosecutor. The Authority 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 Authority shall further be given the opportunity to bring to the hearing any elements deemed relevant for the decision and to have a representative participating in such hearing. Although the Court may in certain cases decide by means of a court order without prior hearing, the Authority, the public prosecutor or the concerned undertaking may oppose such decision. The Court's final decision, as well as all decisions other than routine decisions that do not involve the refusal or the recognition of any right, must be notified to the Authority. The withdrawal of the case by the public prosecutor depends on the Authority's agreement. The Authority has standing to autonomously appeal from the Court's decisions (other than routine decisions).

Appeals of decisions of the Specialised Court that may be appealed are filed with the Appellate Court of Lisbon as a court of last resort.

The duration of the appeal proceedings depends on the complexity of the cases and of the concerned courts' workload. It may nevertheless last longer than 12 months.

Sanctions

15 Criminal sanctions

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

The application of general criminal law can only derive from behaviour also corresponding to a penal offence (fraud, extortion, disturbance of public auction or tender, etc), since there are no criminal sanctions for competition law offences. Cartel activity per se is considered a quasi-criminal minor offence.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

In relation to sanctions for quasi-criminal minor offences, under the Act, fines can be imposed of up to 10 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Authority, for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings:

- for infringements of article 9 of the Act or article 101 TFEU;
- for non-compliance with the conditions attached to the decision of closing the case at the end of the investigation phase (see question 8);
- for non-compliance with the behavioural or structural remedies imposed by the Authority (see question 8); or
- for non-compliance with a decision ordering interim measures.

In cases where any of these infringements is carried out by individuals held responsible under the Act (see below), the applicable fine cannot exceed 10 per cent of the corresponding remuneration in the last full year in which the infringement took place.

In addition, refusal to provide information or the provision of false, inaccurate or incomplete information, or non-cooperation with the Authority, are subject to fines of up to 1 per cent of the corresponding turnover in the year immediately preceding that of the final decision adopted by the Authority for each of the infringing undertakings, or, in the case of associations of undertakings, of the aggregated turnover of the associated undertakings. In cases where any of these infringements is carried out by individuals held responsible under the Act (see below), the applicable fine ranges from 10 to 50 'account units' (each account unit currently amounting to €102).

Furthermore, the absence of a complainant, of a witness or of an expert to a duly notified procedural act is punishable with a fine ranging from two to 10 account units.

Multiple infringements are punished with a fine, the maximum limit of which is the sum of the fines applicable to each infringement. However, the total fine cannot exceed double of the higher limit of the fines applicable to the infringements in question.

Additionally, should the infringement be considered sufficiently serious, the Authority can impose, as ancillary sanctions:

- the publication, at the offender's expense, of an extract of the sanctioning decision in the official gazette of Portugal and in a Portuguese newspaper with national, regional or local coverage, depending on the relevant geographical market; or
- in cases of competition law infringements carried out during, or due to, public procurement proceedings, the prohibition, for a maximum of two years, from participating in proceedings for entering into public works contracts, for concessions of public works or public services, for the lease or acquisition of goods or services by the state, or for the granting of public licences or authorisations.

The Authority may further impose periodic penalty payments of up to 5 per cent of the average daily turnover in Portugal in the year

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immediately preceding that of the final decision, per day of delay counted from the date established in the notification, where the undertakings do not comply with an Authority decision imposing a sanction or ordering the adoption of certain measures.

Individuals, legal persons (regardless of the regularity of their incorporation), companies and associations without legal personality may be held liable for offences under the Act.

Legal persons and equivalent entities are liable when the acts are carried out:

- on their behalf, on their account by persons holding leading positions (eg, the members of the corporate bodies and representatives of the legal entity); or
- by individuals acting under the authority of such persons by virtue of the violation of surveillance or control duties. Merger, demerger or transformation of the legal entity does not extinguish its liability.

The members of the board of directors of the legal entities, as well as the individuals responsible for the direction or surveillance of the area of activity in which an infringement is carried out, are also liable when:

- holding leading positions, they act on behalf or on the account of the legal entity; or
- knowing, or having the obligation to know, the infringement, they do not adopt the measures required to put an end to it, unless a more serious sanction may be imposed by other legal provision.

Undertakings, whose representatives were, at the time of the infringement, members of the directive bodies of an association that is subject to a fine or a periodic penalty payment, are jointly and severally responsible for paying the fine, unless they have expressed in writing their opposition to the infringement.

In relation to civil sanctions, anticompetitive agreements, decisions and practices are considered null and void (except where they are considered justified; see question 5), and civil liability may also arise for the damage caused (see question 20).

The calculation of the above-mentioned fines must follow the mandatory criteria established in the Act (see question 17). In addition, on 20 December 2012, the Authority published Guidelines regarding the methodology to be used in the application of fines. In drafting these Guidelines, the Authority took into consideration the European Commission's Guidelines on the method of setting fines imposed pursuant to article 23(2)(a) of Regulation No. 1/2003. The Authority's Guidelines only apply to cases in which the inquiry phase (see question 8) was initiated after the Act came into force. Furthermore, the Authority 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 Authority in fixing such fines.

According to the Authority's public decision record, which appears on the Authority's website and only includes definitive decisions (ie, decisions that either were not subject to judicial review, or were subject to appeal and the final judicial decision has already been adopted), and in cases where the Authority has determined that an infringement occurred, the Authority 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.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Under the Act, the following circumstances may be considered relevant for setting the amount of the fines:

- the seriousness of the infringement in terms of affecting effective competition in the Portuguese market;
- the nature and size of the market affected by the infringement;
- the duration of the infringement;
- the level of participation in the infringement by the concerned undertakings;
- the advantages that the offending concerned undertakings have enjoyed as a result of the infringement, if possible to determine;
- the behaviour of the concerned undertakings in putting an end to the restrictive practices and in repairing the damages caused to competition;
- the economic situation of the concerned undertakings;
- records of previous competition infringements carried out by the concerned undertakings; and
- cooperation with the Authority until the close of the administrative proceedings.

Consideration of the above circumstances is mandatory for the Authority. However, the absence of a hierarchy and the consideration of circumstances not listed above leave room for discretion.

Furthermore, as stated above, on 20 December 2012 the Authority published Guidelines regarding the methodology to be used in the application of fines (see question 16).

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

As stated in question 16, in the case of competition law infringements carried out during, or due to, public procurement proceedings, the Authority can impose, as an ancillary sanction, a prohibition, for a maximum of two years, from participating in proceedings for entering into public works contracts, for concessions of public works or public services, for the lease or acquisition of goods or services by the state, or for the granting of public licences or authorisations.

19 Parallel proceedings

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

As stated above (see questions 15 and 16) 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

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Third-party claims for damages are dealt with under the general principles and provisions applicable to civil liability as provided for in the Civil Code. The standard liability requirements are the existence of an illicit act (the anticompetitive behaviour), injury to the claimant and a causal link between the two. The purpose of this liability is merely to repair damage (ie, to restore the situation that would have existed if the event that determines the need for the reparation had not occurred). The amount of compensation shall be measured by the difference between the actual patrimonial situation of the damaged party and the patrimonial situation of such party that would exist if the damage had not taken place. This includes not only the amount of the damage caused by the illicit conduct, but also interest and the amount of any benefits that the damaged party could not obtain due to the illicit action. Predictable future damage shall be taken into account for this purpose. Undeterminable future damage, on the contrary, shall be the object of a subsequent procedure and decision.

Any injured party has individual standing.

In the case of indirect purchasers' claims, passing on shall be taken into account in determining the actual damages that may be claimed.

The EU Directive on Antitrust Damages Actions (Directive 2014/104/EU), which must be implemented into national law by 27 December 2016, will bring about substantial changes in the general framework referred to above.

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21 Class actions

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

Class actions, whereby individual litigants or associations may, under certain conditions, sue in representation of injured parties, are provided for in Law No. 83/95 of 31 August and article 31 of the Code of Civil Procedure, and may, in principle, be applicable to competition law injuries. The process is governed by ordinary civil procedure rules.

Cooperating parties

22 Immunity

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

The Act establishes the leniency rules in article 75 et seq. In addition, as stated above (see question 1) the Authority has adopted Regulation No. 1/2013 of 3 January 2013, which sets out the leniency administrative procedure.

Under the Act, the Authority can grant immunity or reduction of fines in procedures for quasi-criminal minor offences that concern agreements and concerted practices between competitors prohibited by article 9 of the Act and (where applicable) article 101 TFEU, which are aimed at coordinating the competitive behaviour of the undertakings or at influencing relevant competitive conditions.

To obtain full immunity, an applicant must:

- be the first undertaking to inform the Authority of its participation in an agreement or a concerted practice, as long as it provides information and evidence which, in the Authority's discretion, enables the latter:
- to substantiate a request for searches or seizure of data, provided that the Authority, at the time the information and evidence are submitted, does not have sufficient elements to perform such acts; or
- to establish the existence of an infringement, provided that, at that moment, the Authority does not have sufficient evidence of the infringement available.
- cooperate fully and continuously with the Authority from the moment of the initial request by:
- providing all data and evidence already obtained or to be obtained in the future;
- responding immediately to any request for information;
- avoiding acts that may endanger the investigation; and
- not informing the other participants in the concerted practice;
- putting an end to its participation in the infringement before it provides the Authority the information and evidence, except as reasonably required, in the Authority's opinion, to preserve the investigation effectiveness; and
- not having coerced other undertakings to participate in the breach.

The information and evidence to be provided must contain complete and precise information on:

- the agreement or concerted practice;
- the undertakings involved, including the objectives, activity and way of operation;
- the product or service concerned; and
- the geographical scope, the duration and the manner in which the breach has been carried out.

23 Subsequent cooperating parties

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

As stated above, under the leniency rules set forth in the Act, the Authority can grant immunity or reduction of fines.

The Authority shall grant a reduction of fines to undertakings which, not being eligible to immunity, submit information and evidence that adds significant value to those already in the possession of the Authority and provided the conditions are met regarding cooperation with the Authority and putting an end to the infringement (see question 22).

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

As regards full immunity, as noted above, 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 Authority as follows:

- a reduction from 30 to 50 per cent granted to the first undertaking that provides information and evidence;
- a reduction from 20 to 30 per cent granted to the second undertaking that provides information and evidence; or
- a reduction of up to 20 per cent granted to the subsequent undertakings that provide information and evidence.

In fixing the fine, the Authority shall take into account the order of submission of the information and evidence, as well as their added value for the investigation. If a leniency application is submitted after the notification of the statement of objections (see question 8) the above reduction limits are reduced by half.

25 Approaching the authorities

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

See questions 22, 23 and 30.

26 Cooperation

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?

See questions 22 and 23.

27 Confidentiality

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

The Authority shall classify as confidential the leniency application as well as the documents and information provided by the applicant.

For the purpose of preparing the observations in response to the statement of objections, a concerned undertaking shall be granted access to the leniency application and to the related documents and information by the Authority. However, the concerned undertaking shall not be allowed to make copies of such elements unless authorised by the leniency applicant. Third parties' access to the leniency application and to the related documents and information shall require the leniency applicant's consent.

The concerned undertaking shall not be granted access to copies of its oral statements and third parties shall have no access to them.

The above rules apply to both full (immunity) and partial (reduction of fines) leniency.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Under the Portuguese leniency regime, the Authority is not granted the power to enter into arrangements such as plea bargains. Settlements

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Update and trends

The leniency regime and settlement proceedings continue to assume an important role in the investigation and decision of cartels by the Authority. Both instruments have been put in place in the Authority's first hybrid case in which, in May 2016, a Portuguese company was condemned to pay a fine in the amount of €440,000 for anticompetitive practices in the office supplies industry. The case was pending against five companies on suspicion of cartel in the form of price fixing and market sharing. For the remaining four companies investigated, against which was adopted by the Authority a statement of objections in September 2015, the proceedings continue.

In October 2015 took place the IV Lisbon Conference, an international event organised by the Authority attended by more than 300 delegates encompassing the top professions and academia from Portugal and abroad.

Last but not least, the Authority has engaged in consistent direct actions (eg, sessions regarding fighting collusion in public procurement proceedings), aimed at alerting companies and the general public to the competition law rules and principles.

are permitted under the terms described above, and a reduction in fine granted in leniency proceedings is added to the reduction granted in the settlement proceedings (see question 8). In its most recent cartel decisions, the Authority, 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.

29 Corporate defendant and employees

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

Individuals and employees of an undertaking who are responsible for the direction or surveillance of the area of activity in which an infringement occurred, may be granted immunity or reduction of fines if they fully and continuously cooperate with the Authority, even if they have not requested such benefits.

30 Dealing with the enforcement agency

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

As stated above, Regulation No. 1/2013 sets out the leniency administrative procedure.

Under Regulation No. 1/2013, a leniency request is made by means of an application addressed to the Authority and must include:

- the object of the application, specifying whether it is a request for immunity or for a reduction in fine, or both;
- the identification of the applicant, the capacity in which the application is filed (ie, a company or the members of its board of directors or equivalent entities, or the individuals responsible for management of supervision of the sector of activity concerned in the infringement) and the corresponding contacts. In the case of legal entities, the information shall include the identification of the current members of the board of directors as well as of the members of such board during the duration of the infringement;
- detailed information on the alleged cartel;
- the identification and contact details of the undertakings involved in the alleged cartel, as well as of the current members of their boards of directors and of the members of such boards during the duration of the infringement;
- identification of other jurisdictions where a leniency application has been filed in respect of the same infringement; and
- other information deemed relevant for the request for immunity or reduction of the fine.

Together with the leniency application, the applicant shall submit all the evidence in its possession or under its control.

The leniency application must be submitted at the Authority's head office by any means, notably:

- telefax (+351 217902 093);
- mail addressed to the Authority's head office;
- email sent to the address clemencia@concorrencia.pt with an electronic signature; or
- hand delivery, notably in a meeting with the Authority's services in charge of the investigation.

Submission of a written application can be replaced by oral statements made in a meeting with the Authority's services in charge of the investigation. Such statements shall be accompanied by all the evidence in the possession of or under the control of the applicant. The statements shall be recorded in the Authority's head office with an indication of their time and date. Within the time frame established by the Authority, the applicant confirms the technical accuracy of the recording and, if necessary, corrects the statements. In the absence of any comment from the applicant, the recording is considered approved by the applicant. The transcription of the statements must be complete and accurate and shall be signed by the applicant.

The request for immunity or reduction of fine shall be deemed made on the date and at the time of its receipt at the Authority's head office. The Authority shall provide a document confirming receipt of the application and the date and hour of its submission.

In special cases and upon reasoned request, the Authority may accept a simplified leniency application if the applicant has filed, or is filing, a leniency application with the European Commission and the Commission is in the situation provided for in the Commission Notice on cooperation within the network of competition authorities (2004/C 101/03). The application shall, in these cases, be made in Portuguese or English according to the form attached to Regulation No. 1/2013 or by oral statements. The Authority shall provide a document confirming the receipt of the simplified application and the date and hour of its submission. If the Authority starts an investigation of the infringement, it shall request that the applicant completes the application within a time frame of no less than 15 days, which, if applicable, shall include a Portuguese translation of a simplified application filed in English. If the application is not completed or the Portuguese translation is not filed within the established deadline, the application shall be refused. If an application is filed only for the purposes of immunity and this latter is no longer available (see question 23), the Authority shall inform the applicant that the application may be withdrawn or completed for the purposes of reduction of the fine. If the applicant completes the application within the established deadline, the request shall be deemed to have been made on the date and hour the application was initially filed.

Upon receipt of a written or oral application for immunity or reduction of fine, the Authority may, on its own initiative or upon reasoned request, grant a marker to the applicant establishing a period of no less than 15 days for the completion of the application by the applicant. To benefit from the marker, the applicant must indicate in the application:

- its name and address;
- information on the alleged cartel, and on the products, services and territory affected;
- an estimate of the duration of the alleged cartel;
- whether other applications for immunity or reduction of fines have been filed or are planned to be filed with other competition authorities regarding the alleged cartel; and
- the justification for the marker.

If the applicant completes the application within the established deadline, the request shall be deemed to have been made on the date and hour the application was initially filed. If the application is not completed, the application shall be refused. Following an analysis of the application, the Authority shall notify the applicant if it considers that the requirements for immunity are not met, in which case the applicant may, within 10 days of such notification, withdraw the application or request the Authority that this latter is considered for the purposes of reduction of the fine.

As regards an application for reduction of a fine, if the Authority considers, on a preliminary basis, that the information and evidence submitted by the applicant adds significant value to that already in its possession, it shall inform the applicant of its intention to grant a reduction of the fine, indicating the level of the applicable reduction.

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The aforementioned rules governing the application for immunity or reduction of fine apply. If the Authority considers, on a preliminary basis, that the information and evidence submitted by the applicant does not add significant value to those already in its possession, it shall notify the applicant, in which case this latter may, within 10 days of such notification, withdraw the application. (See also question 23.)

Immunity or reduction of fines shall only be granted if all the requirements set forth in the Act are fulfilled (see questions 22 and 23). The final decision on immunity or reduction of fines shall be taken in the final decision of the proceedings adopted by the Authority at the end of the investigation (see question 8).

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

As stated, Law No. 19/2012 superseded Law No. 18/2003, the previous competition statute, and, in respect of leniency, Law No. 39/2006. Pursuant to the Act, the current regime, including in respect of leniency provisions, should be reviewed in accordance with the evolution of the EU competition regime (see question 3).

Defending a case

32 Disclosure

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

The defendant can request the consultation of the case file and obtain, at his or her own expense, any extracts, copies or certificates. Nevertheless, the Authority can refuse access to the file until the notification of the statement of objections in cases where the proceedings are subject to secrecy and whenever it considers that such access may harm the investigation. The Authority shall have due care for the legitimate interests of the undertakings, or associations of undertakings, or of other entities, relating to non-disclosure of their business secrets. In order to respond to the statement of objections, the defendant may also have access to the application for immunity from the fine or reduction of the fine, and to the documents and information submitted for the purpose of immunity or reduction, though no copy can be made unless authorised by the applicant.

33 Representing employees

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

Employees can be interviewed or requested to provide information or documents relevant to an investigation by the Authority. In such cases, joint representation of a corporation and employees by the same counsel may constitute a conflict of interest under article 94 of the Portuguese Bar Association Legal Regime.

34 Multiple corporate defendants

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

The representation by counsel of multiple corporate defendants may be acceptable to the extent it does not raise any conflicts of interest (see question 32).

35 Payment of penalties and legal costs

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.

36 Taxes

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

Fines, or other penalties and private damages awards are not tax-deductible.

37 International double jeopardy

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

The ne bis in idem principle, which is essentially the equivalent of the double jeopardy principle, applies in the framework of quasi-criminal minor offences and therefore applies to cartel infringements (see question 1). However, in applying the principle, the Authority shall take into account whether the infringement previously sanctioned is the same as that subject to its assessment, in terms of both the specific behaviour in question and the territory where it occurred or had effect.

As regards liability for private damage claims, the overlapping liability for damages shall be taken into account, notably in the determination of the actual amount of damages that may be claimed before the Portuguese jurisdiction (see question 20).

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38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

See questions 8 (in respect of the settlement proceedings and of the closure of the case with conditions attached) and 22 to 30 (on the leniency regime). In addition, the behaviour of the undertaking concerned in putting an end to the restrictive practices and in repairing the damages caused to competition may be taken into account in the determination of the amount of the fine, under the framework described in question 17. We are not aware of any decisions in which the Authority has explicitly taken into account the pre-existence or the commencement of compliance programmes in determining the level of the fine.

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Russia

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Cartels in Russia are primarily regulated by the Federal Law of the Russian Federation No. 135-FZ On Protection of Competition, dated 26 July 2006 (the Competition Law). Liability for cartels is set out in the Administrative Liability Code (the Code of Administrative Violations of the Russian Federation) and the Criminal Code (the Criminal Code of the Russian Federation).

2 Relevant institutions

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 Antimonopoly Service of the Russian Federation (FAS) is the authority responsible for investigating cartel matters. The FAS extensively cooperates with the Ministry of Internal Affairs of the Russian Federation, the public prosecution authority and other law enforcement agencies (further generally together referred to as 'law enforcement agencies', although they are vested with different rights and authority throughout the process described herein) on all matters relating to enforcement of antimonopoly compliance; cartel matters included. The FAS initiates antimonopoly legislation infringement proceedings and administrative liability proceedings, however, law enforcement agencies are involved when the case requires criminal investigations (whether at the initiative of the FAS or independent of such) and the law enforcement agencies are vested with the authority to initiate criminal proceedings.

3 Changes

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

The biggest recent change in terms of cartel regulation has been the introduction of a leniency policy in criminal proceedings for individuals engaged in cartel activities. While leniency was introduced in Russia as far back as 2007 (just a year after the current Competition Law was adopted), up until 2015, it only applied to administrative liability, which meant that while companies which engaged in cartel activities and applied for leniency could be offered immunity from significant administrative fines, the respective officers of the company (criminal liability does not apply to legal entities in Russia) could still be subject to criminal liability under the Criminal Code and administrative leniency would not immunise them in this regard. Administrative leniency is now also offered to the second and third applicants in the form of a minimum administrative fine envisaged by the law.

Further, the definition of a cartel was adjusted recently and since the beginning of 2016 it now not only includes anticompetitive agreements between sellers, but also between buyers. Since 2015, a cartel is the only anticompetitive violation that entails criminal liability in Russia, other anticompetitive agreements and actions, including abuse of dominance, are no longer subject to criminal liability.

The present-day Competition Law – since the beginning of 2016 – also allows joint activity (joint venture) agreements between competitors to be cleared by the FAS, in which case, once clearance has been received, such agreements are not subject to the cartel restrictions envisaged by the Competition Law.

The FAS also adopted Clarification No.3 of the Presidium of the FAS of Russia 'On Proving Prohibited Agreements (Including Cartels) and Coordinated Actions on Product Markets, Including at Tenders (Actions)' in February 2016, which streamlines the application of cartel regulation in Russian and is primarily targeted at territorial departments of the FAS for the purpose of uniform application of the respective sections of the Competition Law that regulates cartels.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Cartels are defined in article 11 of the Competition Law as agreements between competitors (sellers and buyers alike) that lead to, or may lead to, price (surcharge, rebate, tariff, etc) fixing, price maintenance at tenders and auctions (bid rigging), allocation of the market by territory, volume of purchase or sales, assortment of goods (services) or by the selection of buyers or sellers, termination of production or reduction of volumes of production, or a refusal to enter into agreements with certain buyers or sellers.

Notably, cartel agreements can be written or verbal, and an agreement leading to any of the above consequences or potentially leading to any of such consequences, can be recognised as a cartel.

As a rule, agreements entered into between competitors, which lead or may lead to any of the above consequences, as long as the existence of such agreements has been identified, can be recognised as a cartel irrespective of whether they in fact led to such consequences, ie, cartels are per se infringements in Russia, and very few exemptions from this rule are offered by the Competition Law. Such exemptions include express clearance given by the FAS in respect of a joint activity (joint venture) agreement between competitors further to their application for such, and agreements entered into by members of one 'group of persons' where the contracting parties are controlled (via a shareholding stake of more than 50 per cent) by the same entity or person or where once contracting party controls (also via a shareholding stake of more than 50 per cent) the other contracting party.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

Cartel prohibitions set out in article 11 of the Competition Law, and the liability for infringement thereof set out in the Administrative Code and the Criminal Code, equally apply to all industries and all businesses irrespective of their size. No industry-specific defences or exemptions are set out in these legal acts.

At the same time the Competition Law does allow competitors to apply to the FAS with an application for clearance of a proposed joint activity (joint venture) agreement in cases where such an agreement

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between competitors may be found to lead to any of the negative consequences listed in article 11 of the Competition Law (including price fixing, market or customer allocation, etc), which would in the absence of FAS clearance result in the agreement being recognised as a cartel.

When applying for such clearance, the competitors willing to enter into a joint activity (joint venture) agreement must provide evidence to the FAS that the agreement and the competitors' behaviour under this agreement: (i) will not allow the parties to eliminate competition on the respective market; (ii) do not impose restrictions on the parties or third parties that are disproportionate to the results targeted by such agreements; (iii) will or may result in improvement and advancement of production and sale of products (services) or stimulation of economic progress or increase of competitiveness of Russian products (services) on the global market; or (iv) will or may result in customers receiving benefits (advantages) proportionate to the benefits (advantages) received by the contracting parties.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Law equally applies to legal entities (both commercial and non-profit) and individuals, both Russian and foreign, as well as federal and local and municipal authorities, state non-budget funds and the Central Bank of Russia.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Competition Law enjoys extraterritorial application and equally applies to agreements entered into (activities engaged in) outside of the territory of the Russian Federation between Russian and (or) non-Russian entities and individuals if they affect the competition on the territory of the Russian Federation.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

A cartel investigation can be triggered by a claim submitted to the FAS by any individual or legal entity (customers, competitors included), by an instruction or query from another state authority (the President of the Russian Federation and the Government of the Russian Federation included), as well as by the own initiative of the FAS if the FAS identifies signs of potential infringements through any other sources, including the mass media.

Investigations under the Competition Law can be on-site or off-site, scheduled or unscheduled; however, cartel investigations are usually in the form of on-site unscheduled dawn raids that then continue in the form of further requests for documents and information from the FAS to the entities and individuals involved.

The law requires that an investigation be carried out within one month and in exceptional cases may be extended by another two months if the FAS requires more time and involvement of third parties (eg, expertise, translations, etc) to identify an infringement of the Competition Law or absence of such infringement.

If the FAS identifies signs of infringement of antimonopoly legislation as a result of the investigation, it initiates antimonopoly legislation infringement proceedings.

9 Investigative powers of the authorities

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

When carrying out an investigation, the FAS is entitled to receive copies of all documents and information it may request, including agreements, correspondence, protocols and clarifications; irrespective of whether the originals are in hard copy or on electronic media; irrespective of whether they are protected as commercial secret or not.

In case of an on-site investigation, the FAS is entitled to inspect premises (but not the residential premises of an individual) and carry out photo and video recording.

When investigating a cartel and carrying out a dawn raid, search and seizure rights will be required, and other operational investigation powers (including wiretapping, extraction of hard drives, etc) may also be required with which the FAS is not vested and for which purpose the FAS will engage law enforcement authorities. Certain operational investigation powers which restrict constitutional rights of an individual, including access to the individual's residential premises, will require court approval.

International cooperation

10 Inter-agency cooperation

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

On a regional and international level, the FAS actively cooperates with authorities in other jurisdictions for the purpose of promoting competition and battling cartels; multinational cartels in particular:

- the FAS is a member of or actively cooperates with a range of international organisations and associations, including the Interstate Council for Antimonopoly Policy in the CIS, the Organization of the Petroleum Exporting Countries (OPEC), the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD) and the International Competition Network (ICN);
- the FAS plays an active role in creating and participating in international working groups (eg, in working groups on competition issues in oil and oil products' markets (created at the initiative of the FAS and the Austrian Federal Competition Authority), in the market of international communications (roaming) and for studying competition problems within the pharmaceutical sector); and
- the FAS is a party to cooperation agreements with competition authorities of several jurisdictions (eg, with Brazil, Bulgaria, China, France Hungary, Poland, Romania, Slovakia, etc).

Further, the FAS is actively promoting other forms of interstate cooperation, such as proposing the following means of battling cartels by:

- the development of the draft international convention 'On Combating Cartels'; and
- the initiation of developing guidelines encompassing international best practice in identifying bid rigging.

At the same time, in practice, the FAS tends to be closest in its formal and informal communications with the competition authorities of the Commonwealth of Independent States and former states of the Soviet Union, other BRICS members and a few European competition authorities.

11 Interplay between jurisdictions

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

If cartel cases involve a number of jurisdictions, the FAS can use various means of cooperation with international antitrust agencies including mutual assistance in sharing information and conduct of investigations, exchanging general information on competition and cartel concerns.

As an example, the FAS has actively cooperated with state authorities in Vietnam in the case where the FAS attempted to identify a cartel on the market of wholesale supplies of fish related to the import of pangasius from Vietnam to Russia by several Russian fish companies. According to the FAS officials, such cooperation significantly contributed to the process of investigation of the alleged cartel.

The FAS continues to stress the importance of battling international cartels, such as the international shipping conference cartel, the members of which have already been fined by the FAS for infringing Russian competition legislation, and the importance of cooperation between competition authorities for the purpose of this battle.

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12 Decisions

How is a cartel proceeding adjudicated or determined?

If, based on the results of an investigation, the FAS identifies signs of an antimonopoly infringement, the FAS initiates antimonopoly legislation infringement proceedings and sets up a case-specific commission to hear the case. If the case in question relates to financial and credit institutions, at least half of the commission's members will be representatives of the Central Bank of Russia.

The FAS determines the case based on the evidence presented by the parties and the results of the investigation. To identify a cartel, the FAS has to consider a number of circumstances, including the existence of a verbal or written agreement between the parties to the alleged cartel, the subject of such agreement, the territory to which such agreement applies, the term and the parties to such agreement. The agreement may be qualified as a cartel due to a mere fact of its conclusion, which means that the establishment of the consequences of the agreement and whether it in fact restricted competition, is not necessarily required.

13 Burden of proof

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

The burden of proof is vested with the FAS in both judicial and administrative proceedings. The level of proof, in practice, often depends on the authority determining the case. While the FAS may identify a cartel basing on indirect evidence, courts are likely to require provision of direct evidence to demonstrate the existence of facts constituting a cartel.

14 Appeal process

What is the appeal process?

If the FAS decision is inconsistent with FAS' practice, appellation can be sought in the appellate body within the FAS structure (the FAS Appellate Body). As a general rule, the FAS Appellate Body is required to issue its decision within two months and has the ability to cancel or change the substance of the previous decision.

The appellant can also challenge in court the original FAS decision within three months from its issuance and challenge the decision of the FAS appellate body no later than one month after it is issued. The courts may change the substance or overturn the FAS decisions.

Sanctions

15 Criminal sanctions

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

Criminal sanctions are set out in article 178 of the Criminal Code and criminal sanctions can only be applied to individuals (entities are not subject to criminal liability in Russia).

Restriction of competition as a result of entry into an agreement between competitors, which is prohibited by antimonopoly legislation of the Russian Federation, may entail a fine, community service, disqualification (deprivation of the right to hold certain offices or engage in certain activities), or imprisonment, or a combination thereof.

Under the Criminal Code:

- fines can be imposed to the amounts of 300,000 to 1 million roubles or in the amount of the individual's salary or other income for a period of one to five years;
- community service with or without disqualification can be imposed for one to five years;
- imprisonment with or without disqualification can be imposed for up to seven years;
- disqualification can be imposed for up to three years and, if imposed together with community service or imprisonment, applies throughout the term of community service or imprisonment but the clock on disqualification only starts after the sentence of community service or imprisonment has been served.

The severity of the fine, application of disqualification and length of imprisonment depends on the level of damage incurred on citizens, entities or the state, the level of benefit gained as a result of the anticompetitive behaviour under consideration, as well as whether the behaviour involved abuse of official power, destruction of or damage to property or threat thereof, or if it involved use of force or threat thereof.

Information on the application of criminal sanctions for anticompetitive behaviour is not publicly available in Russia, however, the FAS has confirmed that there have been several cases of application of criminal sanctions for cartel activity and criminal cases are ongoing at the moment.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Cartel activity may entail the following sanctions in accordance with article 14.32 of the Administrative Code:

- an administrative fine imposed on a legal entity to the amount of 1 per cent to 15 per cent of the total annual turnover of the infringing entity from sales on the market on which the violation occurred, or in the amount of expenses carried by the infringing entity for the purchase of goods (works, services) on the market on which the violation, or 10 to 15 per cent of the starting price of the tender (auction), but no less than 100,000 roubles and no more than 4 per cent of the total annual turnover of the infringing entity from all sales;
- an administrative fine imposed on the legal entity's officers to the amount of 20,000 to 50,000 roubles or disqualification for up to three years.

Alternatively, in accordance with article 51 of the Competition Law, the FAS may require that the infringing entity transfer all income received from its anticompetitive behaviour to the Russian federal budget. This form of liability, if duly complied with by the infringing entity, replaces the above administrative liability and cannot be used in combination with such administrative liability.

Individuals and legal entities whose rights have been affected by anticompetitive behaviour of the cartel participants are entitled under article 37 of the Competition Law to seek protection through court procedures, in particular, by seeking redress of infringed rights, recovery of damages and losses, including loss of profit, compensation of damage inflicted on property.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Russian legislation does not envisage specific sentencing principles or guidelines. While the Administrative Code and Criminal Code provide for a range of fines (see question 16) the actual fine imposed on the infringing entity or individual is ultimately in the discretion of the regulator and, subsequently, courts. At the same time, both the Administrative Code and Criminal Code provide for aggravating and extenuating circumstances that would affect the liability to be imposed on the infringing entity.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Participation in cartels does not entail automatic debarment from government procurement procedures under Russian law.

19 Parallel proceedings

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

Where a cartel has the signs of an administrative and a criminal violation, both criminal and administrative sanctions can be pursued in respect of the same conduct. Moreover, individuals and legal entities

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whose rights have been affected by anticompetitive behaviour of the cartel participants – if such individuals and legal entities decided to seek protection of such rights – may pursue such civil liability at the same time in respect of the same conduct.

In practice, the most common scenario of parallel proceedings is as follows: the FAS identifies behaviour that may be in violation of the Competition Law, initiates antimonopoly legislation infringement proceedings in order to establish that a cartel has in fact been identified, then initiates administrative liability proceedings in which the FAS determines the appropriate sanction for such infringement, and in parallel, if the cartel also has signs of a criminal violation, the FAS will provide the Ministry of Internal Affairs of the Russian Federation with case materials for the law enforcement authorities to consider initiating a criminal case in respect of the relevant officers (individuals). If the law enforcement authorities do not to initiate a criminal case due to relevant damage or benefit thresholds envisaged by the Criminal Code not being met or impossible to determine, the FAS will consider imposing administrative fines on the relevant officers (individuals). Civil cases in respect of the same conduct are most often brought to court by persons seeking protection of their rights after the administrative and criminal violations have been identified and proven by the respective regulators.

Private rights of action

20 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

Individuals and legal entities whose rights have been affected by anticompetitive behaviour of the cartel participants are entitled under the Competition Law, as well as under the Civil Code of the Russian Federation, to seek protection of their rights through court procedures. In particular, they may seek recovery of damages and losses, including loss of profit. Both indirect and direct purchasers can thus seek protection through private damage claims if their rights were harmed by the cartel in question.

While Russian legislation provides for private damage claims and the FAS has been active in promoting them, follow-on claims in particular, private actions are still a very rare occurrence. Mostly, this is a result of the difficulties connected with: (i) the calculation of damages and lost profit; (ii) proving damages and their connection with the antimonopoly infringement; and (iii) inequality of parties to the proceedings, especially when claims are made by purchasers and consumers against strong market players.

21 Class actions

Are class actions possible? If yes, 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?

Considering the complexity, cost and unpopularity of private damage claims, the FAS is currently promoting class actions as a means of battling cartels and other anticompetitive behaviour which affects a large number of people.

Currently, Russian legislation provides for co-participation as a mechanism for protecting rights of a large group of persons, however, this mechanism considers each claimant independent from the other claimants, and several other similar mechanisms where only specific persons may file a claim on behalf of a group (eg, the public prosecutor, other state authorities, etc).

As a result, an initiative to incorporate class actions into Russian legislation have been voiced by various state authorities, lawyers, practitioners, several draft laws have been prepared by various institutions, however, at this stage, class actions remain under debate and discussion with significant push-back exercised by businesses.

Cooperating parties

22 Immunity

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

The leniency policy envisaged by Russian administrative legislation provides that an entity or individual who voluntarily informs the FAS of entering into an agreement or engaging in activities that are incompliant with Russian antimonopoly legislation will be exempt from administrative liability if, at the time of such application to the FAS, the FAS was not in possession of relevant documents and information in respect of the said infringement, the applicant ceases participation in the said agreement or activities and the provided documents and information are sufficient to identify an infringement. Only the first applicant who performs all three requirements listed above shall be subject to the leniency programme and shall be exempt from all administrative liability. Several applicants may not apply for leniency together.

23 Subsequent cooperating parties

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

Since 2015 administrative leniency is now also offered to the second and third applicants in the form of a minimum administrative fine envisaged by the law if, at the time of their respective applications to the FAS, the respective applicants confirm participation in the administrative infringement, cease participation in the said agreement or activities and the provided documents and information are sufficient to identify the infringement. This reduction of a fine under the leniency programme, however, is not offered to the organiser of a cartel.

24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

There is no significant difference between the second or third cooperating party. All subsequent cooperating parties may expect a reduction of their respective fines for cooperation; however, only the first applicant is exempt from administrative and criminal liability.

25 Approaching the authorities

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 can be filed at any time before the FAS identifies and formally adopts a decision on the infringement of antimonopoly legislation, which will then trigger administrative liability proceedings.

26 Cooperation

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?

An immunity (full leniency) application requires that the applicant provides documents and information in respect of the respective infringement to the FAS that allows the FAS to identify an infringement of antimonopoly legislation and confirm that the applicant no longer participates in such agreement or activity.

Subsequent applicants, similarly, must provide documents and information allowing the FAS to identify the infringement (including if the first applicant did not provide sufficient documents and information and possibly was not granted immunity), confirming their involvement in the infringement and confirming the termination of such involvement.

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27 Confidentiality

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 of the leniency application submitted to the FAS, and contents thereof, is afforded to the first applicant and such confidentiality is maintained until the FAS adopts a decision on the infringement of antimonopoly legislation.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

Both the antitrust and criminal authorities can settle the case with the defendant under Russian law to reduce the liability for the antimonopoly infringement.

The public prosecutor can enter into a pretrial cooperation agreement with the defendant after initiating a criminal case under chapter 40.1 of the Criminal Process Code of the Russian Federation. In this case the sentence will not exceed half of the maximum term for the sentence envisaged for the respective violation. Alternatively, the defendant can opt for a special procedure under chapter 40 of the Criminal Process Code and agrees with the charge, in which case the court does not hear the case further and the sentence shall not exceed two-thirds of the maximum term.

29 Corporate defendant and employees

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

If a legal entity is subject to an administrative sanction, this does not prevent an individual from being sanctioned for the same infringement with an administrative sanction under article 2.1 of the Administrative Code of the Russian Federation; and, similarly, if an individual is subject to an administrative or criminal sanction, this does not prevent a legal entity from being sanctioned for the same infringement with an administrative sanction. The above applies to both current and former employees.

30 Dealing with the enforcement agency

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

The administrative leniency policy requires that that the applicant provides documents and information in respect of the respective infringement to the FAS that allows the FAS to identify an infringement of antimonopoly legislation and confirm that the applicant no longer participates in such agreement or activity.

The criminal leniency policy requires that the applicant voluntarily inform the authority of the infringement, actively assist in uncovering or investigating the infringement, reimburse the damages caused or otherwise redress the harm caused, and that the authority ensure no other crimes are identified in the applicant behaviour.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There currently are no ongoing or anticipated reviews of the immunity/leniency regime besides the surveillance by the regulators and market players as to how the newly introduced criminal leniency programme will be applied in practice.

Update and trends

The Russian regulator (FAS) continues to stress the importance of battling cartels, including international cartels, which will require cooperation between competition authorities in various jurisdictions. The FAS continues to pursue fishing cartels, the FAS already identified participants of an international shipping conference cartel (the case is being challenged in court at the time of publication, the court of first instance already upheld the FAS decision), and the FAS is engaged in a constant battle against bid rigging cartels at various state tenders in a multitude of markets.

The most significant development in terms of cartel regulation over the past year was the introduction of a leniency policy in criminal proceedings for individuals engaged in cartel activities. While leniency was introduced in Russia as far back as 2007 (just a year after the current Competition Law was adopted), up until 2015 it only applied to administrative liability, which meant that while companies which engaged in cartel activities and applied for leniency could be offered immunity from significant administrative fines, the respective officers of the company (criminal liability does not apply to legal entities in Russia) could still be subject to criminal liability under the Criminal Code and administrative leniency would not immunise them in this regard. This prevented companies from applying for leniency and in certain ways hindered effectiveness of the entire leniency programme. The FAS now expects an increase in the number of leniency applications and still considers leniency programmes to be the most effective tool in identifying and proving and eliminating cartels.

Defending a case

32 Disclosure

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

Entities and individuals involved in antimonopoly legislation infringement proceedings are entitled to receive all documents and information allowing them to identify an antimonopoly legislation infringement or absence of such with the exception of document submitted to the authorities as part of a leniency application – both administrative and criminal.

Disclosure of certain confidential documents will require the consent of the owner of such documents to disclose to the other participants of the antimonopoly legislation infringement proceedings for familiarisation, while other documents provided to the regulator cannot be marked as confidential in accordance with the Competition Law and will be disclosed to the other participants by the FAS in full.

In criminal proceedings the defendant is entitled to receive all information contained in the criminal case materials, including those that may contain state and other protected forms of secrets (commercial secrets included).

33 Representing employees

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

In antimonopoly legislation infringement proceedings and administrative liability proceedings, employees under investigation may represent themselves or can be represented by counsel, attorneys and even other employees of the same company under a power of attorney. The same counsel that represents the corporation that employs the employees can represent the employees under Russian law. In criminal proceedings, however, only an individual may be subject to criminal liability and only an attorney may represent the individual and the individual's close family members. The need to seek independent legal advice for an employee depends on the substance of the cartel case in question.

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34 Multiple corporate defendants

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

Counsel may represent multiple corporate defendants in antimonopoly legislation infringement proceedings irrespective of their affiliation. However, in administrative liability proceedings and criminal proceedings each representative represents only one defendant (in some cases one counsel (attorney) may represent multiple defendants in criminal proceedings as long as such representation does not create a conflict of interest).

35 Payment of penalties and legal costs

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

Legal penalties (administrative and criminal) may only be paid by the individual held liable for the respective infringement under Russian law. However, Russian law does not prevent a corporation from reimbursing its employees for the legal penalties paid by such employees or legal costs incurred by such employees.

36 Taxes

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

Antitrust fines and other penalties paid to the state budget are tax-deductible. Private damages awards may also be deductible if they can be recognised as overhead costs under the Russian Tax Code.

37 International double jeopardy

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?

Russian law does not take any penalties imposed in other jurisdictions into account when determining whether a company may be subject to overlapping liability for engaging in anticompetitive behaviour on the territory of several countries.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The optimal way to get the fine down is to apply for leniency or, if not applicable, to cooperate with the FAS, provide information and documents required to identify the infringement and cure the negative consequences thereof. Alternatively, challenging the FAS decision in court is often the most efficient means of reducing a fine.

The FAS has suggested introducing amendments to existing antimonopoly legislation which will require all companies to adopt antitrust compliance programmes and/or allowing for a reduction of fines in case of pre-existing compliance programmes. This is an open discussion that is likely to gain more traction over the coming months and years.

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Competition law in Singapore is governed by the Singapore Competition Act (Cap 50B) (the Act). Cartel activities are prohibited by section 34 of the Act (the section 34 prohibition), which provides that:

> *[...] agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited [...]*

The section 34 prohibition became effective on 1 January 2006, and since its introduction, the following infringement decisions in respect of the prohibition have been issued:

- bid rigging in the provision of termite control services in Singapore, 9 January 2008 (the *Pest-Busters* case);
- price fixing in the provision of coach tickets for travelling between Singapore and destinations in Malaysia, 3 November 2009 (the *Express Bus* case);
- bid rigging in electrical and building works, 4 June 2010 (the *Electrical Works* case);
- price fixing of monthly salaries of new Indonesian foreign domestic workers in Singapore, 30 September 2011 (the *Domestic Workers* case);
- price fixing of modelling services in Singapore, 23 November 2011 (the *Modelling Services* case);
- information sharing in the provision of ferry services between Batam and Singapore, 18 July 2012 (the *Ferry Services* case);
- bid rigging by motor vehicle traders at public auctions, 28 March 2013 (the *Motor Vehicle Traders* case);
- price fixing of ball and roller bearings sold to aftermarket customers, 27 May 2014 (the *Ball Bearings* case);
- infringement of the section 34 prohibition in relation to the provision of air freight forwarding services for shipments from Japan to Singapore, 11 December 2014 (the *Freight Forwarding* case); and
- infringement of the section 34 prohibition in relation to the distribution of life insurance products in Singapore, 17 March 2016 (the *Financial Advisers* case).

2 Relevant institutions

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 Singapore (CCS), a statutory body established under part II of the Act, is the agency responsible for enforcing the Act and investigating cartel matters.

Cartel matters are adjudicated by the CCS, but its decisions can be appealed to the Competition Appeal Board (CAB). A decision of the CAB can subsequently be appealed to the High Court on a point of law arising from the decision, or from any decision as to the amount of a financial penalty. See question 14 for more details.

3 Changes

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

The CCS is currently in the process of considering the following major changes to the regime:

- establishing formal commitment procedures that organisations may utilise to address any competition concerns that the CCS may have in respect of a section 34 infringement. Currently, sections 60A and 60B of the Act only provide a legal basis for the CCS to accept commitments in the context of merger control. The CCS has previously accepted voluntary commitments by Coca-Cola Singapore Beverages, Cordlife Group Limited, Asia Pacific Breweries (Singapore) Pte Ltd and E M Services Pte Ltd in the context of abuse of dominance investigations;
- amending the Penalty Guidelines to bring Singapore's calculation of financial penalties in line with the practices adopted by the EU and UK, ie, to base the calculation of financial penalties on the financial year preceding the date when the undertaking's participation in the infringement ended, instead of using the infringing undertaking's business turnover in the business year immediately preceding the infringement decision;
- introducing a fast-track procedure for infringements of the section 34 prohibition to increase the efficiency of the CCS's investigation and enforcement process, pursuant to which undertakings under investigation will enter into an agreement with the CCS where they will admit their liability in exchange for receiving a reduction on the financial penalty to be imposed; and
- expanding the class of infringing undertakings which can benefit from leniency to include coercers and initiators of cartel activity. Currently, coercers and initiators of cartel activity are ineligible for immunity or leniency. The proposal aims to encourage and incentivise all participants in a cartel to come forward and seek leniency.

The CCS is also in the process of reviewing its Guidelines more generally, after a consultation process was completed in late 2015.

Separately, the CCS has completed its review of the block exemption order for liner shipping agreements, which was due to expire on 31 December 2015, and has extended the block exemption order until 31 December 2020.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

As stated in question 1, section 34 of the Act prohibits 'agreements, decisions by associations of undertakings, and concerted practices', which have as their 'object or effect' the 'prevention, restriction or distortion' of competition in Singapore. Specifically, section 34(2) provides that agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;

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- 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 CCS has specified in its Guidelines on the section 34 prohibition (the section 34 Guidelines) that many other types of arrangements may have the effect of preventing, restricting or distorting competition (including, inter alia, information-sharing agreements in some circumstances).

The CCS 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, at paragraph 2.19, 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 CCS to proceed to analyse the actual effects of such arrangements.

One important qualification on the application of the section 34 prohibition is that it does not apply to arrangements that give rise to net economic benefit (an exclusion that is provided for at paragraph 9 of the third schedule to the Act). To qualify for the exclusion, it must be shown that the arrangement:

- contributes to improving production or distribution, or promoting technical or economic progress;
- does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives; and
- does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

In determining whether an agreement has the object of preventing, restricting or distorting competition, the CCS 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 objective meaning and purpose of the agreement considered in the economic context in which it is to be applied.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

Certain liner shipping agreements are exempted from the application of the section 34 prohibition by way of a block exemption order (BEO). The BEO initially took effect on 1 July 2006 for a period of five years, and its first extension until 2015 was granted by the Minister for Trade and Industry on 16 December 2010 and second extension until 2020 was granted by the Minister on 25 November 2015. The liner shipping BEO is the only BEO that has been granted in Singapore since the introduction of competition law.

Some other specific activities and industries are excluded from the application of the section 34 prohibition, as specified in paragraphs 5, 6 and 7 of the third schedule to the Act. In particular, the section 34 prohibition will not apply to:

- any agreement or conduct that relates to any goods or services to the extent to which any other written law, or code of practice issued under any written law relating to competition, gives another regulatory authority jurisdiction in the matter;
- the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act;
- the supply of piped potable water;
- the supply of wastewater management services, including the collection, treatment and disposal of wastewater;
- the supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act;
- the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act;
- cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act;
- 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 CCS's Second Consultation Paper on the Draft Competition Bill (available at www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/second-round-of-public-consultation-on-the-competition-act?type=public_consultation).

Section 33(4) of the Act states that substantive prohibitions will not apply to any activity carried on by, any agreement entered into or any conduct on the part of: (i) the government; (ii) any statutory body; or (iii) 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.

6 Application of the law

Does the law apply to individuals or corporations or both?

The section 34 prohibition applies in respect of 'undertakings', which is defined in section 2 of the Act as 'any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services'. Where employees engage in conduct that would be contrary to the section 34 prohibition, liability would be imputed to, and assessed in respect of, the employing undertaking.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside 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 CCS has issued infringement decisions in respect of two international cartels, namely the Ball Bearings case and the Freight Forwarding case. In both cases, the Japanese parent companies engaged in conduct in Japan which had an anticompetitive effect within a Singapore market.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

In the usual course, parties generally become aware that they are being investigated for a potential contravention of the section 34 prohibition in one of two ways. On the one hand, the CCS 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 CCS has reasonable grounds for suspecting has occurred. On the other hand, the CCS 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 CCS may also enter premises without a warrant under section 64 of the Act; however, in such cases the CCS is required

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to first give written notice of at least two working days of its intended entry, and it will not have the ability to actively search the premises.

Following on from this, it is not uncommon for multiple formal notices (for the provision of information, documents, or both) to be issued by the CCS 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 CCS 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 CCS is proceeding to take enforcement action, the CCS will give notice to the infringing parties of the directions it intends to impose. These directions will be encapsulated within a proposed infringement decision (PID), which will set out the facts on which the CCS relies and its reasons for the proposed decision. Upon receipt of the PID, parties are given an opportunity (usually within six to eight weeks) to make written representations to the CCS on the findings in the PID. Parties, and their authorised representatives, are also afforded a reasonable opportunity to inspect the documents in the CCS'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 CCS will issue its final infringement decision.

9 Investigative powers of the authorities

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

Investigatory power	Civil/administrative
Order the production of specific documents or information	Yes
Carry out compulsory interviews with individuals	Yes
Carry out an unannounced search of business premises	Yes*
Carry out an unannounced search of residential premises	Yes* (but limited)
Right to 'image' computer hard drives using forensic IT tools	Yes
Right to retain original documents	Yes (in certain circumstances)
Right to require an explanation of documents or information supplied	Yes
Right to secure premises overnight (eg, by seal)	Yes
* Indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority	

The CCS has the power to issue a formal notice to request documents or information from any person where it considers that such document or information would be relevant to its investigations. The CCS 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 CCS has obtained a warrant, it may:

- enter the premises specified in the warrant and use such force as is reasonably necessary for the purpose of gaining entry;
- search any person on the premises if there are reasonable grounds for believing the person has in his or her possession any document, equipment or article that has a bearing on the investigation;
- search the premises and take copies or extracts from any document appearing to be the kind in respect of which the warrant was granted;
- take possession of any document appearing to be the kind in respect of which the warrant was granted if necessary for preserving the document or prevent tampering, or if it is not reasonably practicable to take copies of the document on the premises;
- take any other step necessary in order to preserve the documents or prevent interference with them, including the sealing of premises, offices or files;
- require any person to provide an explanation of any document appearing to be the kind in respect of which the warrant was granted or state to the best of his or her knowledge where it could be found;
- require any information stored in electronic form to be produced in a form which it could be taken away and read; and
- remove from the premises any equipment or article that relates to any matter relevant to the investigation (eg, computers).

International cooperation

10 Inter-agency cooperation

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

The CCS has the ability, under section 88 of the Act and with the approval of the Minister for Trade and Industry, to enter into arrangements with any foreign competition body under which each party may:

- furnish to the other party information in its possession if the information is required by that other party for the purpose of performing any of its functions; and
- provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.

In entering into any such arrangement, the CCS 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.

It has been publicly acknowledged by the CCS that to date there has been at least one occasion where dawn raids performed by the CCS in respect of a potential violation of the section 34 prohibition have been coordinated with overseas competition authorities.

11 Interplay between jurisdictions

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

As competition law in Singapore is still at a relatively early stage, and it is too early to draw any meaningful conclusions relating to how the interplay between jurisdictions might affect the investigation, prosecution and punishment of cartel activity in Singapore.

Some of the parties of the international cartel in the Ball Bearings case were also investigated and penalised by other competition authorities and courts in other jurisdictions, both before and after the CCS had issued its infringement decision in May 2014 (eg, Japan (March 2013), Canada (January 2014), Australia (May 2014) and China (August 2014)). However, the CCS infringement decision does not specify that there was direct cooperation between the CCS and other foreign authorities in respect of investigations.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Cartel matters are investigated and prosecuted by the CCS, which has the ability to impose fines up to a statutory maximum or to make other directions it deems fit to bring the infringement to an end. Appeals of CCS decisions can be made to the CAB. Thereafter, a more limited right of appeal (in respect of a point of law or the calculation of the financial penalty) is available to the High Court and the Court of Appeal. Further information on the appeal process is set out in question 14.

13 Burden of proof

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

In establishing that an infringement of competition law has occurred (ie, that the section 34 prohibition has been infringed) the evidential burden of proof is borne by the CCS. 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

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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, in its Pest-Busters and Electrical Works cases, the CCS noted that the standard would depend on the facts and circumstances of the case. In those cases, the CCS went on to state 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'.

14 Appeal process

What is the appeal process?

Appeals of CCS decisions are made to the CAB, which is an independent body established under section 72 of the Act. The CAB comprises 30 members including lawyers, economists, accountants, academics and other business people. In the usual course, a panel of five members will be appointed to hear an appeal. The CAB's powers and procedures are set out primarily in section 73 of the Act and the Competition (Appeals) Regulations.

Appeals are made by lodging a notice of appeal, in accordance with the Competition (Appeals) Regulations, within two months from the date of the CCS's infringement decision. Thereafter, the CCS has six weeks to file its defence. The procedure and timetabling of the appeal may be determined at any time during the proceedings by the CAB, usually through holding a case management conference with the parties. The CAB has broad powers to make directions it thinks fit to determine the just, expeditious or economic conduct of the appeal proceedings.

Parties may appeal CAB decisions, in accordance with section 74 of the Act, to the High Court on a point of law arising from a decision of the CAB, or in respect of any decision made by it as to the amount of the financial penalty. Appeals are brought by way of originating summons, and the procedure governing the appeal is set out in order 55 of the Rules of Court (Cap 322, R 5, 2006 Rev ed).

Parties may also appeal High Court decisions to the Court of Appeal under section 74 of the Act. Such appeals are governed by the same procedure as all other civil appeals in Singapore. There is no further appeal right from the Court of Appeal.

Sanctions

15 Criminal sanctions

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

Currently, involvement in cartel activity does not give rise to criminal liability in Singapore. However, criminal prosecutions may arise in the context of cartel investigations where a person:

- refuses to provide information pursuant to a requirement on him or her to do so;
- destroys or falsifies documents;
- provides false or misleading information; or
- obstructs an officer of the CCS in the discharge of his or her duties.

An offence of a nature described above is punishable by a prison sentence not exceeding 12 months, a fine not exceeding S$10,000, or both. To date, no such criminal sanctions have been imposed in Singapore.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The CCS, under section 69 of the Act, can make such directions as it considers appropriate to bring an infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement. While section 69 provides a general discretion to the CCS in making directions, it provides specific examples of the directions that the CCS may make, including:

- requiring parties to the agreement to modify or terminate the agreement;
- to pay to the CCS such financial penalty in respect of the infringement as the CCS may determine (where it determines that the infringement has been committed intentionally or negligently), but not exceeding 10 per cent of such turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of three years;
- to enter such legally enforceable agreements as may be specified by the CCS and designed to prevent or lessen the anticompetitive effects that have arisen;
- to dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the CCS; and
- to provide a performance bond, guarantee or other form of security on such terms and conditions as the CCS may determine.

In determining the amount of financial penalty to impose, in its Guidelines on the Appropriate Amount of Penalty the CCS has stated that it will take into account the following factors:

- the seriousness of the infringement;
- 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;
- the duration of the infringement;
- other relevant factors (eg, deterrent value); and
- any further aggravating or mitigating factors.

In every infringement decision published to date, the CCS has imposed financial penalties on the parties involved in cartel activity, unless they enjoyed immunity under the leniency programme. In the Express Bus case the largest penalty imposed was (after appeal) around S$300,000. However, in the Ball Bearings case the CCS imposed fines totalling S$9.3 million, with the largest fine of S$7.5 million being imposed on one of the parties.

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.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Apart from the broad requirement that directions issued by the CCS 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 CCS will exercise its power to make directions. The CCS has published guidelines on how it will calculate the appropriate amount of financial penalty to impose on infringing undertakings (see question 16). While these guidelines do not have the force of law, they will generally be followed by the CCS, subject to any relevant decisions of the CAB relating to calculation of the financial penalty.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Section 69(1) of the Act confers wide powers on the CCS to 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 the Act does not expressly empower the CCS to issue directions debarring undertakings from government procurement procedures, such a direction may arguably fall within the scope of the CCS's section 69(1) powers. However, this remains untested, and to date, the CCS has yet to impose such directions on any undertaking.

19 Parallel proceedings

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

As discussed in question 15, there are currently no criminal sanctions for cartel activities in Singapore. It is open to the CCS to impose multiple

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administrative sanctions where it considers that such sanctions are necessary or appropriate.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Parties may bring private actions for a breach of competition law under section 86 of the Act, which provides that any person who suffers loss or damage directly as a result of an infringement (including, inter alia, of the section 34 prohibition) shall have a right of action for relief in civil proceedings. The Act does not allow parties to claim for double or treble damages.

Such rights are predicated on an infringement finding by the CCS, and may only be brought within two years following the expiry of any applicable appeal periods. Third parties do not have standing to bring such claims in other circumstances, or to lodge an appeal with the CAB. On a plain reading of section 86 of the Act, indirect purchasers do not have standing to bring a civil claim for damages, because only persons suffering loss or damage directly as a result of an infringement can bring such claims.

21 Class actions

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

The only form of group litigation in Singapore is through a representative action (under Order 15, rule 12 of the Rules of Court). Under this action, proceedings may be commenced without the leave of the court, under the usual court processes. However, the defendant may apply for the representative proceedings to be discontinued, and the court may decide whether a representative action is appropriate and whether it is properly constituted. Notwithstanding the fact that representative actions may be brought, it would still be necessary for parties to establish that they have suffered direct loss, as required by section 86 of the Act.

Cooperating parties

22 Immunity

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

The CCS operates a leniency programme, which encompasses the prospect of full immunity in certain circumstances. The CCS's leniency programme is described in detail in its Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases (the Leniency Guidelines). The Leniency Guidelines were revised in 2009 to include the leniency plus system and marker system initiatives.

Under the leniency programme, where a party provides information to the CCS about a cartel before the CCS has opened an investigation, that party may benefit from full immunity from financial penalties imposed by the CCS in respect of such. Paragraph 2.2 of the Leniency Guidelines states that an undertaking will benefit from full immunity from financial penalties if all of the following conditions are satisfied:

- the undertaking is the first to provide the CCS with evidence of the cartel activity before an investigation has commenced, provided that the CCS does not already have sufficient information to establish the existence of the alleged cartel activity; and
- the undertaking:
  - provides the CCS with all the information, documents and evidence available to it regarding the cartel activity;
  - maintains continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCS 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 CCS (except as may be directed by the CCS);
  - 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.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, 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 provides information to the CCS about a cartel, after the CCS has opened its investigation but before the CCS 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 100 per cent in the level of the financial penalties imposed by the CCS (full leniency). Subsequent applicants may only benefit from a reduction of up to 50 per cent of the financial penalties (partial leniency).

To enjoy partial leniency, the undertaking:

- has to provide the CCS with all the information, documents and evidence available to it regarding the cartel activity;
- has to maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCS arising 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 CCS (except as may be directed by the CCS);
- 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.

Any reduction in financial penalties under these circumstances is discretionary on the part of the CCS. While the Leniency Guidelines do not specifically identify the likely reductions in financial penalties with respect to subsequent applications, it does specify that the CCS will take into account:

- the stage at which the undertaking comes forward;
- the evidence already in the CCS's possession; and
- the quality of the information provided by the undertaking.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The undertaking that is 'second in' may benefit from a reduction in financial penalties of up to 50 per cent. While the Leniency Guidelines do not specifically identify the likely reductions in financial penalties with respect to subsequent applications, it does specify that the CCS will take into account the stage at which the undertaking comes forward, the evidence already in the CCS's possession and the quality of the information provided by the undertaking.

To date, the CCS has not publicly disclosed (eg, in the Ball Bearings case) 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 CCS 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.

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 CCS in respect of another cartel, is available in Singapore. To benefit from this programme, the CCS 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

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Update and trends

On 17 March 2016, the CCS issued an infringement decision against 10 financial advisers in Singapore for infringing section 34 of the Act by engaging in an anticompetitive agreement to pressurise a competitor (a distributor of life insurance products) to withdraw a promotional commission rebate offer.

CCS found that the parties had exchanged their views on the distributor's promotional commission rebate offer during a meeting; decided collectively that they were opposed to it and proceeded to coordinate their actions to pressure the distributor to withdraw its offer. Such conduct had, as its object, the prevention, restriction or distortion of competition in the distribution of the relevant insurers' individual life insurance products in Singapore. As a result, financial penalties totalling S$909,302 were imposed on the financial advisers.

amount of the financial penalty in relation to its activities in the second market.

If a party can satisfy the above conditions, then it could benefit from a reduction in financial penalties in respect of the first cartel, which is in addition to any reduction that it already stood to receive in respect of the first cartel.

25 Approaching the authorities

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 CCS 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 introduction of 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 CCS at the time it makes its application.

While applications for leniency may be made after the CCS has commenced its investigation, full leniency can only be granted to the first applicant that provides the CCS 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 CCS as soon as possible because in both full leniency and partial leniency applications, the CCS will consider the stage at which the undertaking comes forward and the evidence already in the CCS'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 CCS and the more likely that the party will stand to benefit from lenient treatment.

To qualify for reduction in financial penalty through a leniency application, applications must be made before the CCS issues a written notice under section 68(1) of the Competition 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 CCS 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 CCS to establish the existence of the cartel activity, the applicant will be given a limited time to gather sufficient information and evidence in order to perfect the marker. If the applicant fails to perfect the marker within the given time, the next applicant in the marker queue will be allowed to perfect its marker to obtain immunity or a 100 per cent reduction in financial penalties. Once the marker has been perfected, the other applicants in the marker queue will be informed that they no longer qualify for full immunity or a 100 per cent reduction in financial penalties. It is then up to them to decide whether to submit subsequent leniency applications. The marker system does not apply to subsequent leniency applications.

The Leniency Guidelines state that in order to qualify for the marker the undertaking must provide its name and a description of the cartel conduct in sufficient detail to allow the CCS to determine that no other undertaking has applied for immunity or a reduction of up to 100 per cent for the same conduct. The CCS 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.

26 Cooperation

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?

The CCS's Leniency Guidelines provide that in every leniency and immunity application, the applicant must provide the CCS 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 CCS arising as a result of the investigation. It does not appear from the Guidelines that different requirements or expectations as to the nature, level and timing of cooperation apply to subsequent leniency applicants.

27 Confidentiality

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, at paragraph 8.1, that the CCS 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 CCS 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 CCS 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 CCS to provide information or in otherwise cooperating with the CCS, the providing party can request confidential treatment in respect of such information, or the relevant parts thereof, in accordance with section 89(3) of the Act.

At the point that the CCS issues its proposed infringement decision, information provided to the CCS that is not subject to confidential treatment as outlined above, will be available for inspection by all parties subject to the CCS's proposed infringement decision.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

There is currently no applicable plea bargain or settlement concept in Singapore. However, in appropriate cases, the CCS may seek to resolve contraventions through issuing warnings rather than taking enforcement proceedings (eg, the CCS's decision in April 2008 to warn four ceremonial-cake manufacturers not to engage in a proposed arrangement that would likely contravene the Act if implemented). It is understood that the CCS is currently considering the implementation of a formal settlement procedure in the form of the fast-track procedure (see question 3).

29 Corporate defendant and employees

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

Contraventions of the section 34 prohibition by employees would be considered contraventions by their employing undertaking in Singapore. In this regard, and given that there are no criminal sanctions for engaging in activity in breach of the section 34 prohibition, there is no distinction between an undertaking and its employees from the perspective of a leniency or immunity application.

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30 Dealing with the enforcement agency

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 that anonymous enquiries can be made to the CCS to see if leniency is still available in respect of a particular matter, but that any subsequent application cannot be made anonymously.

In order to qualify for leniency or immunity, undertakings must, among other things, maintain continuous and complete cooperation with the CCS throughout the investigation and until the conclusion of any action by the CCS arising as a result of the investigation. Such undertakings must also provide the CCS with all the information, documents and evidence available to it regarding the cartel activity.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There have been changes to the leniency system in Singapore with the introduction of the leniency plus system and marker system. No other ongoing or proposed leniency or policy revisions or reviews have been publicly announced.

Defending a case

32 Disclosure

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

The CCS will provide all parties that are subject to a PID with a copy of it. The PID contains the CCS's arguments of fact and law with regard to the proposed decision and refers to the evidence on which the CCS proposes to rely. Such parties are also provided with a copy of the CCS's file on the matter, save for the fact that confidential information of all parties will be redacted, and the CCS's internal documents will not be disclosed.

33 Representing employees

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

As stated above, cartel involvement does not give rise to liability for individuals or employees. Accordingly, representation is at the corporation level.

34 Multiple corporate defendants

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

It is possible for counsel to represent more than one party, subject to adherence to the standard professional and ethical responsibilities. Usually, in representing multiple parties, such parties must have a common interest in the proceedings, and this is more likely to be the case if the corporations represented are affiliated.

35 Payment of penalties and legal costs

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.

36 Taxes

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

Fines and penalties are generally not considered to be tax-deductible. To date, there has been no follow-on private action for competition law infringements, so the position regarding tax-deductibility of private damages awards remain untested in the context of competition law infringements. However, it is unlikely that such private damages will be considered to be tax-deductible.

37 International double jeopardy

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

Neither the Act nor CCS's Leniency Guidelines specify that sanctions imposed in other jurisdictions will be taken into account in determining the amount of financial penalties to impose. To date, the CCS has also not considered this factor directly in any of its infringement decisions.

There have been no private actions brought in Singapore to date in respect of competition law infringements. However, it is noteworthy that section 86 of the Act provides third parties a right to damages only where they have suffered loss directly as a result of the infringing conduct.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

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

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avenue open to parties in seeking to further reduce their penalties. For further information about the leniency programme and the leniency plus system, see questions 22 to 25.

Further to this, it is in a party's interest to cooperate during the course of the CCS'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 CCS 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 CCS has stated in its Guidelines on the Appropriate Amount of Penalty that the existence of a compliance programme may be taken into consideration as a mitigating factor in the context of calculating the financial penalty.

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Spain

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

In Spain, the competition provisions, and more specifically those in relation to cartel practices, are set out in the Spanish Competition Act 15/2007 (SCA) and the Royal Decree 261/2008, which implemented the Regulations on Defence of Competition (RDC). The RDC developed some of the provisions stated in the SCA in relation to cartels, such as the investigating powers of the National Markets and Competition Commission (NMCC).

In addition, the NMCC issued its Communication on Leniency Programme on 19 June 2013, in order to enhance the method to file and review a leniency application under cartel prosecution proceedings. This communication will be further analysed in questions 22 to 31.

2 Relevant institutions

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 Spanish body empowered to resolve cartel proceedings is the NMCC, which is a public law institution. This new authority has taken over the competition commission and the main regulatory bodies (the energy regulator (the National Energy Commission), telecommunications (the Telecommunications Market Commission), the rail sector (the Railway Regulatory Committee), the postal service (the National Commission of the Postal Sector), airports (the Commission of Economic Regulation of Airports) and the audiovisual sector (the State Council for Audiovisual Media). The NMCC is composed of a council consisting of two chambers, each one dedicated to competition and regulatory matters, and four directorates. The directorates are divided into a competition directorate and three regulatory directorates (telecoms, energy and transport).

The SCA, as amended by Act 3/2013, gives the NMCC powers for pursuing investigations, resolving and imposing sanctions in competition proceedings and, more specifically, in cartels prosecution proceedings. The Act also confers on the NMCC arbitration functions, consultative powers and the task to promote competition in the markets.

The Spanish commercial courts are also entitled to declare the existence of a cartel as they have jurisdiction to declare the infringement of articles 1 and 2 SCA and articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

3 Changes

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

No significant changes, or proposals for change, to the regime have taken place over the last year.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 1 of the SCA prohibits all agreements, collective decisions or recommendations or concerted or consciously parallel practices that have as their object or effect the prevention, restriction or distortion of competition in all or part of the Spanish market and, particularly, those that:

- directly or indirectly fix prices or any other trading or service conditions;
- limit or control the production, distribution, technical development or investment;
- share the market or sources or supply;
- in trading or service relationships, apply dissimilar conditions to equivalent transactions, placing some competitors at a competitive disadvantage; and
- subordinate the conclusion of contracts to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of these contracts.

The concept of a cartel is defined under the Fourth Additional Provision, second paragraph, of the SCA as 'any secret agreement between two or more competitors which has as its object price fixing, production or sales quotas, market sharing, including bid rigging or import or export restrictions'.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

It is not foreseen that there can be exemptions for cartel practices, since these infractions are considered as a very serious infringement of the Spanish competition legislation.

Notwithstanding the above, the SCA foresees a general exemption of the prohibition stated in article 1 of the SCA regarding practices that contribute to improve the production, the commercialisation and distribution of goods and services or to promote technical or economic progress without the need of any prior decision for this purpose, provided that:

- they allow consumers a fair share of its benefits;
- they do not impose on the undertakings concerned restrictions that are not indispensable for the attainment of these objectives; and
- they do not afford participating undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

In addition, this prohibition is not applied to practices that may arise from the enforcement of a law.

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6 Application of the law

Does the law apply to individuals or corporations or both?

Competition rules are applied to undertakings, which refer to any entity engaged in an economic activity. Therefore, individuals acting as economic actors are also subject to the SCA.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Only conduct that may affect the Spanish market can be reviewed by the NMCC, so its regime cannot be extended to conduct that takes place outside Spanish jurisdiction. In the event that the anticompetitive agreement could be considered as capable of affecting trade between EU member states, the NMCC would apply article 101 TFEU.

Notwithstanding the above, the NMCC is able to collaborate with other competition authorities in order to pursue infringements that may affect the effective competition that take place in other jurisdictions.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

In order to determine the possible existence of an infringement, the Competition Directorate may proceed with a preliminary investigation, which is not subject to a given deadline. In the course of the preliminary investigation, the Competition Directorate may send information requests as well as carrying out unannounced investigations (dawn raids).

If, after this preliminary investigation, the Competition Directorate considers that there are reasonable signs of the existence of anticompetitive conduct, it will formally initiate sanctioning proceedings. The decision to initiate proceedings will be notified to the interested parties, providing a copy of the complaint to the defendant.

The SCA foresees a two-phase proceeding:

- the investigation phase is carried out by the Competition Directorate. This stage may be subdivided into three phases:
  - a preliminary phase upon which the Competition Directorate, based on an ex parte complaint or acting ex officio, may collect all the relevant documentation and data, carrying out dawn raids in order to find evidence of the existence of a potential infringement;
  - an intermediate phase, where all the relevant facts obtained in the preliminary phase may lead the Competition Directorate to conclude the existence of a cartel. It may issue a statement of objections (SO) including all its findings. The SO would be notified to all the potential infringing companies so they are able to argue against such accusations and to submit all the documents and evidence that may be relevant; and
  - a final phase, based on the fact that the Competition Directorate has finished its investigation and concludes there is a potential infringement, whereupon the case would be submitted to the Council with a proposal for resolution; and
- the resolution stage, in which the Council, after assessing the information gathered by the Competition Directorate and the arguments of the interested parties, must issue a final decision on the infringement and, if that is the case, the imposition of fines.

The maximum term of the sanctioning proceedings is 18 months from the date of the decision to initiate proceedings. The investigation phase usually takes place during the first 12 months, leaving six months for the resolution phase.

9 Investigative powers of the authorities

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

The SCA provides the NMCC with several ways to detect and sanction anticompetitive agreements, such as information requests and unannounced investigations.

Duties of collaboration and information

All natural or legal persons and the bodies of any public administrations are subject to the duty of collaboration with the NMCC and are obliged to provide all kinds of data and information that they may have and may be necessary for the identification of cartels.

Unannounced inspections

The SCA allows the NMCC to carry out unannounced investigations, not only at the companies' and associations' premises, but also at the homes of directors, managers and other members of staff of the companies and associations concerned. The performing of the inspection requires previous consent of the company or, otherwise, court approval.

The personnel authorised to carry out an investigation will have the following investigatory powers:

- to enter any premises, land and means of transport of the undertakings and associations of undertakings as well as the homes of entrepreneurs, managers and other members of the staff of the undertakings and associations of undertakings concerned;
- to examine the books and other records related to the business, irrespective of the medium in which they are stored;
- to take or obtain in any form copies of or extracts from such books or records;
- to retain the books or documents mentioned above for a maximum period of 10 days;
- to seal all business premises, books or records and other business assets for the period and to the extent necessary for the inspection; and
- to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

Sanctions for the obstruction of investigations

The SCA considers as an obstruction of the investigatory powers of the NMCC the following conduct:

- the lack of submission and the incorrect, misleading or incomplete submission of books or documents requested by the NMCC;
- the refusal to answer the questions posed by the NMCC or to answer them in an incomplete, inexact or misleading manner; and
- to break the seals affixed by the NMCC's personnel during the inspection.

These infringements would be considered as minor infringements, sanctioned with a fine of up to 1 per cent of the total turnover of the undertaking concerned. In the event it is not possible to determine the turnover of the infringing company, the fine would be between €100,000 and €500,000.

International cooperation

10 Inter-agency cooperation

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

With reference to cartels, the European Commission (European Commission) is exclusively entitled to investigate and sanction these practices where they may affect the European market, therefore the national competition authorities may be relieved of their jurisdiction. However, the European Commission shall require the NMCC for assistance on its investigation duties in the prosecution of these practices.

In this sense, the NMCC must inform the European Commission of the submission of a leniency application in relation to a cartel capable of affecting trade between EU member states in order to determine the authority best placed to investigate the presumed cartel and to take the appropriate investigative steps. In similar terms, as mentioned in question 7, the NMCC will act along similar lines if the applicant indicates that it has submitted or intends to submit the leniency application before other competition authorities of EU member states. Further, the NMCC must collaborate and cooperate in investigations that are being carried out by any other national authority. The NMCC is empowered to exchange information (including confidential information) that may be used as evidence for the enforcement of articles 101 and 102 TFEU with the European Commission and other national authorities.

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11 Interplay between jurisdictions

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

As mentioned in the previous question, the national competition authorities must collaborate and ensure their coordination in relation to cartel investigation matters.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The NMCC is the body entitled to investigate and sanction cartels. The regional competition authorities are also entitled to investigate and sanction cartels but they only have jurisdiction over cartels having effect within their respective territory.

In addition to it, as mentioned in question 2, the commercial courts are entitled to apply articles 1 and 2 of the Competition Act, as well as articles 101 and 102 of the TFEU. Therefore, any individual or company may bring an action before the commercial courts to seek a judgment stating that the defendants have infringed competition law, for instance, by participating in a cartel.

13 Burden of proof

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

In accordance with Spanish legislation, the burden of proof rests on the party that alleges an infringement of the competition provisions. In this case, the burden of proof falls on the NMCC since the proceedings are initiated by the NMCC, whether ex officio or at the request of a party. Additionally, there is no specific level of proof required by Spanish legislation in order to determine the existence of cartel infringements.

14 Appeal process

What is the appeal process?

No appeal by administrative procedure may be lodged against the resolutions and acts of the Council of the NMCC and judicial appeals may only be lodged in the terms foreseen in the Administrative Jurisdiction Act 29/1998, of 13 July, before the National High Court.

In general terms, appealing does not lead to a suspension of the sanctions imposed by the administrative body (NMCC), unless the involved companies justify serious damage stemming from the imminent execution of the sanction and the National High Court accepts these arguments as valid to suspend the payment of the fine.

Appeals against the decision of the National High Court on points of law may be only lodged with the Supreme Court.

Sanctions

15 Criminal sanctions

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

The SCA does not foresee the application of criminal sanctions (such as professional remedies, disqualification orders and jail judgments) for breaches of competition law.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

According to the SCA, the NMCC can impose fines on the economic agents, companies or associations that intentionally or by negligence infringe competition regulation. For these purposes, the SCA classifies the infringements according to their seriousness as minor, serious and very serious. Cartels between competing undertakings are classified as very serious infringements.

The amount of the fine will depend on the seriousness of the infringement. Thus, the NMCC may impose fines of up to 10 per cent of the total turnover of the infringing company in the preceding business year in the case of very serious infringements and fines of up to 5 per cent of the total turnover of the infringing company in the preceding business year in the case of serious infringements. When the turnover of the infringing company cannot be calculated, the NMCC can impose a fine of up to €10 million.

In addition to the fine that would be imposed on the company, the SCA foresees a personal sanction of up to €60,000 for each of the legal representatives of the company or the members of the management bodies who have participated in the anticompetitive practice. In fact, the NMCC has issued this year its first resolutions fining the legal representatives of the companies that were liable for the cartels.

Furthermore, the SCA sets out the criteria that are taken into account in order to determine the amount of the fine: (i) scope and characteristics of the affected market; (ii) market shares of the infringing companies; (iii) scope and duration of the infringement; (iv) effects of the breach on the rights and legitimate interest of consumers or on other economic operators; and (v) the illicit benefits obtained as a consequence of the infringement. The SCA also foresees a list of mitigating and aggravating factors.

As regards infringements of article 101 of the TFEU, they could be sanctioned with fines up to 10 per cent of the total turnover in the preceding business year of the company concerned.

The sanctioning power of the NMCC shall lapse after four years in the case of very serious infringements. In cases of application of article 101 of the TFEU, the expiration period would be of five years. In this regard, it is important to highlight that the term of the lapse shall be counted from the day when the infringement has been committed or, in the case of continued infringements, from when they have ceased.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

In February 2009, the NMCC published a notice on the guidelines of the method for calculating fines deriving from the infringements of articles 1, 2 and 3 of the SCA. Basically, these guidelines provided a three-step method to quantify the fines.

Notwithstanding the above, it should be noted that the method for calculating fines used by the NMCC was challenged by the Spanish Supreme Court through a judgment issued in January 2015. The Spanish Supreme Court found that the method used by the NMCC to calculate the maximum amount of the fines was not applicable under Spanish law, despite the fact that it is the method used by the European Commission within the scope of the Council Regulation (EC) No. 1/2003. From their perspective, the NMCC is bound by EU law in terms of the definition of an anticompetitive practice; however, it is not so when calculating subsequent fines. In summary, the Supreme Court:

- stated that the calculation shall be exclusively made according to Spanish regulations, ie, a percentage of the total turnover of the infringing company which will be determined according to the criteria set out in the SCA; and
- confirmed that the total turnover of the infringing company was relevant when calculating the fine, instead of the turnover obtained by the undertaking only in the market (or activity) affected by the anticompetitive practice.

From the date of the above-mentioned judgment, many resolutions have been successfully appealed before the High Court on the basis that the amount of the fines imposed had been erroneously calculated, since it had been done according to the notice on guidelines of the method for calculating fines. The High Court has already issued several judgments where it ordered the NMCC to recalculate such fines according to the criteria set by the Supreme Tribunal.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not automatically applicable in the case of sanctions arising from infringements of

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competition law. Pursuant to the public sector contracts, companies that have been sanctioned for a serious infringement related to distortion of competition by a final judgment will not be able to enter into any kind of public sector agreements. However, this prohibition must be imposed expressly in the same resolution declaring the infringement, or if it is not the case, in a latter proceeding initiated for this purpose. On a general basis, debarment from government procurement cannot exceed a three-year period.

19 Parallel proceedings

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

In this regard, sanctions for cartel activities are investigated and declared by means of an administrative proceeding. However, as mentioned in question 2, the commercial courts are also entitled to investigate and decide in relation to cartel matters, such as the prosecution of practices that may alter prices in the market through criminal proceedings.

In addition, the SCA foresees that in the case of the existence of a criminal prejudicial question that cannot be dispensed or that directly conditions the content of the pronouncement, that this will determine the suspension of the proceedings until it is ruled by the corresponding criminal courts.

Private rights of action

20 Private damage claims

Are private damage claims available for direct and indirect purchasers? What level of damages and cost awards can be recovered?

The Spanish Government has issued a first draft proposal of the Law that will implement Directive 2014/104/EU on Antitrust Damages Actions. According to this Directive, whenever a national competition authority issues a decision establishing the existence of a cartel, this same decision can be used as direct and full evidence before civil courts in Spain to prove that the infringement occurred. Moreover, the Directive sets a rebuttable presumption that cartels cause harm, which implies that the burden of proof swaps to the defendants which must prove that their cartels did not cause any damages. Besides, the general rule is that participants in a cartel will be considered responsible, jointly and severally, towards the victims for the harm caused by the infringement.

However, as the draft proposal has not been approved yet, we will only mention it in the questions below the legislation currently in force.

Private enforcement could be defined as the enforcement of antitrust rules by means of civil actions brought by victims of anticompetitive behaviour (ie, a cartel) before a court, mainly with the aim to obtain compensatory damages.

Since the SCA entered into force in September 2007, the commercial courts are for the first time entitled to apply directly the provisions of articles 1 and 2 of the SCA, as well as articles 101 and 102 of the TFEU, as stated in the First and Second Additional Provisions of the SCA. Hence, commercial courts as more specialised bodies, are empowered to directly grant compensation to those plaintiffs that have been victims of a cartel, not being necessary to have a prior firm administrative decision. It is important to highlight that the commercial courts are also entitled to impose fines as a sanction for cartel infringements, besides the granting of compensatory damages, in the same manner as the fines imposed by the NMCC or the competition regional authorities.

Therefore, any person or company affected by a cartel may bring his or her complaint before the commercial courts claiming compensatory damages for the losses suffered as a consequence of such antitrust practice, without necessarily having a prior firm decision of the NMCC asserting the existence of a cartel. However, considering the difficulties in proving the existence of a cartel, it may be advisable to initiate private enforcement proceedings after at least an administrative decision has been granted by the NMCC (this type of proceeding is what is known as a 'follow-on action').

21 Class actions

Are class actions possible? If yes, 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?

Collective actions are available in Spain. The Spanish Civil Procedure Act clearly establishes the possibility of collective legal standing in cases involving only the defence of consumers' and users' interests. Consumer associations can protect the interests of their associates and even the general interests of consumers and users, therefore, the Spanish Consumers Act allows consumers and final users to file collective proceedings through consumer associations. This could be applicable to antitrust cases, particularly those involving the declaration of an antitrust infringement or injunctions.

A collective action may be more efficient because several consumers or companies affected by a cartel may decide to join forces in a joint or collective action. A collective action could be advantageous to plaintiffs as they can distribute the costs, risks and efforts over several parties instead of one individual plaintiff. This issue was partially recognised in Spain by means of the Civil Procedure Act (Law 1/2000 of 7 January 2000), which recognises the rights of consumers to claim against a cartel.

Cooperating parties

22 Immunity

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

In this regard, according to the SCA, the RDC and the Communication on Leniency Programme issued by the NMCC on 19 June 2013, the NMCC shall exempt a company which is allegedly involved in a cartel from the payment of the fine if:

(i) the company is the first to provide evidence which, according to the NMCC, will allow the NMCC to order an inspection, provided that at the time of the submission of evidence, the NMCC does not already have sufficient evidence to order an inspection; or

(ii) the company is the first to provide evidence which, according to the NMCC may enable it to find an infringement of article 1 in relation to a cartel, provided that, at the time of the submission, the NMCC does not have sufficient evidence to find an infringement and an exemption to a company or individual has not been granted in accordance with point (i).

Notwithstanding the above, only the first company that provides the NMCC with sufficient evidence about the existence of a cartel will obtain the full exemption from the payment of the fine.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, 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 partial leniency programme for parties that cooperate after the immunity application. The NMCC may reduce the fine to a party if it:

- provides evidence of the suspected infringement that represents significant added value with respect to the evidence the NMCC already has;
- cooperates fully, continuously and expeditiously with the NMCC throughout the administrative investigation procedure;
- brings its participation in the alleged infringement to an end at the time that it submits the evidence of the existence of the cartel, except in those cases where the NMCC deems necessary that its participation continues in order to preserve the efficacy of an inspection; and
- has not destroyed evidence related to the application for exemption nor has disclosed, directly or indirectly, to third parties other than the European Commission or other competent authorities, the existence of its application or part of its contents.

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24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Being the second cooperating party is also relevant as it can benefit from fine reductions. The starting point is a reduction of between 30 per cent and 50 per cent for the second cooperating party and it reduces for the subsequent cooperating parties (between 20 per cent and 30 per cent for the third cooperating party and up to 20 per cent for the subsequent cooperating parties).

25 Approaching the authorities

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?

Any applicant for leniency (exemption or reduction of a fine) must submit its exemption or reduction application before the Cartels and Leniency Unit (CLU) of the Competition Directorate of the NMCC. The formal leniency applications may be filed directly by the company or natural person or through their representatives.

The applications will only be registered after they are received at the Registry of the NMCC. The order of registration will be set up according to the exact date and hour of submission of any application with the Registry. Applications will be assessed on a chronological basis, according to their exact time of registration.

26 Cooperation

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?

The granting of such an exemption or reduction by the NMCC is subject to the following conditions, which must be met by the company (or, if applicable, by the natural person) that has submitted the leniency application:

- the applicant must cooperate fully, continuously and expeditiously with the NMCC throughout the administrative investigation procedure. Such a cooperation obligation implies that the applicant must:
  - provide the NMCC immediately with all the relevant information and evidence that may be under its possession regarding the existence of the cartel;
  - immediately answer any request for information made by the NMCC in order to clarify the relevant facts of the case;
  - facilitate oral interviews between the NMCC and present (and, if feasible, former) executives and employees of the company;
  - not destroy, hide or falsify any documents or relevant evidence regarding the cartel; and
  - not disclose to any third parties the existence or the contents of the leniency application before the SO is sent by the NMCC to the affected companies, unless otherwise agreed with the NMCC; and
- the applicant must bring its participation in the alleged infringement to an end at the time that it submits the evidence of the existence of the cartel, except in those cases where the NMCC deems necessary that its participation continues in order to preserve the efficacy of an inspection;
- the applicant must neither have destroyed evidence related to the application for exemption nor have disclosed, directly or indirectly, to third parties other than the European Commission or other competent authorities, the existence of its application or part of its contents; and
- the applicant must not have adopted any measures to oblige other undertakings to participate in the infringement.

Update and trends

In recent years, the NMCC has focused its activities on the detection and sanction of cartels that significantly harm competition in the markets. For that purpose, it has encouraged the leniency programme to detect these practices and fight against them. As a consequence of the enforcement of the Spanish leniency programme, the NMCC has imposed relevant fines during 2016, such as the penalty imposed on 23 companies active in the production and sale of concrete sector or on 15 companies active in the international moving business. During 2016, the NMCC has imposed fines adding up to more than €180 million as a result of the sanctioning proceedings.

In addition, currently a legislative process is taking place to implement Directive 2014/104/EU on antitrust damages actions, which will lead to some changes to the law as it stands. These amendments intend to enhance private enforcement.

27 Confidentiality

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?

All leniency applications and their contents (including the identity of the applicant) shall be treated as confidential information by the NMCC, which must file this documentation in a separate folder when classifying the information corresponding to the relevant case file. However, the affected companies will have access to the information deemed essential in order to reply to the SO formulated by the NMCC.

In the event of judicial review, when the leniency application submitted in the infringement proceeding is sent to the National High Court, the NMCC will expressly identify the statements made by the leniency applicant, no copies of which will be allowed. If documents submitted by a leniency applicant are required by a competent court to examine the NMCC's actions before the resolution is issued that puts an end to the administrative proceeding in which the leniency application was filed, those documents will be remitted on a confidential basis, with an express indication that they cannot be communicated to possible interested parties or third parties, given the special protection the SCA guarantees for leniency applications and the serious consequences that could arise from disclosure of the filing or content of the leniency applications.

As stated in the NMCC's Communication on Leniency Programme in relation to civil damages actions brought in relation to cartel infringements prosecuted in competition proceedings in which leniency applications have been submitted, the NMCC will not provide copies of the statements of the leniency applicants, as such disclosure would impair the effectiveness of the leniency programme and weaken the fight against cartels.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

As stated in the SCA, the NMCC may resolve the termination of sanctioning proceedings in relation to agreements and prohibited practices when the alleged offenders propose commitments in order to resolve the effects on competition caused by the conduct covered by the proceedings and the public interest is sufficiently guaranteed. However, the Guidelines on Termination by Commitments of Infringement Procedure published by the NMCC set out that, as a general rule, a plea bargain will not be initiated when an infringement of article 1 of the SCA relates to a cartel.

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29 Corporate defendant and employees

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

The exemption from payment of a fine imposed upon an undertaking shall also benefit its legal representatives or the members of the management bodies who have taken part in the agreement or decision, provided they have cooperated with the NMCC.

30 Dealing with the enforcement agency

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

The NMCC recommends that applicants submit their applications in a sealed envelope, which, after registration at the Registry of the NMCC, shall be only opened by CLU officials. Applications shall consist of a template (the NMCC has included this template as annexe I of its Communication on Leniency Programme, available on the NMCC website (www.cnmc.es)), which should be signed by the applicant with the relevant information and documentation regarding the existence of the cartel and its main characteristics. According to the provisional guidelines on leniency applications, the leniency applications must be accompanied by, at least, the following information:

- identification of the leniency applicant: name and contact data, a brief description of the applicant and, if necessary, identification of the representative and a copy of the power of attorney;
- participants in the cartel: names and contact data, a brief description of the companies and the form and extent of their participation in the agreement;
- detailed description of the cartel: objective, activities and functioning, products, services and territories affected, duration and nature of the cartel, specific dates, locations, content and participants in meetings, etc;
- evidence relating to the cartel in the possession of the applicant or available to it within a reasonable period; and
- actions adopted (ie, a declaration that the applicant has not disclosed to third parties its intention to submit a leniency application, a declaration that the applicant has not destroyed evidence related to the leniency application, etc).

Each leniency application must be submitted in two versions: the original (to be kept by the NMCC) and a copy (to be kept by the applicant). Both versions should be marked with an adhesive receipt seal by the Registry of the NMCC indicating the exact date and hour of reception of the documents. The NMCC can also, if requested by the applicant, provide it with a document confirming the receipt of its leniency application.

If previously agreed with the CLU, applicants may also submit oral leniency applications, which shall be recorded at the NMCC's premises. The transcription of the application shall be immediately registered in the Registry of the NMCC, indicating the exact date and hour of such registration.

Once the CLU receives an exemption application, it will review its contents and confirm to the applicant whether the exemption can be granted. This shall only be confirmed by the Council of the NMCC at the end of the investigation procedure and provided that the applicant complies with all the cooperation conditions after submission of the application. If the exemption of the fine is not possible (in cases where a previous exemption has been submitted regarding the same cartel, or where the NMCC was already aware of the existence of that cartel), the CLU shall allow any applicant to withdraw its leniency application or to submit an application for a reduction in the fine.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no review or ongoing policy assessments in relation to the leniency regime.

Defending a case

32 Disclosure

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

The opening of a sanctioning proceeding must be notified to the interested party and the minimum information to be included in the notification must be; identification of the presumed infringers and of the complaints, where such exist; reasons for initiating the proceeding; examining officer or officers and, if applicable, examining clerk, indicating the rules for recusal and if applicable, the persons who have standing as interested party.

Without prejudice to it, any interested party is entitled to have access to all the information contained in the file except those documents, or part of them, that have been declared as confidential.

33 Representing employees

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

Counsel may represent the corporation and its employees at the same time, provided that no conflict of interests exists between the referred parties.

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34 Multiple corporate defendants

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

In accordance with the previous question, various defendants may be represented by a legal counsel unless there is any kind of conflict of interests between the companies.

35 Payment of penalties and legal costs

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

An undertaking is not obliged to assume the legal costs and penalties that may be imposed on its employees in cartel investigation proceedings. However, companies may pay employees' costs if they wish.

36 Taxes

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

With regard to this issue, article 14(1)(c) of the Spanish Corporate Income Tax Act expressly provides that fines and penalties shall not be considered as tax-deductible since they arise from an illegal practice. If the Spanish Tax Institution considered these as tax-deductible, it could be understood as a way of financing the mentioned penalty by the authorities and the penalties would not be as effective. On the other hand, private damages awards can be considered as deductible for tax purposes.

37 International double jeopardy

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 Spain, sanctions imposed on a corporation or an individual do not take into account penalties imposed in other jurisdictions.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

As mentioned in questions 22 to 31, the optimal way to get a fine decreased is cooperating and contributing with the NMCC during the investigation phase and seeking to benefit from the leniency programme. In addition, it should be noted that there is no specific provision under the Spanish competition regulations that may consider the existence of a compliance programme as an element affecting the level of the fine to be imposed.

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Sweden

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The Swedish Competition Act (2008:579) (the Act) came into force on 1 November 2008, replacing the previous legislation dating from 1993. The Act governs all aspects of Swedish competition law.

The object of the Act is to eliminate and counteract obstacles to effective competition in the production of and trade in goods and services. The ultimate aim of the legislation is to promote growth and efficiency in the Swedish market. Consumer protection is covered by other legislation, although consumer interests are often referred to in decisions under the Act.

The Act contains two general prohibitions, one against anticompetitive agreements between undertakings (chapter 2, section 1) and one against abuse of a dominant position (chapter 2, section 7). The Act also provides for the control of concentrations (chapter 4). The Act's provisions on anticompetitive agreements between undertakings and abuse of a dominant position are modelled on articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). The Act's merger control rules are modelled on the EC Merger Regulation. The preparatory works (*travaux préparatoires*) to the Act provides that the Act is to be interpreted in line with EU law, including the case law of the European Court of Justice.

As with article 101(1) TFEU, the elements of an agreement or practice that violate the Act are void and unenforceable unless the conditions for exemption in chapter 2, section 2 of the Act are satisfied. The conditions for exemption are the same as under article 101(3) TFEU, which require that the efficiencies produced by an agreement outweigh the anticompetitive effects. Moreover, block exemptions have been adopted in the form of separate regulations largely incorporating their EU counterparts.

Fines may be imposed for infringements of the Act and injured parties may claim damages.

A decision by the Swedish Competition Authority (SCA) may be appealed to the Patent and Market Court.

2 Relevant institutions

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

The SCA is responsible for implementing and administering the Act, and thus for investigating cartel matters.

The SCA has the power to order an undertaking to terminate an infringement and to apply to the Patent and Market Court for a fine to be imposed on the undertaking for infringement of the Act. The SCA itself also has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fines (in non-contentious cases – see question 28). Concentrations are notified to the SCA, and it has the power to initiate proceedings before the Patent and Market Court with a view to obtaining a prohibition. The SCA may also initiate investigations and has fact-finding powers. Finally, the SCA issues guidelines on the application of the competition rules.

The SCA is an independent governmental body consisting of around 200 officials, led by director general Dan Sjöblom and a management group consisting of the heads of departments. It is organised into specialised departments and other units. The SCA is independent of the European Commission but is required to cooperate with it.

In January 2014, the SCA underwent a reorganisation whereby its enforcement tasks were entrusted to a newly created Enforcement Department. Instead of being divided according to different sectors as was previously the case, three units are now responsible for investigating infringements of the Act and of EU competition law, as well as handling complaints and notifications; the cartel and merger unit (T1); the abuse and vertical restraints unit (T2); and the competition neutrality (competition between the public and private sector) unit (T3). In addition, there is the department responsible for the enforcement of the public procurement rules, as well as the Chief Economist's department, Legal Services and the International Department. Following a further reorganisation, the department previously responsible for general supervision and support of the public procurement rules was transferred to the newly created National Agency for Public Procurement in September 2015.

There is no separate prosecution authority since there are no criminal sanctions for cartel activity or any other violation of the Act.

See question 12 for more details.

3 Changes

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

Following the changes in 2014 to introduce a marker system into the leniency regime, the Competition Act was amended on 1 January 2016 to include a specific provision allowing the SCA to carry out indexing and searching of digital material at its own premises in connection with dawn raids. Such an off-site review can only be carried out with the consent of the affected undertaking. Furthermore, the undertaking has the right to oversee the measures taken by the SCA concerning the digital material, such as the SCA's electronic search. It should be noted that this was already common practice prior to the amendment.

On 1 September 2016, the Patent and Market Court replaced the Stockholm District Court as the court of first instance for competition cases. The reform was made in order to make the court procedure in such complex matters more uniform. A new court of appeal, the Patent and Market Court of Appeal, has replaced the previous Market Court and is now set up at the Svea Court of Appeal in Stockholm. The Supreme Court is the final court of appeal. See further under 'Update and trends'.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Act, like its TFEU equivalent, provides no legal definition of a cartel. In Swedish doctrine and case law the term 'cartel' is generally applied to horizontal agreements and concerted practices covering hard-core restrictions of competition such as price fixing, limitations on production or sale, market allocation and bid rigging.

Cartels may violate the general prohibition against restrictive agreements found in chapter 2, section 1 of the Act and, to the extent

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that collective dominance may be involved, the prohibition against abuse of a dominant position found in chapter 2, section 7 of the Act.

According to the wording of chapter 2, section 7 of the Act, a dominant position can be held by 'one or several undertakings'. In other words, the Act reproduces the same expression used in article 102 TFEU. The SCA has confirmed that the EU case law regarding collective dominance constitutes the basis for its analysis when deciding similar questions. It follows that market behaviour by two or more undertakings, although these undertakings do not constitute a single economic entity, can be evaluated by the SCA under chapter 2 section 7 of the Act.

Normally, however, cartels fall under the prohibition contained in chapter 2 section 1 of the Act. The prohibition renders the cartel agreement null and void and results in liability to pay fines as well as damages (see question 16). However, there are two possible exceptions to this.

First, to fall under the prohibition against anticompetitive agreements, the agreement must restrict competition to an appreciable extent. Like the European Commission, the SCA has published a Notice on Agreements of Minor Importance (KKVFS 2009:1) (the Notice). According to the Notice, agreements between actual or potential competitors where the parties' combined market share does not exceed 10 per cent and agreements between non-competitors, where none of the parties has a market share exceeding 15 per cent, normally fall outside the prohibition against restrictive agreements. Where the individual turnover of each of the parties does not exceed 30 million kronor, the 15 per cent threshold applies irrespective of the type of agreement. However, according to the Notice, these de minimis principles do not apply to agreements that contain certain 'hard-core' restrictions. More specifically, typical cartels of the kind referred to above are normally prohibited even where the market shares are below the thresholds set out in the notice.

Secondly, chapter 2 section 2 of the Act provides for a directly applicable legal exemption. The conditions for exemption are the same as in article 101(3) TFEU:

- the agreement must contribute to improving the production or distribution of goods or promote technical or economic progress;
- the agreement must pass on to consumers a fair share of the resulting benefits;
- the agreement must not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the positive effects; and
- the agreement must not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

The Act contains similar exemption rules as the EU competition law regime. With respect to hard-core cartels, there are no industry-specific bans or exemptions or any specific exemptions applicable to government-sanctioned or regulated conduct. However, the Act will not apply to behaviour that is an intended result of legislation or an inevitable consequence thereof.

6 Application of the law

Does the law apply to individuals or corporations or both?

Chapter 1 section 5 of the Act defines an undertaking as a legal or natural person engaged in an activity of an economic or commercial nature. The term 'undertaking' must be viewed in the broadest sense and is interpreted in the same way as under EU competition law. Virtually every natural or legal person participating in the economic process will be regarded as an undertaking. The term covers any activity directed at trade in goods or services, irrespective of the legal form of the undertaking and regardless of whether or not it is intended to create profits.

Activities that have been held to be commercial activities falling under the Act include healthcare, distribution of fire appliances and leasing of real estate. Activities that have been considered non-commercial activities and thus falling outside the scope of the Act, include the public procurement of translation services, the financing of an information brochure on a national system concerning doctors, the distribution of instructions and dissemination of information as well as the procurement of work clothes for private use.

The Act does not apply to agreements between employers and employees regarding wages and other conditions of employment.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Act prohibits agreements between undertakings that have as their object or effect an appreciable prevention, restriction or distortion of competition. The relevant geographic market can be defined as Sweden, a part of Sweden or an area larger than Sweden. An agreement between undertakings situated outside Sweden may be prohibited under the Act if the agreement has actual or potential effects in Sweden.

In practice, this means that a cartel may be prohibited under Swedish law, and the undertakings involved pursued under the Act, if the cartel has appreciable effects on competition in Sweden, even if the cartel in question is organised outside Sweden or the undertakings involved are not Swedish. However, public international law imposes restrictions on the exercise of extraterritorial jurisdiction under the Act and the SCA is unlikely to take action against foreign undertakings unless such action can be enforced.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

When obtaining information, either ex officio or from an informant that suggests the existence of a cartel, the SCA must decide whether to proceed with an investigation. If there is sufficient evidence to suggest the existence of a cartel, the SCA may file an application with the Patent and Market Court for authorisation to conduct an inspection (dawn raid) at the premises of one or more of the suspected parties (see question 9).

If the information collected during the dawn raid supports the suspicion, the SCA will continue the investigation. At this stage, it is likely that the SCA will contact customers and competitors uninvolved in the suspected wrongdoing and question persons working for the suspected undertakings.

If the SCA considers that it has sufficient evidence to prove the existence of the suspected cartel, it will issue a statement of objections to the suspected undertakings setting out its position and the evidence it has obtained. After having received the response of the undertakings (and providing that its suspicions remain), the SCA can adopt three different courses of action. It can order the undertakings to cease the violation of the Act, subject to a fine for non-compliance (a cease-and-desist order). The SCA can also sue the undertakings before the Stockholm District Court and request a judgment ordering the undertakings to pay an administrative fine for infringing the Act. The decision of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. Finally, if the undertaking does not contest the SCA's claim, the SCA does not have to sue before the Patent and Market Court but can instead issue an order for the undertaking to pay fines (a fining order; see question 28).

Typical contentious cartel matters will take a fairly long time from start to finish. The only time limit to which the SCA is subject is that fines may only be imposed if the SCA's application has been served on the undertaking in question within five years from the date on which the violation ended.

9 Investigative powers of the authorities

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

The SCA may order a suspected undertaking, or any natural or legal person, to place information and documents at its disposal and to ask any person considered likely to have useful information to appear before it for interrogation. If the SCA deems it necessary to undertake

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an on-the-spot investigation (dawn raid) at the premises of an undertaking, it must file an application with the Patent and Market Court. Authorisation will only be granted if there is reason to believe that an infringement has been committed, if the undertaking fails to comply with an order to provide information, documents, etc, or there is otherwise a risk of evidence being withheld or tampered with, and if the importance of the measure being taken is sufficient to outweigh the disruption or other inconvenience caused to the party affected by it. An order to provide information, documents, etc, as well as a decision to allow a dawn raid, may be imposed under penalty of a fine for non-compliance.

Such an application to the Patent and Market Court can be granted without consulting the suspected undertakings in advance if there is a risk that the value of the investigation would otherwise be reduced (in particular where the undertakings can be expected to destroy or hide evidence if they are informed about the investigation). This is the normal approach.

During a dawn raid, the SCA may examine and take copies of, or extracts from, accounting records and other business documents (including computer records), request oral explanations from representatives or employees of the undertakings and otherwise investigate the premises, property and means of transport of the undertaking. Provided the company under investigation consents, the SCA usually also 'mirrors' digitally stored material and reviews the material at the SCA's own premises (see question 3). To ensure that the undertaking allows the officials of the SCA full access to the premises, the officials are normally accompanied by representatives of the Swedish Enforcement Service.

An undertaking whose premises are about to be searched may send for legal counsel. The investigation may not start until the lawyers have arrived, unless the investigation would be unduly delayed by waiting or the investigative order has been made without consulting the undertaking concerned. Since the latter is typically the case, the SCA does not normally wait long for counsel to arrive before starting its investigation.

The SCA may not examine or take copies of, or extracts from, documents that are covered by legal professional privilege. In the event of a dispute as to whether a certain document is privileged, the document shall immediately be sealed and sent to the Patent and Market Court by the SCA. The Court shall decide, without delay, whether the document is privileged.

Subject to approval by the Patent and Market Court, dawn raids may also be carried out in the private homes of board members and employees of the undertaking in question.

International cooperation

10 Inter-agency cooperation

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

Under EU law, the SCA must cooperate with the European Commission and assist it in gathering information from undertakings in Sweden. In addition, under Regulation 1/2003 the SCA must cooperate with the national competition authorities of other EU member states within the framework of the network of European competition authorities (ECN). The ECN allows for exchange of information on current investigations and assistance through evidence sharing and investigative measures. In October 2004, the SCA undertook, under article 22(1) of Regulation 1/2003, its first cross-border dawn raid in cooperation with the Danish Competition Authority concerning alleged anticompetitive behaviour in the market for natural gas. The SCA is also cooperating formally under the agreement between Denmark, Iceland and Norway concerning cooperation in matters of competition, signed on 16 March 2001. Sweden acceded to the convention in an agreement on amendments, signed on 9 April 2003. Under the agreement, the national competition authorities of Denmark, Iceland, Norway and Sweden may exchange confidential and non-confidential information during cartel, abuse of dominance and merger control investigations.

The SCA is also cooperating with other national competition authorities outside the ECN and the Nordic agreement. On a global level, such cooperation is taking place within the frameworks of the International Competition Network (ICN), the OECD's Competition Committee and the UN's Conference on Trade and Development, with the purpose of exchanging experience regarding methodology and to further the understanding of competition law matters and the value of effective competition policies. On occasion, the SCA has also coordinated certain reports with its equivalents in the Baltic states, for instance, with the Latvian competition authority concerning the waste disposal sector.

Sweden is not, however, a party to any legal assistance treaty in relation to non-EEA countries. This is partly due to the provisions of the Public Access to Information and Secrecy Act (2009:400), which places restrictions on the SCA regarding the provision of information covered by secrecy to authorities outside Sweden and the possibility of keeping information received from non-Swedish authorities, secret.

Rules on some forms of international cooperation were introduced in 2002. These rules provide that the SCA may, upon application by an authority in a state with which Sweden has entered into an agreement on legal assistance in competition law matters, order an undertaking to provide information, documents and other materials, and require persons who are thought to be able to provide information to attend interrogations.

Moreover, at the request of such an authority, the Patent and Market Court may, upon written application by the SCA, allow it to carry out a dawn raid to assist the other state in its investigation into whether a party has infringed the competition rules of that state, if the following conditions are met:

- there is reason to believe that an infringement has been committed;
- the conduct under investigation would have been found to infringe chapter 2 sections 1 or 7 of the Act or of articles 101 or 102 TFEU, if those rules had been applied to the conduct;
- there is particular reason to believe that evidence is in the possession of the party to which the request refers;
- the party in question does not comply with an order to provide information, documents, etc, or there is otherwise a risk that evidence will be withheld or tampered with; and
- the importance of the action being taken is sufficient to outweigh the disruption or other inconvenience caused to the party affected by it.

Under a confidentiality rule introduced together with the rules on international assistance described above, information received by the SCA in the context of international assistance is confidential if it can be assumed that the assistance was requested by the foreign authority on condition that the information would not be disclosed.

In view of the increasing regulation at an EU level of cooperation between national competition authorities of the member states and between national authorities and the European Commission, the rules on international assistance described above are believed to be of practical relevance mainly in the context of cartels limited to another Nordic country where information also needs to be collected in Sweden.

At the domestic level, the SCA cooperates in various ways with the various county administrative boards in Sweden. Pursuant to a government regulation, the county administrative boards have a responsibility to promote competition in their respective counties and to report activities suspected of restricting competition to the SCA. The SCA also regularly consults with other Swedish authorities affected by its activities.

11 Interplay between jurisdictions

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

See question 10.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The SCA does not have authority to impose fines other than in non-contentious cases. If the SCA decides to sanction companies for cartel activities and the undertakings do not accept the fines, the SCA will have to file an application before the Patent and Market Court. Hence,

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such an application results in civil litigation under the general procedural framework.

The decision of the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. Leave to appeal is required, but should typically be granted in a cartel case. The judgment by the Patent and Market Court of Appeal may, in turn, be appealed to the Supreme Court subject to the Patent and Market Court of Appeal's leave and provided that the determination of the Supreme Court is of importance as a precedent (see question 14).

When the SCA issues a cease-and-desist order (see question 8), its decision may be appealed to the Patent and Market Court.

13 Burden of proof

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

The burden of proof lies with the SCA, or, in the case of private damages claims based on violations of the Act, normally with the party claiming to have suffered damage. The SCA must prove that the conditions are fulfilled for imposing a fine, and the Market Court (now replaced by the Patent and Market Court of Appeal) has held that the level of proof for the SCA is relatively high, but not as high as the level required in criminal cases (ie, beyond reasonable doubt).

14 Appeal process

What is the appeal process?

As mentioned in question 12, the Patent and Market Court is the court of first instance in fining matters. Its judgments can be appealed to the Patent and Market Court of Appeal, which will review the case on the merits. Leave to appeal in the Patent and Market Court of Appeal will be granted if there is reason to question the accuracy of the Patent and Market Court's decision; it must grant leave to appeal to be able to determine the accuracy of the Patent and Market Court's decision; the determination of the Court may be of importance as a precedent; or otherwise there are extraordinary reasons to grant appeal. Judgments by the Patent and Market Court of Appeal may be appealed to the Supreme Court subject to the Patent and Market Court of Appeal's leave and provided that the determination of the Supreme Court is of importance as a precedent. Also the Supreme Court's leave to appeal is required, and would typically only be granted in exceptional cases.

The party who wishes to appeal must do so in writing within three weeks of the pronouncement of the judgment or from when the plaintiff received the judgment. As regards timing, the procedure before the Patent and Market Court of Appeal is usually less time-consuming than the procedure before the Patent and Market Court.

Sanctions

15 Criminal sanctions

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

There are no criminal sanctions for cartel activity or any other violation of the Act.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Cartel agreements are void ex tunc. Unlawful concerted practices between competing undertakings that are not based on agreements are also legally unenforceable. The SCA may order cartel members to cease the cartel activity, subject to a fine for non-compliance with the order. The imposition of the fine requires a decision by the relevant courts.

Further, the cartel members may, as an administrative sanction, upon application by the SCA, be ordered by the Patent and Market Court to pay fines as an economic sanction for their illegal activities. The decision of the District Court may be appealed to the Patent and Market Court of Appeal. As mentioned earlier, the SCA itself has the right to impose binding fines on undertakings where the undertaking in question does not dispute the fine (see question 28).

A fine may not exceed 10 per cent of the turnover of the undertaking concerned during the previous financial year. There is no lower limit to the fine. Unlike under EU competition law, only the turnover of the violating undertaking itself is taken into account in this calculation, rather than the turnover of all undertakings belonging to the same group. Fines are primarily determined according to the gravity and duration of the infringement. The degree of gravity is measured by the harmful effects of the infringement on competition and prices in the market, as well as by the extent of direct economic losses suffered by other parties. Moreover, when setting the fines, one may also take into account whether the undertaking in question has previously violated articles 101 and 102 TFEU or the corresponding national rules.

In addition to fines, the current Act introduced the possibility of imposing an injunction against trading for persons who have participated in serious breaches of chapter 2 section 1 or article 101 TFEU, provided such an injunction is necessitated by the public interest. The new Trading Prohibition Act was introduced in 2014 and the SCA has published new guidelines on the application of the rules on injunctions against trading (KKVFS 2015:2). The new act broadened the scope for trading prohibitions, in the sense that injunctions can now be imposed on all persons that conduct the management of a business. The Act also gives the Swedish Enforcement Authority a mandate to obligate a third party to submit information regarding his economic dealings with the person alleged to have participated in the infringement.

In assessing whether an injunction against trading is necessitated by the public interest, special consideration shall be given to whether the conduct was systematic or intended to produce significant personal gain, whether such conduct caused or was intended to cause significant harm, whether the person in question has previously been convicted of criminal acts in respect of business activities and whether the conduct was intended seriously to prevent, restrict or distort competition. The infringement must therefore have been of a serious nature and of relatively long duration for an injunction to be imposed. Furthermore, where the person against whom the injunction is considered has participated in giving significant assistance in the investigation of the infringement by the SCA, the European Commission or a competition authority in another member state, an injunction shall not be considered necessitated by the public interest. This will particularly apply to companies that are first to report an infringement to the SCA. An individual risking such an injunction may apply to the SCA for individual leniency.

An injunction against trading may be issued against members and alternate members of the board of directors, the managing director and the deputy managing director, provided that such a person committed the wrongdoing in respect of business activities or was serving in such a post at the time of the infringement of the competition rules. An injunction against trading can further be imposed against persons who, in another capacity, have in fact conducted the management of a business, or who have held themselves out to third parties as responsible for a business. Negligence in appointing, instructing and supervising staff is normally not sufficient for an injunction against trading to be imposed. The board of directors and the management are, however, obliged to take corrective actions if they learn that persons within the company are engaged in infringing conduct. If such actions are not taken immediately, infringements that are committed thereafter may be relevant when assessing whether an injunction should be imposed. The SCA may apply for an injunction against trading either in conjunction with an action for administrative fines or in separate proceedings before the Patent and Market Court.

In addition to administrative sanctions, the Act contains an explicit right to claim damages for parties who have suffered injury as a result of infringements of the prohibitions against anticompetitive agreements or abuse of a dominant position. Chapter 3 section 25 of the Act stipulates a right to damages for parties injured as a consequence of infringements of chapter 2 sections 1 or 7 of the Act or articles 101 or 102 TFEU. Damages should equal, and thus compensate, the injuries sustained (and proven) by the plaintiff. A private antitrust action may be brought under the general Swedish procedural rules. Notwithstanding the new judicial system for competition cases that entered into force on 1 September 2016 (see question 3), the general courts are still competent in private antitrust actions according to the forum rules in chapter 10 of the Code of Judicial Procedure (1942:740), although this may be changed as it has been suggested that all damages actions shall be handled by the Patent and Market Courts in the proposal to introduce a new act governing private antitrust matters following the EU Damages Directive. The competent court is primarily the district court where

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the defendant resides or has its seat, as the case may be. An action for damages can also, alternatively, be brought where the infringement took place or where the injury occurred. In a consolidated damages and fines case, however, the Patent and Market Court of Appeal is the competent court of appeal and leave to appeal is required.

There is also a possibility for the Consumer Ombudsman to represent consumers in class actions, in accordance with the Group Proceedings Act (2002:599) (see question 21). Finally, the Swedish Arbitration Act (1999:116) stipulates that the civil law consequences of competition law violations may be the subject of arbitration.

Administrative fines imposed by competition authorities are normally not taken into account when determining damages.

To date, the SCA has filed about 30 applications for fines with the Stockholm District Court (now to be filed with the Patent and Market Court) for activities restricting competition. These applications have concerned both alleged abuses of a dominant position and anticompetitive cooperation between undertakings. The highest individual fine so far imposed by the courts amounted to 200 million kronor as a result of a cross-appeal in the *Asphalt* case (see below). A tendency can be observed regarding the SCA's increased interest in different kinds of unlawful behaviour, whereby it no longer focuses only on the most grave and obvious cartels, but also pursues companies for fines in less traditional cases. This might lead to an increased number of cases in the future and consequently the possibility that fines will be imposed more frequently.

In the biggest cartel case in Sweden to date, following the 2007 judgment of the Stockholm District Court in the *Asphalt* cartel, total fines on all nine companies involved amounted to approximately 500 million kronor after all appeals were settled. Although the amount is high for Sweden, it is considerably lower than the 1.2 billion kronor sought by the SCA. To establish the fines in that case, the Court made an overall assessment of the violations which had occurred and all relevant circumstances. The most recent judgment in Sweden on anticompetitive agreements was handed down in May 2016, and concerned cooperation between three removal firms. The SCA claimed that the firms had agreed on excessively long non-compete clauses, but the claim was rejected by the Stockholm District Court (see further under 'Update and trends'). The case has been appealed by the SCA to the Patent and Market Court of Appeal.

It should also be mentioned that the SCA has used its authority to issue binding fines in non-contentious cases on a number of occasions. This power for the SCA was introduced by the current Act (see question 28).

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Swedish legislation does not provide for criminal sanctions for violations of the competition rules. With respect to fines, the Act follows the method used in EU law and the SCA has also published a methodology paper on how to determine fines (Dnr 394/2009). Similar to under EU law, chapter 3 section 8 of the Act states that the gravity and the duration of the violation shall be taken into account when determining the basic amount of the fine. When the basic amount of the fine has been determined, the SCA may take into account aggravating and mitigating circumstances that result in an increase or decrease in the basic amount as determined above. Regarding aggravating circumstances, particular attention is paid to any steps taken to coerce other undertakings to participate in the infringement, or if the undertaking has had a role of leader in the cartel. Regarding mitigating circumstances, particular attention is paid to evidence that the undertaking's involvement in the infringement is substantially limited. Moreover, the SCA may take into account circumstances that are not connected to the specific infringement in question. These circumstances include previous infringements of the prohibitions in the Act or in the TFEU; evidence that shows that the infringement was terminated as soon as the SCA intervened; and the financial situation of the undertaking. As previously stated in question 16, a fine may not exceed 10 per cent of the turnover of the undertaking concerned during the previous year.

Finally, it is stated that no fines will be imposed in minor cases.

The sentencing principles mentioned are binding on the adjudicator. The SCA methodology paper, however, is not binding on the adjudicator, but it is binding on the SCA when determining what fines to ask for (and when imposing binding fines on undertakings where the undertaking in question does not dispute the fine, see also question 28).

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures may be available as a discretionary choice for the government authority which conducts a procurement, according to chapter 10 section 2 paragraph 1(4) of the Public Procurement Act (2007:1091). It is not a sanction that can be imposed during the competition infringement procedure, but is instead decided in the procurement procedure. For debarment, some conditions must be met.

First, the undertaking must have been liable of grave professional misconduct proven by any means which the contracting authorities can demonstrate. Non-compliance with the cartel ban, which has been the subject of a final judgment, or a decision by the SCA where the undertaking in question does not dispute the fine, may constitute a professional misconduct of that kind.

Second, debarment must be proportionate to the gravity of the professional misconduct, according to chapter 1 section 9 in the Public Procurement Act and the Supreme Administrative Court in case *RÅ 2010 ref 79*. If those conditions are met, the authority may debar an undertaking from participation in a procurement process. The possibility of debarment shall, however, be construed restrictively considering the grave consequences for excluded undertakings.

A decision to debar a tenderer from a procurement procedure should be made as early as possible in the procedure, although there is no provision in the Public Procurement Act stating a formal time limit. The decision can be appealed to the Administrative Court of the circuit where the procuring authority is located.

There are a number of cases concerning debarment from government procurement procedures as a result of cartel activity (see, for example, the judgments of the Stockholm Administrative Court of Appeal of 2 December 2013 in cases 3727-13, 3725-13, 4081-13 and 5060-13).

19 Parallel proceedings

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

See questions 15 and 16.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

An undertaking that has intentionally or negligently violated chapter 2, section 1 or chapter 2, section 7 of the Act, or articles 101 or 102 TFEU, is liable to compensate other parties for the damage the violation has caused them, including parties to the agreement violating the Act. Both contractual liability and indemnity liability are included, and the liability covers pure economic loss without any link to personal or property damage. Thus, this means that the proven injury can be recovered, which presumably would be considered single level damages. Hence, Swedish rules on damages are of a 'compensatory nature'. Passing-on defences and similar will thus be permitted under Swedish law.

The scope of persons entitled to damages is not defined in the Act. The scope is limited by considering the purpose and object of the Act and the subjects protected by the Act, as well as general principles on damages, including the principle of proximate cause.

The Act itself gives little guidance on the size of damages that can be awarded, and there are very few cases.

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Regarding the judicial procedure, see question 16.

The Swedish government has proposed amendments to Swedish law necessary in order to fulfil the requirements of the EU Damages Directive. The amendments are proposed to enter into force on 27 December 2016 and include changes and clarifications concerning, for example, liability, limitation periods, compensation, recourse, passing on of overcharges, disclosure and other general procedural provisions. The amendments are proposed to be introduced through a separate competition damages act governing actions for damages for infringements of the competition law provisions.

21 Class actions

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

Under the Group Proceedings Act (2002:599), it is possible to initiate individual group actions (class actions), public group actions and organisational group actions. A person who is a member of a group may bring an individual group action. This means that the plaintiff must have standing to be a party to litigation with respect to one of the claims to which the action relates. The organisational action means, as with the public group action, that someone is given standing to sue without the dispute in any way affecting the plaintiff's own legal interests. This is contrary to the normal principles regarding standing under Swedish law. The procedural rules are with only a few exceptions the same as in civil proceedings.

A group action can be initiated in certain competent courts. Generally, the courts elected are the property courts in each court district.

No competition cases have to date been subject to a class action in Sweden.

Cooperating parties

22 Immunity

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

Full leniency (ie, immunity from fines) may be granted to the first undertaking to notify the SCA if it is owing only to the information contained in the application that the SCA has obtained sufficient material to take action against the infringement, if the undertaking; (i) provides the SCA with all the information about the infringement that it has at its disposal; (ii) cooperates fully with the SCA throughout the investigation of the infringement; (iii) does not destroy, falsify or conceal relevant information or evidence relating to the alleged anticompetitive agreement; and (iv) has ended its involvement in the infringement, or ends it as soon as possible after informing the SCA. An undertaking that has forced others to participate may not obtain immunity.

In the event that another company has already obtained a marker (see question 25), immunity may not be granted before the period of extension has ended, nor may immunity be granted if the SCA has stated in a decision that the conditions for immunity are fulfilled.

All the information which the leniency applicant has at its disposal relating to the alleged anticompetitive agreement at the time of the application has to be provided for an application to be considered as filed. In addition, the information must be relevant to prove the infringement and include the identification of the other participants, the affected market, as well as the type and duration of the infringement. Even where the SCA already suspects an infringement at the time of the application, this does not prevent an undertaking from being granted immunity. However, the requirements are not fulfilled if the SCA has already in some other way received sufficient information to intervene. It does not matter whether a decision to intervene has already been made.

Additional information to which the undertaking may subsequently gain access during the ongoing investigation must also be given to the SCA. In other words, the undertaking must continuously, and voluntarily, submit all relevant information regarding the infringement and copies of all relevant material to which the undertaking has access, for example, notes or minutes from meetings. Informing other participants about the application or evidence supplied and other measures that hinder the SCA's investigation will remove the possibility of immunity.

In the event that the SCA has received sufficient information to commence an investigation into an infringement and no undertaking has applied for leniency in accordance with the above, immunity may still be granted to an undertaking if it, in addition to criteria (i) to (iv) set out above, is (v) the first to provide information that makes it possible to establish that an infringement has occurred, or (vi) in some other way to a very significant extent has facilitated the investigation of an infringement. The latter criterion will, according to the SCA's guidelines, be interpreted strictly and the availability of immunity is intended to be very limited under this rule. New guidelines on immunity and leniency were introduced in December 2014 (KKVFS 2015:1).

23 Subsequent cooperating parties

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

Under the Act, only the first undertaking to cooperate with the SCA may qualify for immunity. However, the undertaking that comes second may get a reduced fine under chapter 3 section 13 of the Act if the undertaking fulfils the same kinds of conditions on cooperation applicable to immunity applicants. The SCA decides in its writ of summons whether the information an undertaking has provided has added considerable value, and the level of reduction. The reduction for the first undertaking for providing information adding considerable value will be between 30 and 50 per cent, for the second undertaking the reduction will be 20 to 30 per cent, and for other undertakings the reduction will be up to 20 per cent. In determining the level of reduction within these categories, the SCA will take into account at what time the information was provided, to what extent the information added value and to what extent and with what continuity the undertaking has cooperated with the SCA after the information was provided.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

See question 23.

25 Approaching the authorities

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

Although there are no express 'deadlines', if an undertaking wishes to benefit from full immunity under the Swedish leniency programme, it should file an application as soon as it has gathered the necessary information. Otherwise, it runs the risk that one of the other participants may 'blow the whistle' first, considerably limiting the undertaking's chance of qualifying for immunity. However, even if the undertaking is not first in, there is a chance of qualifying for a reduction of the fine.

An undertaking whose application is incomplete may obtain a marker, provided that the application contains information on the market concerned by the infringement, which other companies are involved in the infringement and the object of the infringement. The time limit is at the discretion of the SCA, but is usually no longer than two weeks unless the undertaking can provide sufficient reasons for a longer time limit.

26 Cooperation

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?

See questions 22 and 23.

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27 Confidentiality

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

Confidentiality issues are regulated by the Public Access to Information and Secrecy Act (2009:400). Under those rules, information regarding planning and other preparations for investigations, dawn raids, etc, that the SCA intends to undertake may be confidential, provided it can be assumed that the purpose of the investigation will be negatively affected if the information is revealed. The information related to an investigation by the SCA (not only planning and preparations) will be confidential if, considering the object of the investigation, it is of exceptional importance that the information is not disclosed. The information is primarily confidential in relation to the companies subject to the investigation, but it may also be confidential in relation to third parties. Information provided by leniency applicants or other cooperating parties may be treated as confidential under this rule.

The provisions guarantee the confidentiality, in matters regarding investigations of infringements of chapter 2 section 1 and chapter 2 section 7 of the Act or articles 101 or 102 TFEU, of reports and other information provided to the SCA by an informant, if it can be assumed that the informant will suffer substantial damage or other substantial detriment if the information is revealed. The confidentiality concerns both legal and natural persons. Both information given on an informant's own initiative and information provided on request from the SCA may be confidential under this rule. However, since the object of the rule is to protect the informant, only information that could somehow disclose the identity of the informant is treated as confidential under this rule. The provisions also guarantee the confidentiality of certain information in the context of legal assistance requested by another state (see question 10).

Information in public records related to the SCA's investigations and other enforcement measures remain confidential for a maximum of 20 years, or otherwise as long as it can be assumed that the informant will suffer substantial damage or other substantial detriment if the information is revealed.

It follows from the rules that the level of confidentiality does not depend on the level of cooperation by the parties.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The SCA may not enter into a plea bargain or a binding resolution to resolve liability and penalty for alleged cartel activity. However, chapter 3 section 16 of the Act provides the SCA with the right to issue a binding settlement to alleged cartel members. This is referred to as a fine order. This section is of a non-mandatory nature, which means that the SCA can issue settlements in suitable cases. According to the preparatory works of the Act, settlements should not be issued in cases where the facts are uncertain. If the settlement is confirmed in writing by the alleged cartel member, within a period of time determined by the SCA, the settlement will have the same effect as that of a judgment with legal force. A settlement that has been approved in writing can be appealed to the Patent and Market Court within a year of the written confirmation.

29 Corporate defendant and employees

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

As mentioned in question 16, the current Act introduced the possibility of imposing an injunction against trading for persons who have participated in serious breaches of chapter 2 section 1 of the Act or article 101 TFEU, provided such an injunction is necessitated by the public interest. However, where the person against whom the injunction could be imposed has participated in the provision of significant assistance in the SCA's investigation of the infringement, an injunction shall not be considered necessitated by the public interest.

30 Dealing with the enforcement agency

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

If an undertaking wishes to take advantage of the leniency programme, it should contact the SCA for an assessment of its chances of qualifying for immunity from, or a reduction of, fines (see question 22). The contact must be made by a person empowered to represent the undertaking (but can initially be anonymous). The undertaking cannot qualify for immunity until a formal application has been filed with the SCA. This application can be made in writing. However, in practice, the SCA accepts oral applications since undertakings sometimes hesitate to file written applications due to the risk that the material will be used in proceedings for damages.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or proposed leniency and immunity policy assessments or policy reviews.

Defending a case

32 Disclosure

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

As indicated above (see question 27), the SCA may keep certain information confidential for a company concerned during the investigation phase. This is typically the case for trade secrets provided to the SCA by certain third parties, for instance competitors or customers, and evidence concerning other parties' involvement in an infringement.

Access to the case file in its entirety (with few exceptions, see below) is normally granted at the stage when the SCA considers that it has sufficient evidence to prove the existence of a suspected cartel and thereby issues a draft statement of claim (similar to a statement of objections). The companies concerned will, before the SCA files an allocation to issue fines, be granted an opportunity to review and comment on the draft application and the evidence disclosed.

As indicated, there are a few limited possibilities, however, for the SCA to keep certain information confidential to a party also after the draft statement of claim has been issued, or to release documents to a limited number of individuals under the proviso that the documents may only be used for exercising defence rights etc. Similarly, certain information may be disclosed only at the SCA's own premises (typically quantitative data). Also in such cases, the SCA issues a decision to limit the group of people that may have access to the information, for instance legal and economic advisors.

At the stage when the SCA has submitted an application to the Patent and Market Court asking the Court to impose fines on a company, the rules on evidence in the Swedish Code of Judicial Procedure (1942:740) will prevail over the rules set out in the Public Access to Information and Secrecy Act. In practice, this means that all documents submitted to the Court (ie, evidence invoked against a party) must be disclosed to the party in question.

33 Representing employees

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

As mentioned in questions 16 and 29, the Act provides the SCA with the possibility of imposing an injunction against trading for persons who have participated in serious breaches of chapter 2, section 1 of the Act or article 101 TFEU. The preparatory works of the Act states that nothing prevents the employee being represented by counsel during interrogations held by the SCA. As there are often conflicting interests

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Update and trends

On the enforcement side, the most recent judgment in a cartel case was handed down by the Stockholm District Court on 15 May 2016. The SCA claimed that three removal firms had infringed the cartel ban by agreeing on excessively long non-compete clauses in two share purchase agreements. The duration of the non-competes was set to five years, and a breach of the clauses was subject to the penalty of a fine. According to the SCA, the clauses were not to be considered ancillary to the two concentrations (that were not subject to mandatory merger control notification to the SCA) as they did not have a direct and necessary link to the establishment of the concentrations. The court dismissed the SCA's application and held (i) that the first non-compete clause was ancillary (ie, that it had a direct and necessary link to the establishment of the concentration) and (ii) that it had not been able to determine if the second non-compete clause appreciably restricted competition as the SCA's relevant market investigation had been insufficient. The SCA has appealed the judgment.

Other cases currently in court involve procurement-related competition infringements. In December 2015, the Stockholm District Court fined three healthcare companies for engaging in certain bilateral subcontracting arrangements before a public procurement of clinical physiology services in 2008. The parties had agreed that the losing party would be entitled to act as subcontractor to the other party in each agreement in the event one of the parties won the tender and the other did not. Despite the fact that the agreements did not involve any bid rigging, the court found that agreements should be categorised as infringements by object. However, the court also considered that the infringement was not intentional (but negligent), that the contracting authority had somewhat encouraged the arrangements and that the arrangements as such were not kept confidential to the procuring authority. The court therefore reduced the fines with 30 per cent. The judgment has been appealed by the healthcare companies to the Patent and Market Court of Appeal.

Another case, initiated in December 2014, concerns TeliaSonera and the Swedish fibre transmission company GothNet. The companies allegedly engaged in an anticompetitive arrangement in relation to a tender in 2009. According to the SCA, the companies were important competitors in the same market and agreed that TeliaSonera would not participate in the tender process. When GothNet won the tender, TeliaSonera was sub-contracted as its exclusive supplier. The SCA is seeking fines of approximately 35 million kronor. It is unknown at this stage when a judgment can be expected.

As mentioned in question 3, the Patent and Market Court Act introduced a reform in the Swedish court system, moving the court of first instance in IP, marketing and competition matters from the Stockholm District Court to the new Patent and Market Court. The reform also introduced the new Patent and Market Court of Appeal, replacing the former Market Court as the court of appeal. In addition to the new court system, the Patent and Market Court Act have also introduced certain new procedural rules, such as rules on when it is permitted to invoke new circumstances in appeals.

A new report from the Swedish government regarding the SCA's powers to take decisions was published on 30 June 2016. The report (SOU 2016:49) suggests that the SCA shall be granted powers to impose fines for cartel activity and abuse of dominance without filing an application with the Patent and Market Court. It is also suggested that the SCA should be able to block mergers without filing an application with the Patent and Market Court. The report proposes that the legislative changes should enter into force on 1 January 2018.

As noted in question 20, the Swedish government has also proposed amendments to Swedish law necessary in order to fulfil the requirements of the EU Damages Directive. The amendments are proposed to enter into force on 27 December 2016 and include changes and clarifications concerning, for example, liability, limitation periods, compensation, recourse, passing on of overcharges, disclosure and other general procedural provisions. The amendments are proposed to be introduced through a separate competition damages act governing actions for damages for infringements of the competition law provisions.

between an undertaking under investigation on the one hand, and its employees on the other, it is advisable to have separate counsel representing the undertaking and its employees.

Furthermore, when the SCA applies for an injunction against a person in a district court, the court may appoint a public defence counsel if there are special reasons.

34 Multiple corporate defendants

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

The guidelines on ethics of the Swedish Bar Association contain stringent provisions relating to the representation of clients with conflicting interests. For members of the Swedish Bar and their employees, these provisions limit the possibility to represent multiple corporate defendants. Subject to these limitations, a multiple corporate defence is possible.

35 Payment of penalties and legal costs

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

Legal penalties are imposed on the undertakings involved in the cartel, and are not imposed on the employees of those undertakings. Hence, individual employees cannot be ordered to pay fines or other monetary sanctions. However, undertakings may pay the legal costs of their employees.

36 Taxes

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

No. Fines, penalties and similar public charges (such as fines imposed by the SCA or the European Commission) are non-deductible for Swedish tax purposes.

Private damages awards may be tax deductible depending on the circumstances. In general, private damages awards should be tax-deductible if they qualify as an operating expense. Certain specific exemptions exist but these should not be relevant here.

37 International double jeopardy

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

To answer this question, first it must be considered whether the SCA or the courts can fine or otherwise penalise an undertaking that has been penalised in other jurisdictions. Second, the question arises as to whether sanctions already imposed in other jurisdictions shall be taken into account when determining the fine. Regard must be had to EU law and consequently to whether the earlier penalty has been imposed within the EU or not.

The European Competition Network (ECN) was set up with the objective that each case involving application of EU competition law should be dealt with by a single authority in a member state. However, the rules are not binding and Regulation 1/2003 article 13 paragraph 2 stipulates that a complaint which has already been dealt with by another competition authority may be rejected by the authority (here: the SCA). Hence, the SCA can choose not to reject the complaint and the system consequently allows for sanctions under the EU competition rules by more than one authority in the same case. However, the principle of ne bis in idem is a general principle of EU law (article 50 of the Charter on Fundamental Rights). The ECJ held in *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* that if the Commission had penalised an undertaking for anticompetitive behaviour with reference to the object or effects in a certain territory, the undertaking cannot again be brought to a national court with reference to the object or effects in the same territory. It follows from the principle of ne bis in idem and the condition of 'identity of facts'. Accordingly, an undertaking cannot under the principle of ne bis in idem be fined in a Swedish national court for the same anticompetitive conduct, if the object or effects in Sweden have already been taken into account in a previous proceeding within the EU (including the Commission's power to issue fines).

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Thus, it should not be considered 'double jeopardy' if a company will be fined in respect of indirect sales in Sweden where the direct sales have been penalised elsewhere, following *Toshiba Corporation and Others*.

With respect to non-EU member states, there are no safeguards protecting an undertaking from fines or penalties in Sweden if the undertaking has been penalised in a state outside the EU.

There is no clear legal ground for taking into account any penalties imposed in other jurisdictions. The SCA does not mention it as a mitigating factor in its methodology paper on how to determine fines (see question 17), nor is it mentioned as a mitigating factor in the Act.

The system of reducing a fine by the amount of previous penalties has been rejected by the advocate general as not satisfying the principle of ne bis in idem (opinion in C-213/00 P, pages 96–97). Similarly, the European Court of Human Rights has rejected that kind of system.

As indicated in question 20, Swedish rules on damages are of a compensatory nature. This means that overlapping liability for damages can be taken into account when assessing damages.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Companies can avail themselves of the leniency principles described in question 24. The existence of a compliance programme does not affect the level of the fine, due to the difficulties in assessing the impact of such a programme. Hence, compliance initiatives undertaken after the investigation has commenced would typically not affect the level of the fine.

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Switzerland

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The legislation governing cartels in Switzerland is the Federal Law on Cartels and Other Restraints of Competition of 6 October 1995, as amended (the Cartel Act). The regulatory framework is complemented by several federal ordinances and general notices and communications of the Competition Commission (the Commission).

2 Relevant institutions

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 the Secretariat of the Competition Commission (the Secretariat). They are independent of the federal government. Based in Berne, the Commission consists of 12 members. The Commission is headed by the president and 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). The Commission is the deciding body in cartel matters, while investigations are conducted by the Secretariat. The Secretariat also prepares the Commission's decisions. The Secretariat is organised into four services responsible for the product, services, infrastructure and construction markets respectively. Each service is headed by a vice-director. The Secretariat has more than 60 employees, including a significant number of economists.

In exceptional cases and upon request of the undertakings concerned, the Federal Council may authorise specific conduct of undertakings for compelling public interest reasons.

3 Changes

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

There has recently been the following change to the applicable regime. On 1 January 2016, the Commission's revised Communication on Motor Vehicle Distribution (the revised Communication) entered into force and replaced the previous communication of 2002. The revised Communication does not provide for fundamental changes as compared to the previous rules and it does in particular not provide for a distinction between primary and secondary markets. This contrasts with the approach taken in the EU. The revised Communication does, however, introduce a catalogue of 'serious restrictions' on the quality of competition. This catalogue encompasses territorial restrictions regarding the distribution of motor vehicles as well as the provision of guarantees, practices which prevent the separation of sales and service, restrictions on the distribution of spare parts, the limitation of access to technical documentation, restrictions on the right of dealers to sell products of different brands (multi-branding) and the termination of contracts without observing specific notice periods. According to the revised Communication, restrictions in the catalogue are unlawful if they significantly affect effective competition and, if such is the case, if they are not justified based on grounds of economic efficiencies. The transitory period of one year, during which existing contracts have to be adapted to the revised Communication, ends on 31 December 2016.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Cartel Act prohibits unlawful restraints of competition such as anticompetitive agreements or concerted practices. Anticompetitive agreements are characterised by the following three elements:

- Regarding the content and effect of an agreement limiting effective competition in the market for certain goods or services, either the purpose or the effect of the agreement must be to significantly impede competition or to eliminate effective competition. It is the economic effect of the agreement that is relevant. However, the Federal Supreme Court upheld in a recent decision that hard core agreements on prices, quantities and territories constitute in principle per se significant restraints of competition (see 'Update and trends').
- Irrespective of the form of the agreement, any agreement qualifies under the Cartel Act, be it bilateral (a cooperative or non-enforceable agreement, a binding or non-binding or a 'gentlemen's agreement') or the concerted practices of several undertakings.
- Regarding the parties to the agreement, the Cartel Act applies both to agreements between undertakings operating at the same level of the market and to those between undertakings operating at different levels of the market (horizontal and vertical agreements).

The Cartel Act is based on the principle of abuse. The mere existence of an anticompetitive agreement does in principle not mean that the agreement is unlawful. To be unlawful, such an agreement must either eliminate effective competition or significantly restrict effective competition without being justified on economic efficiency grounds.

By law (article 5(3) and (4) of the Cartel Act), certain horizontal and vertical restraints (hard-core restraints) are presumed to eliminate effective competition, namely:

- 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:
  - contain minimum or fixed resale prices; or
  - foreclose geographical markets.

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. In case competition is not eliminated, it has to be assessed whether the agreement significantly restricts competition. A significant restriction of competition is created if the parties to such an agreement reach a certain minimal level of market power. However, the Federal Supreme Court upheld in a recent decision that hard core agreements on prices, quantities and territories constitute in principle per se significant restraints of competition (see 'Update and trends').

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Agreements significantly restricting competition are only unlawful if they cannot be justified on economic efficiency grounds. Economic efficiencies justifying 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.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

The Cartel Act does not provide for any industry-specific offences or defences or any antitrust exemptions for government-sanctioned activity. However, pursuant to article 3(1) of the Cartel Act, statutory provisions that do not allow for competition in a certain market for certain goods or services take precedence over the Cartel Act. Such statutory provisions include in particular: (i) provisions that establish an official market or price system; and (ii) provisions that grant special rights to specific undertakings to enable them to fulfil public duties.

Moreover, agreements significantly restricting, but not eliminating, competition may be justified on the basis of economic efficiencies (see question 4).

The Cartel Act also empowers the Commission to issue ordinances or other general notices on certain anticompetitive agreements that are, in principle, justified on efficiency grounds. Such anticompetitive agreements include:

- cooperation agreements relating to research and development;
- specialisation and rationalisation agreements (including agreements concerning the use of schemes for calculating costs);
- exclusive distribution and purchase agreements for certain goods or services;
- exclusive licensing agreements for intellectual property rights; and
- agreements with the purpose of improving the competitiveness of small and medium-sized enterprises, provided that they have only a limited effect on the market.

On this basis, several general notices and communications have been published by the Commission.

On 1 August 2010, a revised communication on the assessment of vertical agreements entered into force. This communication incorporates the principles developed by the Commission in its first decisions based on article 5(4) of the Cartel Act and seeks harmonisation with the Block Exemption Regulation 330/2010 and the related Guidelines on Vertical Restraints while taking the economic and legal specificities of Switzerland into account. The communication is not binding upon Swiss courts.

On 19 December 2005, the Commission adopted the Communication on Agreements of Minor Importance (de minimis).

On 1 November 2002, the Commission enacted a communication on vertical agreements in the motor vehicle sector (the Communication on Motor Vehicle Distribution) and short guidelines regarding its application. The aims of the Communication on Motor Vehicle Distribution were essentially to allow the parallel importation of motor vehicles from the EU and EEA to Switzerland, to suppress the link between retail and after-sales servicing, to facilitate the sale and the parallel importation of spare parts and to give distributors more freedom in relation to multi-branding. On 1 January 2016 the Commission's revised Communication on Motor Vehicle Distribution entered into force and replaced the communication of 2002 (please see question 3).

Moreover, the Commission has published a general notice on homology and sponsoring of sports goods and other on schemes for calculating costs (cost-calculation aids). The purpose of the latter, which is the more important of the two, is to distinguish lawful calculation aids from illegal horizontal price-fixing behaviour. To qualify as a calculation aid, the following requirements must be met:

- the calculation aid may only set out the basis for the calculation, but may not stipulate any flat costs;
- know-how may be exchanged to allow the cost calculation, however, information on how prices are set must not be disclosed;
- the parties must be free to set prices and conditions and determine discounts; and
- price elements, discounts or consumer prices may not be 'proposed'.

In addition, the Federal Council has the possibility, upon request of the undertakings involved, to authorise agreements restricting competition as well as unlawful behaviour of dominant undertakings provided they are necessary for compelling public interest reasons.

6 Application of the law

Does the law apply to individuals or corporations or both?

Article 2(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.

Private undertakings can be both individuals and corporations. Individuals acting as consumers are not caught by the Cartel Act. Further, undertakings that perform tasks in the public interest and that are vested by law with special rights (such as the Swiss Post for specific postal services) are also (partly) exempt.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

According to article 2(2), the Cartel Act applies to all concerted practices and agreements that have a direct, substantial and reasonably foreseeable effect within Switzerland (the effects doctrine). Therefore, agreements concluded abroad or conduct that takes place outside Switzerland but that has such effects in Switzerland may fall under Swiss jurisdiction. In its most recent practice, the Commission imposed severe sanctions on Nikon and BMW because their European dealer agreements contained provisions prohibiting exports to countries outside the EEA. As Switzerland is not part of the EEA (and was as a result affected by those provisions), the Commission was of the opinion that these restrictions led to a foreclosure of the Swiss market. In general, the Commission tends to interpret effects in Switzerland rather broadly – the mere possibility of effects suffices.

In September 2016 and November 2015 respectively, the Federal Administrative Court confirmed in the *Nikon* and the *BMW* cases that pursuant to the effects doctrine restrictions of competition committed outside Switzerland also fall into the geographic scope of the Cartel Act (see 'Update and trends').

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Investigations under the Cartel Act are two-staged procedures consisting of a first stage preliminary investigation that may be followed by a second stage in-depth investigation. Nevertheless, the Commission may open an in-depth investigation even without going through a preliminary investigation.

The Secretariat can initiate preliminary investigations either on its own initiative, at the request of certain undertakings concerned (eg, competitors) or based on information received from third parties. It is at the discretion of the Secretariat to open a preliminary investigation. If the Secretariat concludes that there are indications of significant impediment of effective competition, an investigation will be opened, provided that a member of the Commission's presiding body consents. The Secretariat must open an investigation if requested to do so by the Commission or by the Department of Commerce of the Swiss government. During preliminary investigations, the parties concerned have no procedural rights (that is to say, no right to consult files or records and no right to be heard). By the same token, third parties have no right to demand that the Secretariat opens an investigation. The preliminary investigation is intended to determine whether a further investigation is necessary. The decision to open an investigation need not to be taken in the form of a formal decision, and it cannot be appealed.

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For the second stage, the Secretariat must announce the opening of an in-depth investigation by means of an official publication. Such announcement must state the purpose of the investigation and the names of the parties involved. Furthermore, affected third parties have the possibility to join the investigation, albeit with limited procedural rights, upon a corresponding request made within 30 days of the announcement. All parties to the investigation are vested with the usual procedural rights. They may consult files and suggest witness statements, and have the right to be heard and to participate in hearings. The Secretariat conducts the investigation, but the Commission has the power to intervene and to hold hearings, a right which the Commission has made frequent use of in the recent past.

On the basis of this investigation, the Secretariat drafts and brings forward a motion for a decision. The parties and participating third parties may comment on the motion. If important new facts emerge, another round of hearings and witness statements may take place.

An investigation can have one of the following outcomes. First, the Commission may decide that there is no evidence of an unlawful agreement. 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 sanctions, as the case may be. Amicable settlements are limited to cases where no direct sanctions may be imposed.

Formally, the decision itself is not issued by the Secretariat, but by the Commission. Accordingly, the investigating and decision-making bodies are separate.

There are no statutory time limitations applying to investigations. As a rule of thumb, a preliminary investigation can take from one to several months and a formal investigation nine months to two years or more.

9 Investigative powers of the authorities

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

The Secretariat has broad investigative powers. The Secretariat may hear the parties who have allegedly committed the violation as well as third parties concerned (such as competitors or suppliers), ask for statements and hold hearings. It can compel testimony from witnesses, although not from the parties alleged to have entered into an unlawful anticompetitive agreement. Any hearings or witness statements must be evidenced in the minutes. The parties involved have the right to comment on these minutes.

The parties in the investigation are, in principle, required to disclose information and documents.

The competition authorities may use all kinds of evidence to establish the facts, such as documents, information supplied by third parties, testimony and expert opinions.

Moreover, according to article 42(2) of the Cartel Act, the president or each vice-president of the Commission has the power to order inspections/dawn raids and seizures upon request of the Secretariat. The Federal Act on Criminal Administrative Law applies by analogy to such proceedings.

The Secretariat further published a notice on its procedure in inspections, essentially laying down the following:

Right to call in an external lawyer
Undertakings subject to an inspection have the right to be assisted by external lawyers. Such external lawyer will have an advisory role for the undertaking, but will not be considered as a contact person for the Secretariat. The contact person for the Secretariat will be the CEO or the most senior representative of the undertaking present during the investigation.

No waiting for the arrival of the external lawyer
The representatives of the Secretariat in charge of the investigation will not wait for the external lawyer to arrive before searching the premises or seizing documents and electronic data. Any evidence discovered while external lawyers are not present will be separated. Once an external lawyer is on site, he or she may screen the evidence collected in his or her absence, comment on its content and, if necessary, ask for it to be sealed.

Legal privilege
As of 1 May 2013, the protection available under the concept of legal privilege has been expanded and harmonised in Switzerland. Legal privilege now extends to any document produced in the course of the (core) professional activity of an independent attorney. It applies irrespective of when such document was created (ie, before or after an investigation was launched) and of where such document is located, be it in the custody of the attorney him or herself, the client or any other third party. Legal privilege may be invoked by the attorney him or herself, the client and also every third party having a protected document in custody.

The scope of legal privilege is limited to independent attorneys admitted to the Bar that are allowed to professionally represent parties in Swiss courts. Hence, legal privilege is not granted to the work product of in-house counsel.

International cooperation

10 Inter-agency cooperation

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

Switzerland was the first state to sign a second generation cooperation agreement in competition matters with the EU on 17 May 2013. This agreement is the legal basis for cooperation between the European Commission (but not the member states) and the Swiss authorities and facilitates significantly the exchange of information and the transmission of documents between both authorities. The agreement entered into force on 1 December 2014.

11 Interplay between jurisdictions

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 have no legal implications for the Commission. Even if the EU regulatory framework and case law has often made significant inroads into the Commission's practice, the Federal Supreme Court has held explicitly that Swiss competition law must be interpreted independently from EU law.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The Commission is the authority that normally decides cartel matters. The Secretariat is responsible for conducting investigations and preparing cases. In addition, a person 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; or
- restitution of unlawful profits.

Only civil courts have jurisdiction over claims for damages.

13 Burden of proof

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

In proceedings before the Commission, the burden of proof is on the authorities. The principle of investigation applies generally in administrative proceedings, so the Commission and the Federal Administrative Tribunal must 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 appeal courts are obliged to cooperate in assessing the facts and circumstances. In principle, there are no rules of evidence outlining how to conclude that there is valid proof. Recent decisions of the Federal Administrative Tribunal in the *Metal Fittings for Windows* case establish

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that the level of proof required is beyond reasonable doubt. These decisions, which are not final, reject the Commission's previous practice of considering the balance of probabilities as sufficient proof due to the uncertainty of economic findings.

In proceedings before the civil courts, in principle, the burden of proof is with the claimant.

14 Appeal process

What is the appeal process?

Decisions of the Commission and, to a limited extent, also interim procedural decisions, can be appealed to the Federal Administrative Tribunal within 30 days of the notification of the decision.

The addressees of the decision have the right to appeal, whereas it is uncertain to what extent competitors, suppliers or customers have the same right. The decisive factor is whether these third parties are affected by the Commission's decision. Usually this is true if a third party is significantly affected in its market activity by the anticompetitive agreement.

The scope of judicial reviews is extensive. Therefore, an appeal can be lodged on the following grounds:

- wrongful application of the Cartel Act;
- the facts established by the competition authorities were incomplete or wrong; or
- the Commission's decision was unreasonable (this claim is rarely invoked in practice).

However, in practice the Federal Administrative Tribunal grants the Commission a significant margin of technical discretion.

Judgments of the Federal Administrative Tribunal – including to a limited extent, also interim procedural decisions – may be challenged before the Federal Supreme Court within 30 days of the notification of the decision. In proceedings before the Federal Supreme Court, one may not claim that the judgment of the Federal Administrative Tribunal is unreasonable, while claiming the fact finding of the inferior instances to be incomplete or wrong is only permissible to a very limited extent. In principle, the Federal Supreme Court can only review the application of the Cartel Act.

In addition, the parties involved may at any time during and after appeal procedures request the Federal Council to exceptionally authorise a specific behaviour for compelling public interest reasons.

Judgments of the civil courts may ultimately be challenged before the Federal Supreme Court. The above-mentioned developments regarding the request for exceptional authorisation to the Federal Council apply mutatis mutandis. If the legality of a restraint of competition is disputed before a civil court, the case must be referred to the Commission for an expert report.

Sanctions

15 Criminal sanctions

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

There are no direct criminal sanctions for individuals 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.

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.

Individuals who can be fined include executives and board members, as well as all de facto managers and directors. These sanctions are time-barred after five years following the incriminating act.

The Commission has yet to impose fines against individuals in cartel cases.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

From a civil law point of view, the sanction for cartel activities lies in the total or partial nullity of the agreement in question. Although generally accepted in the actual doctrine, it has not yet been confirmed that the nullity of the agreements applies ex tunc.

From an administrative law point of view, under article 49a of the Cartel Act, direct sanctions (fines) are imposed on undertakings that:

- participate in a hard-core horizontal cartel according to article 5(3) of the Cartel Act (see question 4);
- participate in hard-core vertical restraints pursuant to article 5(4) of the Cartel Act (see question 4); or
- abuse a dominant position pursuant to article 7 of the Cartel Act.

The maximum administrative sanction is a fine of up to 10 per cent of the turnover realised in Switzerland during the past three financial years (cumulative). The amount of the fine is calculated by taking into account the duration and gravity of the unlawful agreements or practices, as well as the presumed profit arising from the unlawful agreements or practices. Aggravating factors (such as recidivism, a leading role in the cartel or non-cooperation with the authorities) or mitigating factors (such as a passive role in the cartel, effective cooperation with the authorities or settlement) also have an influence on the final amount. The Ordinance on Sanctions lays down the method of calculation of the fines (please see question 17).

Furthermore, an undertaking that violates to its own advantage an amicable settlement, a legally enforceable decision of the Commission or a judgment of the Federal Administrative Tribunal or the Federal Supreme Court can be fined up to three times the profit generated from such non-compliance. If such profit cannot be calculated or estimated, the amount may not exceed 10 per cent of the undertaking's most recent annual turnover in Switzerland.

Finally, 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.

The Commission has not yet imposed sanctions against individuals acting as private undertakings in cartel cases.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

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 on the Ordinance of Sanctions. According to the principles in the Ordinance on Sanctions, the penalty must be assessed on the basis of the duration and the seriousness of the unlawful conduct, the probable profit that the undertaking has achieved as a result of its conduct and the principle of proportionality.

In a first step, the Commission determines the base amount of the penalty which, depending on the seriousness and nature of the infringement, may amount up to a maximum of 10 per cent of the turnover achieved by the undertaking concerned in the relevant markets in Switzerland during the preceding three financial years.

In a second step, the base amount is increased based on the duration of the infringement.

In a third step, the penalty may be increased or reduced due to aggravating and mitigating factors such as achieving a profit that is particularly high by objective standards, playing an instigating or leading role in the restraint of competition or playing a strictly passive role in the restraint of competition. A discount can also be obtained based on leniency cooperation or on settlement.

Finally, the Commission will ensure that the penalty imposed is proportional. By determining the penalty level the Commission is bound by the maximum amount of the sanction which is 10 per cent of the turnover achieved by the undertaking in Switzerland during the preceding three financial years.

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18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

The Cartel Act contains no specific regulation on the exclusion from public procurement procedures in cases of 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 cartel conduct. In addition, several cantonal procurement acts provide that undertakings may be banned from participating in procurement procedures for a period of several years in cases of cartel conduct. However, no automatic exclusion applies on the federal or cantonal level.

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, 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 Federal Administrative Tribunal or the Federal Supreme Court, as well as the failure to provide information or produce documents, or the partial compliance with the obligation to provide information during an ongoing investigation, are subject to administrative or criminal fines, or both. Criminal prosecutions against individuals rely on similar criteria to those applied in imposing administrative sanctions. However, the roles of individuals in the violation of a decision or judgment, or the failure to comply with their obligations to provide information, as well as subjective criteria (degree of intent) are more important. Civil sanctions may be accompanied by claims for damages and reparations or restitution of unlawful profits from third parties affected by the illegal cartel activity.

Private rights of action

20 Private damage claims

Are private damage claims available? 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; passing-on defences are not excluded. However, a claimant may request the remittance of illicitly earned profits. Court costs as well as legal costs must usually be borne by the losing party in the proceedings. The claimant bears the burden of proof. Under Swiss law, the main difficulties are providing concrete proof of the damage incurred and establishing a sufficient connection between the anticompetitive agreement and the damage. This is even more difficult in the case of indirect purchaser claims.

21 Class actions

Are class actions possible? If yes, 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 standing before civil courts. Whether and to what extent trade associations have standing is a matter of dispute.

Cooperating parties

22 Immunity

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

The Cartel Act provides for a leniency programme. According to the Cartel Act, an undertaking that cooperates with the Commission in view of the discovery and the elimination of a restraint of competition may benefit from total or partial immunity. Only the first applicant may enjoy total immunity. The threshold for total immunity is rather high.

Pursuant to the Ordinance on Sanctions, the Commission may grant immunity from fines if an undertaking is the first to either:

- provide information enabling the Commission to open an in-depth investigation and the Commission did not have, at the time of the filing of the leniency application, sufficient information to open a preliminary or an in-depth investigation (so-called disclosure cooperation); or
- submit evidence enabling the Commission to find a hard-core horizontal or vertical agreement, provided that no undertaking has already been granted conditional immunity from fines and that the Commission did not have, at the time of the filing of the leniency application, sufficient evidence to find an infringement of the Cartel Act (identification cooperation).

Moreover, the undertaking has to fulfil the following conditions:

- it has not coerced any other undertaking into participating in the infringement of competition and has not played the instigating or leading role in the relevant infringement of competition;
- it voluntarily submits to the competition authority all available information and evidence relating to the infringement of competition that lies within its sphere of influence;
- it continuously cooperates with the competition authority throughout the procedure without restrictions and without delay; and
- it ceases its participation in the infringement of competition upon submitting its voluntary report or upon being ordered to do so by the competition authority.

In September 2014, the Secretariat published a revised notice on leniency, which included a form for leniency applications. The notice was slightly revised in August 2015.

In addition, no fine will be imposed if the undertaking itself notifies the restraint of competition 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 undertaking the opening of a preliminary investigation (article 26 of the Cartel Act) or the opening of an in-depth investigation (as per article 27 of the Cartel Act) within a period of five months following the notification of the restraint and the undertaking continues to implement the restraint of competition.

23 Subsequent cooperating parties

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

The Ordinance on Sanctions provides for a partial leniency programme for parties that cooperate with the Commission after the immunity application. It does not allow total immunity from fine, but the fine may be reduced up to 50 per cent of the sanction calculated according to the method explained in question 17. 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).

Further, the amount of the fine can be reduced by up to 80 per cent where an undertaking provides information to the Commission about other hard-core restraints of competition within the meaning of article 5(3) or (4) of the Cartel Act, and such hard-core restraints of competition were unknown to the Commission at the time of

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disclosure (article 8(3) of the Ordinance on Sanctions: the amnesty plus programme).

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

As already mentioned (see question 23), being the second or third or subsequent cooperating party will not allow for total but only partial immunity. 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 that the third and subsequent cooperating parties.

In addition, as mentioned in question 23, there is an amnesty plus option.

25 Approaching the authorities

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 applying for immunity or leniency.

Markers are available. There are no statutory deadlines for applying or perfecting a marker. Marker requirements are set out in the revised notice on leniency published by the Secretariat, including a brief description of the company and the conduct.

26 Cooperation

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?

According to the Ordinance on Sanctions, immunity will only be granted if the 'first-in' undertaking:

- did not coerce any other undertaking to participate in the infringement and was neither instigator nor leader of the cartel;
- voluntarily submits all information or evidence in its possession concerning the unlawful practice in question to the Commission;
- cooperates on a continuing basis in an expeditious manner throughout the Commission's administrative procedure; and
- discontinues 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.

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 it clear that it is not sufficient to simply produce factual elements. In the Secretariat's view, a leniency applicant would in principle have to admit that the unlawful agreement had effects on the markets. However, the recent decisions of the Federal Administrative Tribunal in the *Metal Fittings for Windows* case clearly state the right of the leniency applicants to argue against the Commission's legal interpretation of the facts. The decision is not yet final.

Where an undertaking does not meet these conditions, but has cooperated with the Commission and terminated its involvement in the infringement no later than the time at which it submitted evidence, the Commission still has the possibility to reduce the sanction.

27 Confidentiality

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, minutes of hearings 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 need for confidentiality and, in the recent past, have established several measures to protect leniency applicants. However, these measures have not been tested in court so far. The catalogue of protective instruments includes the possibility to submit oral statements, paperless proceedings and restricted access to the files. Access rights of other parties to an investigation were, in the Secretariat's practice, limited to access the files at the premises of the Secretariat. The right to take photocopies was limited to annexes, while copies of the main body of corporate statements or minutes of hearings were not allowed. In addition, access to the files was only granted shortly before the investigation had finished. The Secretariat has also implemented a number of specific internal measures to protect leniency applicants. Internal access to the file is restricted, and only the case team knows about the existence or identity of leniency applicants. Moreover, the leniency documents are stored in a separate file. The above practice has been set out by the Secretariat in the notice on leniency.

In case of the opening of 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 applicant confidential. In practice, the Secretariat keeps the leniency applicant's identity confidential as long as possible. However, even if the final decision does not reveal the name of the leniency applicant it is not excluded that a party familiar with the facts of the case may deduce its identity from the context. In addition, the competition authorities' publications may not reveal any business secrets.

Furthermore, according to its practice, the Commission excludes leniency information completely from the disclosure of data of a cartel investigation, that is closed and the respective Commission's decision is final and binding, to third parties.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

According to the Cartel Act, neither the Secretariat nor the Commission is authorised to enter into a plea bargain or a binding resolution to resolve liability and penalty for alleged cartel activity.

However, article 29 of the Cartel Act provides that the Secretariat may propose settlements to undertakings involved concerning ways to eliminate the restraint of competition. A settlement must be made in writing and requires formal approval of the Commission. The settlement will also include a proposal of the range of the fine which, however, has to be finally decided by the Commission.

Settlements are binding on 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 (see questions 15 and 16). In recent proceedings, the Secretariat has used settlement rules for the settlement discussions.

29 Corporate defendant and employees

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

There is no effect on employees of the defendant. They are not addressees of administrative sanctions.

30 Dealing with the enforcement agency

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 and specify the date and time of its receipt. With the consent of the

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Update and trends

Tightening of Swiss cartel law: per se significance of hard-core restraints

In June 2016, the Federal Supreme Court rejected Gaba's appeal and decided that a contractual clause prohibiting a licensee to export into other territories constitutes an illegal agreement which significantly restricts competition.

The Federal Supreme Court decided that vertical and horizontal agreements on price, quantity and territory according to article 5(3) and (4) of the Cartel Act in principle significantly restrict competition. The significance of the competition restraints is assumed for hard-core agreements due to their quality without the need to examine quantitative effects, such as market shares. Significance is only absent – according to the Federal Supreme Court's oral debate on this ruling – in case of minor effects on competition, such as 'bagatelle offences' which were not further defined. Therefore, horizontal and vertical hard-core agreements are only permissible if they can be justified on the grounds of economic efficiency.

In its judgment, the Federal Supreme Court also held that direct sanctions may be imposed for hard-core agreements according to article 5 (3) and (4) of the Cartel Act that significantly restrict but do not eliminate competition. This question had been disputed for a long time in Swiss doctrine.

The written statement of the grounds is still outstanding.

Further decisions regarding geographic scope of the Cartel Act and the per se significance of hard-core restraints

In November 2015, the Federal Administrative Court confirmed the fine imposed on BMW for restricting direct and parallel import into Switzerland by clauses in BMW's EEA dealer contracts. It stated that pursuant to the effects doctrine restrictions of competition committed outside Switzerland also fall into the geographic scope of the Cartel Act. It is sufficient that the restriction of competition may have had an effect on the Swiss market. By contrast, whether the restrictions of competition actually had an effect on the Swiss market is not decisive. In the case at hand, it was sufficient that BMW's EEA dealer contracts could affect the selling of new vehicles into Switzerland. Furthermore, the Federal Administrative Court held – in line with the most recent *Gaba* decision of the Supreme Court from June 2016 – that territorial restrictions (in particular absolute territorial protection) within the meaning of article 5 (4) of the Cartel Act are per se to be qualified as significant restrictions of competition.

In September 2016, the Federal Administrative Court also confirmed the fine imposed on Nikon for restricting parallel import into Switzerland by clauses in distributor contracts. The *Nikon* decision is the first decision of the Federal Administrative Court in which the *Gaba* decision of the Federal Supreme Court had to be taken into consideration. The Federal Administrative Court took its decision in accordance with the *Gaba* decision and held that even in the light of the *Gaba* decision it has to be assumed that the actual implementation of a restricting clause still needs to be examined.

Neither the *BMW* nor the *Nikon* case has entered into legal force yet.

Conditional access to files in cartel proceedings

In August 2016, the Swiss Federal Administrative Court 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 a municipality seeking civil damage claims. However, the Court limited the access to file in various respects: first, data may only be accessed to the extent necessary, meaning that data retention for later use is not allowed. Second, access is to be limited to data that 'directly affects' the requesting party. Third, access may only be granted and data may only be used to serve the purpose disclosed in the access request and a legal obligation must be imposed on the requesting party to that effect. Fourth, access to the files must not include data of companies that were involved in the investigated conduct but which had not been addressees of the decision.

In the case at hand, the Court did not have to decide on information requests of private undertakings. It would appear that in such a case the conditions applied by the Court are all the more relevant. Neither did the Court formally decide on the issue of access to leniency application data. However, the Court explicitly endorsed the practice of the Commission to exclude leniency information completely from access of third parties. Whether these third parties are public or private entities should have no bearing.

Tax deductibility of fines and other administrative sanctions of punitive nature

In September 2016, the Swiss Federal Supreme Court ruled that fines and other sanctions of a punitive nature are not tax deductible for legal entities, as they are not deemed to be business-related expenses. Tax deductibility is only granted insofar as sanctions aim at disgorging illegally obtained profits.

In the case at hand, the Swiss Federal Supreme Court had to judge the deductibility of a fine of €348,000 imposed in 2009 on a Swiss company by the European Commission for carrying out administrative activities in connection with cartel agreements. The Swiss Federal Supreme Court ruled that fines and other financial sanctions of a punitive nature imposed on legal entities on their own responsibility are not deductible for corporate income tax and capital tax purposes. However, the Court admitted that sanctions aiming at disgorging illegally obtained profits are deemed to be business-related expenses and thus tax deductible. Such sanctions do not have a punitive purpose, but aim at correcting an unlawful situation. In the present case, the Court referred the matter back to the lower court in order to examine whether the imposed fine was of pure punitive nature, or whether a part of it represented a profit disgorgement sanction.

According to this case, it is essential for Swiss income tax purposes to distinguish fines with a punitive nature from sanctions aimed at disgorging illegally-obtained profits. In its decision, however, the Swiss Federal Supreme Court did not provide specific guidance on how this distinction is to be made.

president or either of the two vice-presidents of the Commission, the Secretariat will communicate to the applicant whether it deems that the conditions for total 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.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No, there are currently no ongoing reviews of the immunity/leniency regime.

Defending a case

32 Disclosure

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

During the preliminary investigation procedure, there is no right of access to file. After the opening of an investigation, the defendant has a right to access the file. The files include submissions from parties and the comments made thereon by the authorities, any documents serving as evidence as well as copies of rulings already issued. The authority may under certain conditions – for example, essential public or private interests – refuse access to file. In particular, access to file may be limited with respect to business secrets as well as information regarding leniency applications of other parties (see question 27).

33 Representing employees

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

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 sanction apply to individuals and undertakings, as a general rule it is advisable to seek independent legal advice.

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34 Multiple corporate defendants

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

Under the Cartel Act, the Commission may require groups of more than five parties in a cartel proceeding to appoint a common representative, provided these parties have identical interests and if otherwise the investigation would be unduly complicated. In practice, the Secretariat mainly applies this rule in cases involving trade associations, and provided that the members of such trade associations agree to one representative.

A limitation on representing multiple corporate defendants applies if the interests of the various clients are in conflict. Under such circumstances it would be advisable for a party to seek independent legal advice.

35 Payment of penalties and legal costs

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 criminal sanctions imposed.

36 Taxes

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

In a recent ruling, the Federal Supreme Court held that fines and other financial sanctions of punitive nature imposed on legal entities on their own responsibility are not deductible as business expenses for corporate income tax purposes. In the same ruling, the Federal Supreme Court also clarified that fines or sanctions aiming at disgorging illegally obtained profits are deemed to be business-related expenses and thus tax deductible (see 'Update and trends').

In parallel, the Swiss government aims at establishing an explicit legal basis for this question: A draft legislative bill published by the Swiss Federal Council in December 2015 provides that financial administrative sanctions of criminal nature as well as the related cost of proceedings will not be deductible while profit disgorgement sanctions of non-penal purpose will be deductible.

Private damages awards that take place in the ordinary course of business qualify in principle as business expenses and are deductible from profit taxes.

37 International double jeopardy

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

It is in the Commission's discretion to take into account sanctions imposed in other jurisdictions. The Commission states in its explanatory communication on the Ordinance of Sanctions that for the sake of reasonability of sanctions it may consider administrative sanctions imposed outside Switzerland. However, there is no statutory obligation in this respect and, so far, the Commission has not considered foreign sanctions as a mitigating factor in its case law. In private damage claims, it could be argued that damages paid for the same conduct in another jurisdiction could be taken in consideration in order to determine the effective damage of the party.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Generally, the best way to influence the level of fines is to fully cooperate with the competition authorities as early as possible and to disclose all relevant facts. An undertaking cooperating with the competition authorities in view of the discovery and the elimination of a restraint of competition will in principle enjoy total or partial immunity. Moreover, a settlement with the authority may also result on a reduction of the potential fine.

Further, it is more important than ever for undertakings whose activities 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 antitrust compliance programmes 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, however, be taken into consideration by the Commission when deciding on the level of fines.

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Taiwan

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The principal legislation concerning cartels in Taiwan consists of:

- the Antitrust Compliance Guideline for Enterprises, promulgated in October 2011;
- the Fair Trade Law (FTL), the most recent amendments to which were promulgated in June 2015;
- the Guidelines on Filing for Approval of Cartel Activity, the most recent amendments to which were promulgated in September 2015;
- the Regulations for Calculation of Administrative Fines for Serious Violations of articles 9 and 15 of the FTL, the most recent amendments to which were promulgated in March 2015;
- the Regulations on Immunity and Reduction of Fines in Illegal Cartel Activity Cases, the most recent amendments to which were promulgated in March 2015; and
- the Enforcement Rules of the FTL, the most recent amendments to which were promulgated in July 2015.

2 Relevant institutions

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?

At the national level, the Fair Trade Commission (FTC), an independent government authority, governs cartel regulation and enforcement. Its seven commissioners serve four-year terms and may be reappointed. The FTC is empowered to examine and investigate possible violations of the FTL, and to take action against violators by imposing administrative fines and other penalties. The FTC undertakes investigations in response to complaints against cartel activities and on its own initiative.

3 Changes

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

The amendments to the FTL, which were promulgated in February 2015, included the following significant changes.

First, mutual understanding may be presumed by the FTC based on the market status, the products, the characteristics of the goods or services, the costs and profits, and the financial impact of the business conduct at issue.

Second, the amendments provide for more general conditions for cartel exemptions. In addition to those conditions set forth under article 15 of the FTL (see question 4), an exemption may be granted where a concerted action is considered to be necessary for improving industrial development, technological innovation or operational efficiency.

Third, according to the newly amended article 16 of the FTL, the maximum period for cartel exemption approval was extended from three years to five years.

Fourth, the maximum penalty available was also raised (see question 16).

Lastly, the statute of limitations for imposing administrative penalties on illegal cartels was extended from three years to five years as calculated from the date of termination of the conduct or of the occurrence of the consequences of the act, if the consequences occurred later. Accordingly, proceedings undertaken by the FTC must be completed prior to the expiration of this period.

In addition to the above, the amendments, which were promulgated in June 2015, stipulate the establishment of an antitrust fund (see question 9).

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

According to article 14 of the FTL, cartel activity refers to:

> *[...] the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price, the quantity, the technology, the products, the facilities, the trading counterparts, or trading territory of goods or services, or to limit each other's business activities with respect to such goods and services, resulting in an impact on the market function with respect to production, trade in goods or supply and demand of services; [...]*

Illegal cartel activity is limited to horizontal arrangements, and not vertical arrangements. Means of carrying out a horizontal cartel activity include but are not limited to an act of a trade association restricting the activities of its members by means of its charter and resolutions passed at a general meeting of members, or a board meeting of directors or supervisors. Mutual understanding is not limited to explicit expressions; in certain circumstances, some activities may meet the conditions of article 14 of the FTL if they constitute tacit consent. However, based on the FTL amendments, such mutual understanding could be presumed by the FTC based on the market status, the characteristics of the goods or services, the costs and profits, and the financial impact of the business conduct at issue.

Cartel activity is illegal per se unless the action has met specific conditions and has been approved by the FTC in light of its benefits to the economy and to the public interest. According to article 15 of the FTL, the specific conditions for exemption are as follows:

- unifying the specifications or models of goods for the purpose of reducing costs, improving quality or increasing efficiency;
- joint research and development of goods or markets for the purpose of upgrading technology, improving quality, reducing costs or increasing efficiency;
- developing a separate and specialised area for the purpose of rationalising operations;
- entering into agreements solely concerning competition in foreign markets for the purpose of securing or promoting exports;
- joint acts regarding the import of foreign goods for the purpose of strengthening trade;
- in a time of economic downturn where the market price of the products is lower than the average production costs, resulting in enterprises in a particular industry having difficulty maintaining their business or encountering a situation of overproduction, joint

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acts limiting the quantity of production and sales, equipment or prices for the purpose of meeting demand in an orderly fashion;
- joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small and medium-sized enterprises; or
- joint acts are considered to be necessary for improving industrial development, technological innovation or operational efficiency.

The FTC has published principles to deal specifically with price-fixing activities between small and medium-sized enterprises, purchasing agreements between petrol station operators and cartel activities in the civil air transport and elevator repair businesses. In addition, the FTC has published rules that establish standards for applying article 14 of the FTL in specified areas of business activity, including real estate agency, banking, and telecommunications. In June 2016, the FTC published amendments to the Guidelines on Handling Cases Involving Trade Associations and Other Organizations, which revised the list of activities that may constitute cartel activities if performed by trade associations or other organisations.

Application of the law and jurisdictional reach

5 Industry-specific provisions

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

The FTC may grant an exemption for a cartel activity that meets the conditions set forth in article 15 of the FTL (see question 4). For cartel activities by specific types of enterprises such as small and medium-sized enterprises, petrol station operators and civil air transport businesses, the guidelines promulgated by the FTC (see question 4) specify the criteria for defences and exemptions.

6 Application of the law

Does the law apply to individuals or corporations or both?

The FTL applies to both corporations (and other legal entities) and individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The FTL extends to conduct that takes place outside Taiwan if the conduct has an effect on the relevant market in Taiwan. In September 2012, the FTC issued a decision fining four foreign corporations active primarily in international markets for a cartel to rig bids and fix prices for optical disk drives. This was the first case in which the FTC investigated a cartel based on an application for leniency made pursuant to the new leniency programme adopted in amendments to the FTL in November 2011.

In December 2015, the FTC found that seven aluminium capacitor companies, namely, Nippon Chemi-Con Corporation (NCC), Hong Kong Chemi-Con Limited (NCC HK), Taiwan Chemi-Con Corporation (NCC TW), Rubycon Corporation(RUBYCON), ELNA Co Ltd (ELNA), SANYO Electric (Hong Kong) Ltd (SANYO HK) and Nichicon (Hong Kong) Ltd (NICHICON HK), and three tantalum capacitor companies, NEC TOKIN Corporation(NEC TOKIN), Vishay Polytech Co, Ltd (VISHAY POLYTEC) and Matsuo Electric Co Ltd (MATSUO) participated in meetings or bilateral communications to exchange sensitive business information such as prices, quantity, capacity, and terms of trade to reach agreements, the conducts were sufficient to affect the market function of capacitor in Taiwan. The amounts of the fines imposed by the FTC totalled NT$5,796,600,000. The FTC stressed that this case has shown the successful results of its efforts in international enforcement cooperation with other competition authorities through years. The FTC had worked with competition authorities of US, EU and Singapore in investigation activities since the beginning. In addition, the FTC also exchanged enforcement experiences with these agencies through telephone conferences or emails. The FTC's decision is the first among competition agencies and will be a highly concern internationally as it is still under investigation at least in countries such as China, the EU, Japan, Singapore, South Korea and the US.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Before opening a formal investigation, the administrative department of the FTC reviews all the facts, evidence and other information provided by informants or obtained through the FTC's own investigation. The administrative department then drafts a report and submits it with relevant evidence to the FTC commissioner or commissioners on duty for review. If the commissioner or commissioners consider the information or evidence to be sufficient, the administrative department commences an investigation within one to two weeks. If the commissioner or commissioners consider the information or evidence available to be insufficient, the administrative department may either seek further specific information or evidence, or decide not to conduct a full investigation.

The administrative department of the FTC gives informants written notice when it decides to open an investigation. The informants may also contact the case handler appointed by the FTC to track the progress of the case.

During the course of the FTC's investigation, both parties and any related parties may, in order to claim or defend their legal rights and interests, apply to read, transcribe, photocopy or photograph relevant materials or files obtained by the FTC. With the information or evidence discovered from the investigation, both parties and related parties may, from time to time, file further complaints or answers with additional evidence or supplemental information to strengthen their arguments, or ask the FTC to conduct a further investigation, stating the reasons therefor.

The length of the investigation depends mainly on how complex the facts are, how much evidence needs to be investigated, and the volume of cases that the FTC is handling. A cartel investigation normally takes more than one year to complete. During the investigation, if the enterprise being investigated makes commitments to take specific measures to cease and rectify its alleged illegal conduct within the time period prescribed by the FTC, the FTC may suspend the investigation. If the enterprise has fulfilled its commitments by taking specific measures to cease and rectify its alleged illegal conduct, the FTC may decide to terminate the investigation. However, under any of the following circumstances, the investigation will resume if:
- the enterprise fails to fulfil its commitments;
- there have been significant changes to the facts upon which the decision to suspend the investigation was based; and
- the decision to suspend the investigation was based on incomplete or misleading information that had been provided by the enterprise.

The FTC does not usually reveal the existence of an ongoing investigation publicly. If investigations do become publicly known, it is usually because the case is also being investigated in other jurisdictions or involves foreign companies, and is discovered by the press.

Once an investigation is completed, it is handed over to a meeting of the FTC commissioners for a final decision.

9 Investigative powers of the authorities

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

According to article 27 of the FTL, when the FTC conducts an investigation, it may:
- notify the parties and any related third parties to appear to make statements;
- notify the parties and any related third parties to submit books and records, documents and any other necessary materials or exhibits; and
- dispatch personnel for any necessary on-site inspections of the offices, places of business or other locations of the parties and any related third parties.

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Generally speaking, the FTC may also adopt any other investigation methods in addition to those mentioned above so long as the FTC considers the methods appropriate. Court approval is not required for the FTC to initiate such investigations. However, the FTL does not grant the FTC search and seizure powers.

The FTC may retain material obtained from the investigation that may serve as evidence. The scope and duration of holding the retained material is limited to the need of investigation, inspection, verification or any other purpose of preserving evidence. Any person, subject to an investigation conducted by the FTC, shall not evade, obstruct or refuse to cooperate without justification.

Article 44 of the FTL further states that, should any person subject to an investigation conducted by the FTC pursuant to article 27 evade, obstruct or refuse to cooperate with the investigation without justification, an administrative fine of not less than NT$50,000 but no more than NT$500,000 may be imposed. If such person continues to refuse without justification upon another notice, the FTC may continue to issue notices of investigation, and each time may impose successive administrative fines of not less than NT$100,000 but not more than NT$1,000,000 per occurrence until the person accepts the investigation, appears to respond or supplies the relevant materials.

Also, according to article 47-1, to strengthen the investigation and sanction over concerted actions and promote the healthy development of market competition, the FTC may set up an antitrust fund. Capital sources of the antitrust fund include 30 per cent of the fines imposed on according to the FTL. The fund shall be used for the following purposes:

- rewards for the reporting of illegal concerted actions;
- promotion of cooperation, investigation and communication matters with international competition law enforcement agencies;
- subsidies to cover expenses incurred in litigation associated with the FTL;
- deployment and maintenance of databases;
- research and development on the systems;
- education and advocacy; and
- other necessary expenditures to maintain the market order.

International cooperation

10 Inter-agency cooperation

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

Taiwan is an observer at the OECD Competition Commission and a regular participant at the meetings of the International Competition Network. Taiwan has entered into cooperation agreements or MOUs with, and has cooperated with, various authorities in other jurisdictions (eg, France and Canada). For those countries where FTC has not established official relationships, according to reports issued by the FTC, the FTC can still obtain agent information from these countries regarding international cartel activities through information on official websites, from private email exchanges with agents of competition authorities of these countries, via telephone conferences with these countries' representatives or via other forms of communications.

11 Interplay between jurisdictions

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?

Jurisdictions that, like Taiwan, have a strong technology media and telecommunications (TMT) sector tend to have relatively greater interplay with Taiwan given the importance of that sector to the Taiwan economy. For example, there have been a number of multi-jurisdictional investigations originated in the United States, Korea and Japan in recent years relating to the TMT sector. Due to the lack of search and seizure powers of the FTC, the FTC has in many cases launched investigations only after the competition authorities in other jurisdiction, which have more well-developed investigatory powers, have issued decisions or obtained significant evidence in connection with an investigation in which parties in Taiwan have been involved.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Once an investigation is completed, it is handed over to the FTC commissioners for a final decision. The FTC consists of seven full-time commissioners, who convene once a week and on an ad hoc basis when necessary. All decisions made at a commissioners' meeting require majority approval by the commissioners in attendance. The duration of meetings is not fixed and depends on the complexity of the case being discussed.

FTC commissioners' meetings are not open to the public, and attendees are prohibited from recording minutes of meetings or disclosing the content of meetings. However, all final decisions of the commissioners' meetings are made public via the FTC website.

13 Burden of proof

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

The FTC bears the initial burden of proof with regard to the allegations of cartel activities. According to article 14 of the FTL, mutual understanding may be presumed based on a number of factors, such as market condition, characteristics of the good or service, cost and profit considerations and economic rationale of the business conduct. If the FTC provides evidence for the case, the burden of proof then shifts to the suspected violator.

14 Appeal process

What is the appeal process?

Any decision of the FTC commissioners may be appealed to the Taipei High Administrative Court within two months from the date of receipt of the decision. Likewise, the decision of the Taipei High Administrative Court may be appealed to the Supreme Administrative Court within 20 days from the date of receipt of a judgment from the Taipei High Administrative Court.

Cases are subject to review of the findings of law and fact in the High Administrative Court, and review of the findings of law in the Supreme Administrative Court.

Sanctions

15 Criminal sanctions

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

The FTC may, according to article 40 of the FTL, order an enterprise to cease cartel activity, rectify its conduct or take necessary corrective action by a specified deadline; in addition, the FTL may also impose an administrative fine of NT$100,000 to NT$50 million. Under article 34 of the FTL, if the enterprise fails to satisfy the order or, after ceasing the cartel activity, commits the same violation, the criminal sanction for the actor is imprisonment for no more than three years or detention, a fine of not more than NT$100 million, or both.

Administrative sanctions for cartel activity must be sought prior to criminal sanctions, and criminal sanctions will not be pursued in respect of the same conduct unless the administrative sanctions fail to stop the cartel activity (see question 16).

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

There are no civil sanctions that may be pursued by the government. However, civil sanctions may be pursued by individuals or private entities for damages incurred (see question 20).

According to article 40 of the FTL, the FTC may order an enterprise to cease cartel activity, rectify its cartel conduct or take necessary corrective action within the time prescribed in the order. It may also levy an administrative fine of NT$100,000 to NT$50 million. If the enterprise fails to satisfy the order by the end of the prescribed period, the FTC may continue to issue successive orders, and in each instance of failure to comply may levy an administrative fine of NT$200,000 to

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NT$100 million. If the FTC deems the violation serious, it may impose an administrative fine of up to 10 per cent of the total sales income of the enterprise in the previous fiscal year, without being subject to this limit. As mentioned in question 15, administrative fines are levied in virtually all violations and the criminal sanctions were rarely imposed.

The FTC published the Regulations for Calculation of Administrative Fines for Serious Violations of articles 9 and 15 of the FTL, which establish guidelines for administrative fines for serious violation. According to such Regulation, a serious violation refers to unlawful conduct that has seriously affected market competition and order, as determined by consideration of the following factors:

- the scope and extent of the harm to market competition and order;
- the duration of the damage to market competition and order;
- the market status of the enterprise in violation and the structure of the corresponding market;
- the total sales and profits obtained from the unlawful conduct during the violation period; and
- the type of cartel – joint product or service price decision, or quantity, trading counterpart or trading area restriction.

Conduct leading to one of the following circumstances may be deemed a serious violation:

- the total product or service sales obtained during the violation period by one of the participating enterprises in the cartel actions exceeds NT$100 million; or
- the total profits obtained from the unlawful conduct exceed the upper limit for administrative fines of NT$100 million.

The administrative fine to be imposed for a serious violation is calculated by determining the basic amount (30 per cent of the sales of the product or service involved in the cartel during the violation period) and increasing or decreasing it according to the following circumstances:

- circumstances supporting fine increases:
  - the enterprise in question organised or encouraged the unlawful conduct;
  - the enterprise in question implemented supervision or sanctioning measures to ensure that the cartel was upheld or implemented; and
  - in the preceding five years, the enterprise in question was sanctioned for prohibited monopolistic activities or for engaging in cartel activities without approval; or
- circumstances supporting fine reductions:
  - the enterprise in question immediately ceased the unlawful act when the FTC began its investigation;
  - the enterprise in question has shown real remorse and has cooperated in the investigation;
  - the enterprise in question has established compensation agreements with the victims or has taken remedial measures;
  - the enterprise in question participated in the cartel under coercion; and
  - the actions of the enterprise in question are encouraged or approved by other agencies or can be granted in accordance with other laws.

The first two items regarding fine reductions do not apply to enterprises that the FTC has approved for fine reductions under the leniency programme (described below).

The FTC may also grant reductions of or exemptions from fines on enterprises in violation of article 15 of the FTL if such enterprise qualifies for the leniency programme.

The maximum administrative fine is 10 per cent of the previous fiscal year's total sales income of the enterprise sanctioned.

Since the date that the FTL went into effect, until 14 September 2016, the FTC has issued orders against 205 cartel offences.

Until late 2011, administrative fines of NT$50,000 to NT$25 million were imposed for cartel activities, and the actual fines levied were at the lower end of that range. On 23 November 2011, the FTL was amended to permit administrative fines of up to 10 per cent of the total sales income of an enterprise in the previous fiscal year without being subject to the limit of the administrative fine (set forth above). Subsequently, on 13 March 2013, the FTC levied a record-high administrative fine of NT$6.32 billion against nine independent power producers. This FTC decision was overturned on appeal to the Executive Yuan and was remanded to the FTC. The FTC later adjusted the fine down to NT$6.007 billion on 10 July 2014.

Other amendments to the FTL on 23 November 2011 introduced a leniency and immunity programme for cartel activities. In 2012, in a case involving four optical disk drive companies, the FTC used this programme to waive all administrative fines for the first time.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

There are no sentencing guidelines. However, there are guidelines for administrative fines that are binding on the FTC (see question 16). Leniency and immunity programmes in Taiwan apply to administrative fines only.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

No, the FTC does not have the power under the FTL or other Taiwanese regulations to impose debarment from government procurements as a discretionary sanction for cartel infringements.

19 Parallel proceedings

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

As noted in question 15, administrative sanctions for cartel activity must be sought prior to criminal sanctions. However, civil sanctions and administrative sanctions could be pursued in parallel, provided that the civil damages are available only to private parties.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Yes, private damage claims are permitted. Articles 30 and 31 of the FTL provide for awarding damages to a person harmed by a violation of the FTL, such as cartel behaviour. If the violation is intentional, a court may, taking into consideration the nature of the infringement, award compensation beyond actual proven damages, provided that no award shall exceed three times the value of the proven damages. It is doubtful as to whether indirect purchaser claims would be permitted, as the FTL does not expressly exclude such claims from private damage claims. However, the indirect purchaser would need to prove that he or she has suffered damages in order to substantiate such claims.

21 Class actions

Are class actions possible? If yes, 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?

According to article 44-2 of Taiwan's Civil Procedure Code, class actions are possible for a violation of the FTL. Multiple parties who have common interests should first appoint one or more persons among themselves to sue on behalf of the appointing parties and the appointed parties. The court may then, with the consent of the appointed party, or upon the court deeming the original appointed party's motion appropriate, publish a notice to the effect that other persons with the same common interests may join the action by filing a pleading within a designated period of time specifying the transaction or occurrence giving rise to such claim, the evidence and a demand for judgment for the relief. Those persons so joining shall be deemed to have made the aforementioned appointment. The appointed parties may conduct all acts of litigation for the appointing parties, provided, however, that

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the appointing parties may restrict the appointed parties' authority to abandon claims, admit claims, voluntarily dismiss the action or settle the case.

Cooperating parties

22 Immunity

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

Yes, but only for administrative sanctions.

On 6 March 2015, the FTC amended the Regulations on Immunity and Reduction of Fines in Illegal Cartel Activity Cases (the Immunity and Reduction Rules) under amendments to the FTL promulgated in February 2015.

According to article 35 of the FTL, the FTC is empowered to reduce or entirely waive administrative fines that would otherwise be imposed on enterprises participating in a cartel if one of the following conditions exists:

- the enterprise files a complaint or informs the FTC in writing about the specific cartel activities that the enterprise has participated in, and also provides evidence and assists with the investigation before the FTC becomes aware of the illegal conduct or before it has initiated its own investigation (Condition 1); or
- the enterprise reveals the specific illegal conduct, and also submits evidence and assists with the FTC's investigation during the period the FTC is investigating the illegal conduct in accordance with the FTL (Condition 2).

However, if the FTC has already obtained enough evidence to initiate the investigation, or the investigation is already in process when an application is submitted according to the Condition 1, the application may be rejected. This principle also applies if the FTC has already obtained enough evidence to establish the involved enterprises' illegal cartel activities when an application is submitted according to Condition 2.

Under the Immunity and Reduction Rules, the leniency and immunity programme is only available to those enterprises with concrete evidence that they have not coerced other enterprises to participate in or remain part of the cartel actions. In addition, an enterprise may not apply for a reduction in or immunity from administrative fines if it has been found to have been involved in either of the following activities between the time that it first intends to apply for leniency or immunity until the time that the FTC initiates an investigation:

- destroying, forging, altering or concealing evidence related to the cartel in which it is involved; or
- directly or indirectly disclosing to other parties its intention to apply for immunity or reduction of fines, or any of the information that it intends to provide to the FTC to apply for immunity or reduction of fines.

A leniency or immunity applicant must provide concrete evidence that can assist the FTC in initiating an investigation under Condition 1 or establishing that the enterprises involved have participated in a cartel under Condition 2. To facilitate the FTC's initiation of an investigation under Condition 1, the applicant must provide concrete details of the cartel activities in which it has been involved, along with related evidence that the FTC does not possess or is unaware of to give an outline of the cartel activities in question, as well as the time and location where the mutual understanding was established and the content of the mutual understanding or other related matters for the FTC to initiate an investigation. To help the FTC establish the violation by the involved enterprises under Condition 2:

- the applicant must provide a statement of concrete details of the cartel activities in question, along with evidence obtained prior to the time of application, which evidence is capable of proving the existence of the cartel activities; or
- the contents of the statement and evidence from the applicant are able to assist the FTC in its investigation of the cartel activities in question.

If an application complies with the above qualifications, the FTC may approve immunity from or a reduction of the administrative fines with conditions attached, which may include:

- that the applicant shall withdraw from the cartel in question immediately upon filing the application or at a time specified by the FTC; or
- that the applicant shall follow the instructions of the FTC and provide honest, full and continuous assistance in the investigation from the time the application is filed until the case is concluded. Such assistance shall include the following:
- the enterprise shall provide the FTC at the earliest opportunity with all information and evidence regarding the cartel activity in question that it currently possesses or may obtain in the future. For those applying for fine reductions, the information and evidence provided must be of significant help in the FTC's investigation on the cartel activity in question or able to enhance the probative value of the evidence the FTC has already obtained;
- the enterprise shall follow the instructions of the FTC and provide prompt descriptions or cooperation to help the investigation with related facts capable of proving the existence of the cartel in question;
- if necessary, the enterprise must require its staff members or representatives that have participated in activities related to the cartel in question to be examined by the FTC;
- none of the statements, information or evidence provided may contain any falsehoods, and no destruction, forgery, alteration or concealment of any information or evidence related to the cartel in question shall be tolerated; and
- without the consent of the FTC, the applicant may not disclose to any other parties the fact that an application has been filed or the content of the application prior to the case being concluded.

Complete immunity from administrative fines may be granted only under either of the following circumstances:

- the enterprise is the first to apply according to Condition 1, has been approved by the FTC for immunity with conditions attached and has fulfilled all of the conditions attached by the FTC; or
- the enterprise is the first to apply according to Condition 2, has been approved by the FTC for immunity with conditions attached and has fulfilled all of the conditions, provided that Condition 1 is not applicable to any other enterprises.

Enterprises in compliance with the above circumstances that have been approved by the FTC with conditions attached and have fulfilled all of the conditions attached may be granted a reduction in the fines to be imposed. The ratio of the fine reductions shall be applied as follows:

- the first applying enterprise that meets the requirements shall be granted a 30–50 per cent reduction in the fines to be imposed;
- the second applying enterprise that meets the requirements shall be granted a 20–30 per cent reduction in the fines to be imposed;
- the third applying enterprise that meets the requirements shall be granted a 10–20 per cent reduction in the fines to be imposed; and
- the fourth applying enterprise that meets the requirements shall be granted a reduction of up to 10 per cent of the fines to be imposed.

Enterprises applying for immunity or a reduction in fines shall each present their own information and evidence, and file an oral or written application with the FTC separately. In cases where there are multiple enterprises applying for immunity or a reduction in fines for the same cartel, priority status shall be determined in accordance with the time that the applications are filed. Two or more enterprises that are affiliated (as defined under Taiwan's Company Law) may jointly file an application and shall be regarded as one enterprise when priority status is determined.

23 Subsequent cooperating parties

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

See question 22.

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Update and trends

With the significant regulatory change followed by the FTL amendments, the relevant guidelines and the internal rules of the FTC have been revised to reflect the law change at issue, and the FTC is also using these revisions as an opportunity to strengthen enforcement of the FTL in due course.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

See question 22.

25 Approaching the authorities

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

See question 22.

26 Cooperation

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?

See question 22.

27 Confidentiality

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

According to the Immunity and Reduction Rules, the identities of all applicants will be kept confidential unless the applicant has given prior consent to the contrary. Any document exchanges and communication records between the applicants and the FTC containing information that could identify the applicants will not be available for review by others, nor will they be provided to any agencies, groups or individuals other than investigation and judicial agencies, unless the law provides otherwise. When publishing its decisions, the FTC may redact information that could identify the applicants or may issue separate decision letters to the various enterprises participating in the cartel so as to not disclose information that could identify the other participants or the penalties given to the other participants.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

No. Criminal sanctions may not be pursued unless administrative sanctions fail to halt the cartel activity.

29 Corporate defendant and employees

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

The directors, representatives and managers of an enterprise involved, or others with the authority to represent the enterprise that, according to paragraphs 1 and 2 of article 15 or article 16 of Taiwan's Administrative Penalty Law, are to be jointly penalised, may also be granted immunity or a reduction in fines if the following requirements are met:

- the involved enterprise is granted immunity or a reduction of the fine;
- the involved parties provide honest and complete statements regarding the unlawful act; and
- the involved parties follow the instruction of the FTC and provide honest, complete and continuous assistance during the investigation until the case is concluded.

30 Dealing with the enforcement agency

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

Enterprises applying for immunity or a reduction of the fine must present the information and evidence required and file an oral or written application with the FTC individually. Written applications must comply with the format established by the FTC and be submitted by registered mail or in person. Enterprises filing an oral application must send a representative to the offices of the FTC to make the statement. In such case, the FTC will record the statement given and will require that the representative sign a record confirming the statement.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No.

Defending a case

32 Disclosure

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

Under the Guidelines Governing Access to Materials and Files of the FTC promulgated by the FTC in accordance with article 46 of the Taiwan Administrative Procedure Act, parties to a complaint (both the complainant and the defendant) and any related third parties are allowed to access the materials and files of the FTC.

Production and marketing data, statements of opinion and relevant documents provided by the parties or related third parties can be accessed unless the information is confidential by nature, is subject to confidentiality requirements for legitimate reasons, or would impede the FTC in the performance of its duties. However, the identity and background data of the parties and related third parties, and data unrelated to the case are not accessible.

In general, the data from FTC investigations are accessible, such as investigation statement records, the structure of questionnaires and their statistical results, expert opinions, the opinions presented at forums and public hearings, opinions of other administrative authorities and investigation records of the FTC, unless the information is confidential by nature, is subject to confidentiality requirements for legitimate reasons, or would impede the FTC in the performance of its duties. Individual questionnaires, identity of experts and their background data, evidence gathered during FTC investigations (other than photographs) and video and audio records are not accessible.

33 Representing employees

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

Subject to Bar rules on conflicts of interest, counsel may represent employees under investigation as well as the corporation.

34 Multiple corporate defendants

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

Subject to Bar rules on conflicts of interest, counsel may represent multiple corporate defendants, regardless of whether they are affiliated.

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35 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Subject to the company's internal rules, a corporation may pay the legal costs of and penalties imposed on its employees.

36 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines and private damage awards are not tax-deductible.

37 International double jeopardy

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 regulations, rulings or precedents supporting or prohibiting the FTC from taking international double jeopardy into account. There are no regulations, rulings or precedents permitting or prohibiting the court from taking into account overlapping liability for damages in other jurisdictions.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The optimal way to minimise a fine is to be the first to come forward to the FTC, preferably before the FTC initiates an investigation, and then to provide concrete evidence to and fully cooperate with the FTC. Article 35 of the FTL also provides for a leniency programme.

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation on cartel regulation is the Law on Protection of Competition No. 4054 of 13 December 1994 (the Competition Law). The Competition Law finds its underlying rationale in article 167 of the Turkish Constitution of 1982, which authorises the government to take appropriate measures and actions to secure a free market economy. The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The national authority for investigating cartel matters in Turkey is the Competition Authority. The Competition Authority has administrative and financial autonomy and consists of the Competition Board (the Board), presidency and service departments. Five divisions with sector-specific work distribution handle competition law enforcement work through approximately 125 case handlers. A research department, a leniency unit, a decisions unit, an information-management unit, an external-relations unit and a strategy development unit assist the five technical divisions and the presidency in the completion of their tasks. As the competent body of the Competition Authority, the Board is responsible for, inter alia, investigating and condemning cartel activity. The Board consists of seven independent members.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

After a long wait on the sidelines, the Prime Ministry finally sent the Draft Law on Protection of Competition to the Presidency of the Turkish Parliament on 23 January 2014. The Draft Law is designed to introduce new concepts to the Turkish competition cartel regime such as the de minimis defence and the settlement procedure. In 2015, the Draft Law became obsolete again due to the general elections in June and November 2015. It is yet to be seen whether the new Turkish Parliament or the Government will renew the Draft Law. As reported in the 2015 Annual Report of the Competition Authority, the Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law. The 2015 Annual Report of the Competition Authority notes that the Competition Authority may take steps toward the amendment of certain articles if Parliament does not pass the Draft Law.

The Turkish Competition Authority announced for public consultation the Draft Regulation on Administrative Monetary Fines. The Draft Regulation is set to replace the current Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines). Consultations on the Draft Regulation are still ongoing. The most significant changes the Draft Regulation will bring are as follows:

- the base fine to be determined based on 'the turnover generated in the relevant market, which is directly or indirectly related to the respective competition law infringement';
- the impact and the duration of the infringement will also be taken into account in calculating the base fine;
- the Competition Board will take into account factors such as the concerned undertaking's market power, the infringement's nature and the actual or potential damages of the infringement, as well as the geographical scope of the violation;
- the three aggravating factors are (i) being the leader or the initiator of the infringement, (ii) coercion, and (iii) non-compliance to commitments previously made to the Competition Board and recidivism; which increase the base fine by half or one-fold;
- the Competition Board is obliged to reduce the fine when mitigation factors exist, without any discretion;
- the Competition Board has the discretion to increase the fines in certain cases, with the intent to ensure deterrence; and
- where the administrative fine would compromise the ability of maintaining the respective undertaking's economic activities, the Board can reduce the fine upon request.

Finally, the following key legislative texts have been announced and enacted between 2013 and the beginning of 2016:

- Block Exemption Communiqué No. 2016/5 on R&D Agreements;
- Communique on the Increase of the Lower Threshold for Administrative Fines Specified in paragraph 1, article 16 of the Act No. 4054 on the Protection of Competition;
- Guidelines on the Evaluation of the Abuse of Dominance Through Discriminatory Practices, enacted on 7 April 2014;
- Guidelines on Exclusionary Abusive Conducts by Companies in Dominant Positions, enacted on 29 January 2014;
- Block Exemption Communiqué on Specialization Agreements (Communiqué No. 2013/3), entered into force on 26 July 2013;
- Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions, enacted on 26 March 2013;
- Guidelines on Active Cooperation for the Exposure of Cartels, enacted on 17 April 2013;
- Guidelines on the Protection of Horizontal Agreements in line with articles 4 and 5 of the Competition Law Act No. 4054, enacted on 30 April 2013;
- Guidelines on the Assessment of Horizontal Mergers and Acquisitions, enacted on 4 June 2013;
- Guidelines on the Assessment of Non-horizontal Mergers and Acquisitions, enacted on 4 June 2013;
- Guidelines on Cases Considered as Merger and Acquisition and Concept of Control, enacted on 16 July 2013; and
- Guidelines on General Principles of Exemption, enacted on 28 November 2013.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

Article 4 of the Competition Law is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union

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(TFEU) (ex article 81(1) of the EC Treaty). It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Article 4 does not bring a definition of 'cartel'. Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Unlike the TFEU, article 4 does not refer to 'appreciable effect' or 'substantial part of a market' and thereby excludes any de minimis exception. The enforcement trends and proposed changes to the legislation are, however, increasingly focusing on de minimis defences and exceptions.

Article 4 prohibits agreements that restrict competition by object or effect. The assessment whether the agreement restricts competition by object is based on the content of the agreement, the objectives it attains and the economic and legal context. The parties' intention is irrelevant to the finding of liability but it may operate as an aggravating or mitigating factor, depending on circumstances. Article 4 also prohibits any form of agreement that has the potential to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, recognising a broad discretionary power of the Board. Both actual and potential effects are taken into account. Pursuant to the Guidelines on Horizontal Cooperation Agreements, the restrictive effects are assessed on the basis of their adverse impact on at least one of the parameters of the competition in the market, such as price, output, quality, product variety or innovation. Article 4 brings a non-exhaustive list of restrictive agreements that is, to a large extent, the same as article 101(1) TFEU. The list includes examples such as price fixing, market allocation and refusal to deal agreements. A number of horizontal restrictive agreement types, such as price fixing, market allocation, collective refusals to deal (group boycotts) and bid rigging, have consistently been deemed to be per se illegal. Certain other types of competitor agreements such as vertical agreements and purchasing cartels are generally subject to a competitive effects test.

The prohibition on restrictive agreements and practices does not apply to agreements that benefit from a block exemption or an individual exemption (or both) issued by the Board. The applicable block exemption rules are:

- the Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
- the Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector;
- the Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
- the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
- the Block Exemption Communiqué No. 2013/2 on Specialisation Agreements; and
- Block Exemption Communiqué No. 2016/5 on R&D Agreements.

These are all modelled on their respective equivalents in the EU. The newest of these block exemptions, the Block Exemption Communiqué No. 2016/3 on R&D Agreements, sets out revised rules for research and development agreements in Turkey, overhauling the Block Exemption Communiqué No. 2003/2 on Research and Development Agreements in order to retain the harmony between EU and Turkish competition law instruments.

Restrictive agreements that do not benefit from the block exemption under the relevant communiqué or an individual exemption issued by the Board are caught by the prohibition in article 4.

The Turkish antitrust regime also condemns concerted practices and the Competition Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called 'the presumption of concerted practice'. The special challenges posed by the proof standard concerning concerted practices are addressed in question 13.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

There are no industry-specific offences or defences. The Competition Law applies to all industries, without exception. To the extent that they act as an undertaking within the meaning of the Competition Law, state-owned entities also fall within the scope of application of article 4.

Due to the 'presumption of concerted practice' (see question 13), oligopoly markets for the supply of homogenous products (eg, cement, bread yeast, ready-mixed concrete) have constantly been under investigation for concerted practice. Nevertheless, whether this track record (over 29 investigations in the cement and ready-mixed concrete markets in 17 years of enforcement history) leads to an industry-specific offence would be debatable.

There are sector-specific antitrust exemptions. The block exemptions applicable in the motor vehicle sector and in the insurance sector are notable examples. The Turkish competition law does not provide any specific exceptions to government-sanctioned activities or regulated conduct. There are, however, examples where the Competition Board took the state action defence into account (see, eg, *Paper Recycling*, 8 July 2013, 13-42/538-238; *Waste Accumulator*, 4 October 2012, 12-48/1415-476; *Pharmaceuticals*, 2 March 2012, 12-09/290-91; *Et-Balık Kurumu*, 16 June 2011, 11-37/785-248; *Türkiye Şöförler ve Otomobilciler Federasyonu*, 3 March 1999, 99-12/91-33; *Esgaz*, 9 August 2012, 12-41/1171-384).

6 Application of the law

Does the law apply to individuals or corporations or both?

The Competition Law applies to 'undertakings' and 'associations of undertakings'. An undertaking is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. The Competition Law therefore applies to individuals and corporations alike if they act as an undertaking.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Turkey is one of the 'effect theory' jurisdictions where what matters is whether the cartel activity has produced effects on Turkish markets, regardless of the nationality of the cartel members, where the cartel activity took place or whether the members have a subsidiary in Turkey. The Board has refrained from declining jurisdiction over non-Turkish cartels or cartel members in the past, as long as there has been an effect on the Turkish markets (see, for example, *Sisecam/Yioula*, 28 February 2007; 07-17/155-50; *Gas Insulated Switchgear*, 24 June 2004; 04-43/538-133; *Refrigerator Compressor*, 1 July 2009; 09-31/668-156). It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside of Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service or failure to identify a tax number). The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules. Article 2 of the Competition Law would support at least a colourable argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside of Turkey does not in and of itself produce effects in Turkey.

The Board finds the underlying basis of its jurisdiction in article 2 of the Competition Law, which captures all restrictive agreements, decisions, transactions and practices to the extent they produce an effect on a Turkish market, regardless of where the conduct takes place.

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Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The Board is entitled to launch an investigation into an alleged cartel activity ex officio or in response to a complaint. In the case of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent for 60 days. The Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced onsite inspections) (see question 9) and other investigatory tools (eg, formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Board within 30 days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 days whether to launch a formal investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months by the Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences (first written defence). Subsequently, the main investigation report is issued by the Competition Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30-day period to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Competition Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held ex officio or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Competition Board. The Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterpart.

9 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine is 17,700 Turkish lira (Communique on the Increase of the Lower Threshold for Administrative Fines Specified in paragraph 1, article 16 of the Act No. 4054 on the Protection of Competition (Communiqué No. 2016/1)). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

Article 15 of the Competition Law also authorises the Board to conduct on-site investigations and dawn raids. Accordingly, the Board is entitled to:

- examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;
- request undertakings and trade associations to provide written or verbal explanations on specific topics; and
- conduct on-site investigations with regard to any asset of an undertaking.

Refusal to grant the staff of the Competition Authority access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the 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). It may also lead to the imposition of a fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision, for each day of the violation (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

The Competition Law provides vast authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. Other than that, the Competition Authority does not need to obtain judicial authorisation to use its powers. While the wording of the Law is such that employees can be compelled to give verbal testimony, case handlers do allow a delay in giving an answer so long as there is a quick written follow-up correspondence. Therefore, in practice, employees can avoid providing answers on issues that are uncertain to them, provided that a written response is submitted within a mutually agreed time. Computer records are fully examined by the experts of the Competition Authority, including but not limited to deleted items.

Officials conducting an on-site investigation must be in possession of a deed of authorisation from the Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc) in relation to matters that do not fall within the scope of the investigation (that is, that which is written on the deed of authorisation).

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Article 43 of Decision No. 1/95 of the EC–Turkey Association Council (Decision No. 1/95) authorises the Competition Authority to notify and request the European Commission (DG Competition) to apply relevant measures if the Board believes that cartels organised in the territory of the European Union adversely affect competition in Turkey. The provision grants reciprocal rights and obligations to the parties (the EU and Turkey), and thus the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

There are also a number of bilateral cooperation agreements between the Competition Authority and the competition agencies in other jurisdictions (eg, Romania, Korea, Bulgaria, Portugal, Bosnia-Herzegovina, Russia, Croatia and Mongolia) on cartel enforcement matters. The Competition Authority also has close ties with the OECD, UNCTAD, WTO, ICN and the World Bank.

The research department of the Competition Authority makes periodic consultations with relevant domestic and foreign institutions and organisations about the protection of competition in order to assess their results, and submits its recommendations to the Board. As an example, a cooperation protocol was signed on 14 October 2009 between the Turkish Competition Authority and the Turkish Public Procurement Authority in order to procure a healthy competition environment with regard to public tenders by cooperating and sharing information. Informal contacts do not constitute a legal basis for the Turkish Competition Authority's actions.

11 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

It is fair to say that the interplay between jurisdictions does not in practice materially affect the Board's handling of cartel investigations, including cross-border cases. Principle of comity does not take part as

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an explicit provision in Turkish Competition law. A cartel's conduct that was investigated elsewhere in the world can be prosecuted in Turkey if it has had an effect on non-Turkish markets.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The Board can initiate an inspection about an undertaking or an association of undertakings upon complaint or ex officio. Cartel matters are primarily adjudicated by the Board. Enforcement is supplemented with private lawsuits as well. Private suits against cartel members are tried before regular courts. Due to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Competition Authority and build their own decision on that decision.

13 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The most important material issue specific to Turkey is the very low standard of proof adopted by the Board. The participation of an undertaking in a cartel activity requires proof that there was such a cartel activity or, in the case of multilateral discussions or cooperation, that the particular undertaking was a participant. With a broadening interpretation of the Competition Law, and especially of the 'object or effect of which...' branch, the Board has established an extremely low standard of proof concerning cartel activity. The standard of proof is even lower as far as concerted practices are concerned; in practice, if parallel behaviour is established, a concerted practice might readily be inferred and the undertakings concerned might be required to prove that the parallel behaviour is not the result of a concerted practice. The Competition Law brings a 'presumption of concerted practice', which enables the Board to engage in an article 4 enforcement in cases where price changes in the market, supply-demand equilibrium or fields of activity of enterprises bear a resemblance to those in the markets where competition is obstructed, disrupted or restricted. Turkish antitrust precedents recognise that 'conscious parallelism' is rebuttable evidence of forbidden behaviour and constitutes sufficient ground to impose fines on the undertakings concerned. Therefore, the burden of proof is very easily switched and it becomes incumbent upon the defendants to demonstrate that the parallelism in question is not based on concerted practice, but has economic and rational reasons behind it.

Unlike the EC, where the undisputed acceptance is that tacit collusion does not constitute a violation of competition, the Competition Law does not give weight to the doctrine known as 'conscious parallelism and plus factors'. In practice, the Competition Board does not go to the trouble of seeking 'plus factors' along with conscious parallelism if naked parallel behaviour is established.

Recent indications in practice also suggest that the Competition Authority officials are increasingly inclined to adopt a broadening interpretation of the definition of 'cartel'.

14 Appeal process

What is the appeal process?

As per Law No. 6352, which entered into force as of 5 July 2012, final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified (reasoned) decision of the Board. Decisions of the Competition Board are considered as administrative acts, and thus legal actions against them shall be pursued in accordance with the Turkish Administrative Procedural Law. The judicial review comprises both procedural and substantive review.

As per article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, at the request of the plaintiff the court, by providing its justifications, may decide on a stay of execution if the execution of the decision is likely to cause serious and irreparable damages, and the decision is highly likely to be against the law (that is, showing of a prima facie case).

The judicial review period before the Ankara administrative courts usually takes about 12 to 24 months. Decisions by the Ankara administrative courts are, in turn, subject to appeal before the regional courts (appellate courts) and the High State Court.

After the recent legislative changes, administrative litigation cases will now be subject to judicial review before the newly established regional courts (appellate courts). The new legislation has created a three-level appellate court system consisting of administrative courts, regional courts (appellate courts) and the High State Court. The regional courts will (i) go through the case file both on procedural and substantive grounds and (ii) investigate the case file and make their decision considering the merits of the case. The regional courts' decisions will be considered as final in nature. The decision of the regional court will be subject to the High State Court's review in exceptional circumstances, which are set forth in article 46 of the Administrative Procedure Law. In this case, the decision of the regional court will not be considered as a final decision. In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed by the High State Court, it will be remanded back to the deciding regional court, which will in turn issue a new decision which takes into account the High State Court's decision. The appeal period before the High State Court usually takes about 24 to 36 months. Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 30 months.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability), but no criminal sanctions. Cartel conduct will not result in imprisonment against individuals implicated. That said, there have been cases where the matter had to be referred to a public prosecutor before or after the competition law investigation was complete. On that note, bid-rigging activity may be criminally prosecutable under section 235 et seq of the Turkish Criminal Code. Illegal price manipulation (manipulation through disinformation or other fraudulent means) may also be punished by up to two years of imprisonment and a judicial fine under section 237 of the Turkish Criminal Code.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

In the case of a proven cartel activity, the undertakings concerned will be separately subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings. After the recent amendments, the new version of the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings or the compliance with their commitments etc, in determining the magnitude of the monetary fine.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all de facto and legal consequences of every action that has been taken unlawfully and to take all other necessary measures in order to restore the level of competition and status as before the infringement. Furthermore, such a restrictive agreement shall be deemed legally

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invalid and unenforceable with all its legal consequences. Similarly, the Competition Law authorises the Board to take interim measures until the final resolution on the matter in case there is a possibility of serious and irreparable damages.

The years 2015 and 2016 have witnessed various fining decisions on cartels. The Board imposed administrative monetary fines in no less than 10 cases (*Six Cement Companies in the Aegean Region,* 14 January 2016, 16-02/44-14; Yeast Producers, 30 March 2015, 14-42/738-346; *Kahramanmaraş Driving Schools*, 20 August 2014, 14-29/610-264; *Tokat Kırıkkale Private Teaching Institutions*, 11 August 2014, 14-27/556-239; *Aegean Region Driving Schools*, 11 August 2014, 14-27/555-238; *Kırıkkale Driving Schools*, 8 May 2014, *Aksaray Bakeries*, 16 April 2014, 14-15/287-120; 14-17/330-142; *Didim Bakeries*, 22 January 2014, 14-04/80-33; *Aksaray Driving Schools*, 12 February 2014, 14-06/127-56; *Hyundai Dealers*, 15 December 2013, 13-70/952-403; *Çorum Construction Inspection Firms*, 2 December 2013, 13-67/929-391; *Erzincan Ready-Mixed Concrete Investigation*, 17 September 2013, 13-54/755-315, and *Cement and Ready-Mixed Concrete*, 17 September 2013, 13-54/756-316). Having said that, a great majority of the investigations into cartel allegations did not result in monetary fines against defendants in 2016.

The highest administrative monetary fine ever imposed by the Board in a cartel case is 213,384,545.76 Turkish lira, which was imposed on the economic entity comprising Türkiye Garanti Bankası AŞ ve Garanti Ödeme Sistemleri AŞ and Garanti Konut Finansmanı Danışmanlık AŞ (*Banking Industry*, 8 March 2013, 13-13/198-100). This amount represented 1.5 per cent of Garanti's annual gross revenue for the year 2011. The case also represents the highest ever combined administrative monetary fine, which amounts to 1,116,957,468.76 Turkish lira.

Civil actions are still rare but increasing in practice.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

After the recent amendments, the new version of the Competition Law makes reference to article 17 of the Law on Minor Offences to require the Board to take into consideration factors such as the level of fault and amount of possible damage in the relevant market, the market power of the undertakings within the relevant market, the duration and recurrence of the infringement, the cooperation or driving role of the undertakings in the infringement, the financial power of the undertakings, compliance with their commitments, etc, in determining the magnitude of the monetary fine. In line with this, the Regulation on Monetary Fines was recently enacted by the Turkish Competition Authority. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but illegal concentrations are not covered by the Regulation on Fines. According to the Regulation on Fines, fines are calculated by first determining the basic level, which in the case of cartels is between 2 and 4 per cent of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines applies also to managers or employees that had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity), and provides for certain reductions in their favour.

The Regulation on Fines is binding on the Competition Authority.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Bid riggers in government procurement tenders may face blacklisting (ie, debarment from government tenders) for up to two years under article 58 of the Public Tenders Law No. 4734. The blacklisting is decided by the relevant ministry implementing the tender contract or by the relevant ministry that the contracting authority is subordinate to or is associated with. It is even a duty, not an option, for administrative authorities to apply for blacklisting in the case of bid rigging in government tenders.

Blacklisting is only applicable to bid rigging – it is not available in cases of other forms of cartel infringement.

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Yes. The same conduct can trigger administrative or civil sanctions (or criminal sanctions in the case of bid rigging or other criminally prosecutable conduct) at the same time.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

One of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq of the Competition Law entitle any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times their damages plus litigation costs and attorney fees. The Turkish obligation law regulates the joint creditors and prevents the debtor from the double recovery. All the creditors shall pursue a claim against the debtor and in that case, the debtor shall pay on the amount of their shares. However, in the event that the debtor make a payment to only one creditor as a whole, this creditor shall be liable to the others and the other creditors.

Antitrust-based private lawsuits are rare but increasing in practice. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal-to-supply allegations.

Indirect purchaser claims have not yet been tested before the courts.

21 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts.

Turkish procedural law allows group actions under article 113 of the Turkish Procedure Law No. 6100. Associations and other legal entities may initiate a group action to 'protect the interest of their members', 'to determine their members' rights', and 'to remove the illegal situation or prevent any future breach'. Group actions do not cover actions for damages. A group action can be brought before a court as one single lawsuit only. The verdict shall encompass all individuals within the group.

Cooperating parties

22 Immunity

Is there an immunity programme? What are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Regulation on Active Cooperation for Discovery of Cartels (Regulation on Leniency) was enacted on 15 February 2009. The Regulation on Leniency sets out the main principles of immunity and leniency mechanisms. In parallel to the Regulation on Leniency, the Board published the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels on April 2013.

The leniency programme is only applicable for cartel cases. It does not apply to other forms of antitrust infringement. Section 3 of the Regulation on Leniency provides for a definition of cartel that encompasses price fixing, customer, supplier or market sharing, restricting output or placing quotas and bid rigging.

A cartel member may apply for leniency until the investigation report is officially served on it. Depending on the timing of the application, the applicant may benefit from full immunity or fine reduction.

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The first one to file an appropriately prepared application for leniency before the investigation report is officially served may benefit from full immunity. Employees or managers of the first applicant can also benefit from the full immunity granted to the applicant firm. However, there are several conditions an applicant must meet to receive full immunity from all charges. One of them is not to be the coercer of the reported cartel. If this is the case (ie, if the applicant has forced the other cartel members to participate in the cartel), the applicant firm and its employees may only receive a reduction of between 33 per cent and 100 per cent. The other conditions are as follows:

- the applicant shall submit information and evidence in respect of the alleged cartel, including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, specific dates, locations and participants of cartel meetings;
- the applicant shall not conceal or destroy information or evidence related to the alleged cartel;
- the applicant shall end its involvement in the alleged cartel except when otherwise is requested by the assigned unit on the ground that detecting the cartel would be complicated;
- the applicant shall keep the application confidential until the end of the investigation, unless otherwise is requested by the assigned unit; and
- the applicant shall maintain active cooperation until the Board takes the final decision after the investigation is completed.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

The Regulation on Leniency provides for the possibility of a reduction of the fine for 'second-in' and subsequent leniency applicants. Also, the Competition Authority may consider the parties' active cooperation after the immunity application as a mitigating factor as per the provisions of Regulation on Fines.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

The second firm to file an appropriately prepared application would receive a fine reduction of between 33 and 50 per cent. Employees or managers of the second applicant that actively cooperate with the Competition Authority would benefit from a reduction of between 33 and 100 per cent.

The third applicant would receive a 25 per cent to 33 per cent reduction. Employees or managers of the third applicant that actively cooperate with the Competition Authority would benefit from a reduction of 25 per cent up to 100 per cent.

Subsequent applicants would receive a 16 per cent to 25 per cent reduction. Employees or managers of subsequent applicants would benefit from a reduction of 16 per cent up to 100 per cent.

There is no amnesty plus or immunity plus option.

25 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

As stated in question 22, a cartel member may apply for leniency until the investigation report is officially served. Although the Regulation on Leniency does not provide detailed principles on the 'marker system', the Competition Authority can grant a grace period to applicants to submit the necessary information and evidence. For the applicant to be eligible for a grace period, it must provide minimum information concerning the affected products, duration of the cartel and names of the parties. A document (showing the date and time of the application and request for time to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

Leniency applications submitted after the official service of the investigation report would not benefit from conditional immunity. Still, such applications may benefit from fine reductions.

26 Cooperation

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?

The applicant must submit: information on the products affected by the cartel; information on the duration of the cartel; names of the cartelists; dates, locations, and participants of the cartel meetings; and other information or documents about the cartel activity. The required information may be submitted verbally. A marker is also available. Admission of actual price effect is not a required element of leniency application. The applicant must avoid concealing or destroying the information or documents concerning the cartel activity. Unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel. Unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served. The applicant must continue to actively cooperate with the Competition Authority until the final decision on the case has been rendered. The applicant must also convey any new documents to the Authority as soon as they are discovered; cooperate with the Authority on additional information requests; and avoid statements contradictory to the documents submitted as part of the leniency application.

These ground rules apply to subsequent cooperating parties as well.

Indications in practice show that the Authority was, until recently, inclined to adopt an extremely high standard regarding what constitutes 'necessary documents and information for a successful leniency application' and the 'minimum set of documents that a company is required to submit'. In *3M* (27 September 2012; 12-46/1409-461), the investigation team recommended that the Board revoke the applicant's full immunity on the grounds that the applicant did not provide all of the documents that could be discovered during a dawn raid. Unfortunately, the reasoned decision did not go into the details of the matter, since the case was closed without a finding of violation. This approach arguably sets an almost impossible standard for 'cooperation' in the context of the leniency programme that very few companies will be able to meet. The trend towards adopting an extremely broadening interpretation of the concepts of 'coercion' and 'the Authority's already being in possession of documents that prove a violation at the time of the leniency application' are all alarming signs of this new trend.

Recently, however, the Board eased the tensions a little and handed a new decision that could beckon a new era for the Turkish leniency programme. On 30 March 2015, the reasoned decision of the fresh yeast producers investigation was released (14-42/738-346). The decision is the first of its kind to be entered by the Board where it granted full immunity, based on article 4/2 of the Regulation on Active Cooperation for Detecting Cartels. This immunity was afforded to a submission made after the initiation of the preliminary investigation and dawn raids. It serves as a landmark case as it is the first instance where the Board granted immunity after dawn raids. The Board justified its unprecedented application by claiming that substantive evidence and added value was brought in through the leniency application. The case is therefore expected to result in an increase in number of leniency applications in Turkey in the near future.

27 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

According to the principles set forth under the Regulation on Leniency, the applicant (the undertaking or the employees or managers of the undertaking) must keep the application confidential until the end of the investigation, unless otherwise requested by the assigned unit. The same level of confidentiality is applicable to subsequent cooperating parties as well. While the Competition Board can also evaluate the information or documents ex officio, the general rule is that information

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or documents that are not requested to be treated as confidential are accepted as not confidential. Undertakings must request in writing confidentiality from the Competition Board and justify their reasons for the confidential nature of the information or documents that are requested to be treated as commercial secrets. Non-confidential information may become public through the reasoned decision, which is typically announced within three to four months after the Competition Board has decided on the case.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The Board does not enter into plea bargain arrangements. A mutual agreement on other liability matters (which would have to take the form of an administrative contract) has also not been tested in Turkey. When enacted, the new Draft Law is expected to introduce a form of settlement procedure.

29 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

The current employees of a cartelist entity also benefit from the same level of leniency or immunity that is granted to the entity. There are no precedents about the status of former employees as yet.

Apart from this, according to the Regulation on Leniency a manager or employee of a cartelist may also apply for leniency until the investigation report is officially served. Such an application would be independent from applications by the cartel member itself, if there are any. Depending on the application order, there may be total immunity from, or reduction of, a fine for such manager or employee. The reduction rates and conditions for immunity or reduction are the same as those designated for the cartelists.

30 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Since active cooperation is required from all applicant cartel members in order to maintain the leniency or immunity granted by the Board, extra effort should be spent to keep the Board informed to the maximum possible extent regarding the cartel that is subject to investigation.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

There are no ongoing or proposed leniency and immunity policy assessments or policy reviews. That said, the Turkish Competition Authority has recently published the Guidelines on Explanation of the Regulation on Active Cooperation for Discovery of Cartels in April 2013.

Defending a case

32 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The right of access to the file has two legal bases in the Turkish competition law regime: (i) Law No. 4982 and (ii) Communiqué No. 2010/3 on the Regulation of Right to Access to File and Protection of Commercial Secrets (Communique No. 2010/3). Article 5/1 of Communiqué No. 2010/3 provides that the right of access to the case file will be granted upon the written requests of the parties within due period during the investigations. The right to access the file can be exercised on written request at any time until the end of the period for submitting the last written statement. This right can only be used once so long as no new evidence has been obtained within the scope of the investigation. On the other hand, Law No. 4982 does not have such a restriction in terms of timing or scope. Access to the case file enables the applicant to get access to information and documents in the case file that do not qualify as (i) internal documents of the Competition Authority, or (ii) trade secrets of other firms or trade associations. Law No. 4982 provides for similar limitations.

33 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to seek independent legal advice?

So long as there are no conflicts of interest, Turkish law does not prevent counsel from representing both the investigated corporation and its employees. That said, employees are hardly ever investigated separately, and there is no criminal sanction against employees for antitrust infringements in practice.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

So long as there are no conflicts of interest, and all the related parties consent to such representation, attorneys-at-law (members of a Turkish bar association qualified to practise law in Turkey) can and do represent multiple corporate defendants, even if they are not affiliated. Persons who are not attorneys sometimes also undertake representations, but they are not bound by the same ethics codes binding attorneys in Turkey.

35 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

Yes. It is advisable to seek separate tax or bookkeeping advice before the corporation pays the legal costs or penalties imposed on its employee.

36 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Pursuant to article 11 of the Corporate Tax Law No. 5520, any administrative monetary fine is not considered as tax-deductible. Depending on the specific circumstances, losses, damages and indemnities paid based upon judicial decisions may or may not be tax-deductible. This requires a case-by-case analysis and it is advisable to seek separate tax or bookkeeping advice in each case.

There is a reduction mechanism for the administrative monetary fines. The relevant legislation on payment of administrative monetary fines allows the undertakings to discharge from liability by paying 75 per cent of the fine, provided that the payment is made before any appeal. The payment of such amount is without prejudice to a later appeal. The time frame in which to pay the 75 per cent portion terminates on the 30th calendar day from the service of the full reasoned decision.

37 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

No. The Turkish Competition Authority would not take into account penalties imposed in other jurisdictions. The specific circumstances surrounding indirect sales are not tried under Turkish cartel rules (see question 8).

Overlapping liability for damages in other jurisdictions is not taken into account.

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Update and trends

The most recent changes with respect to the Turkish cartel regime were the publication of the Block Exemption Communiqué on R&D Agreements of 16 March 2016, overhauling the Block Exemption Communiqué on Specialisation Agreements of 26 July 2013. Furthermore, in 2015, the Draft Law became yet again obsolete due to the general elections in June and November 2015.

The year in review did not witness ground-breaking cartel cases or record fines for cartel activity. In fact, there is an easily detectable decline in the number of cartel cases. Most of the fully fledged investigations did not result in monetary fines against the defendants.

Recently, the Board concluded that six cement companies operating in the Aegean region of Turkey violated article 4 of the Competition Law by sharing sales territories and increasing resale prices in collusion in the Aegean region (14 January 2016, 16-02/44-14). The Board fined the cement producers a total of approximately 71 million Turkish lira. The fines ranged between 3 per cent and 4.5 per cent of each company's 2014 annual turnover. These fines were relatively high for a Turkish jurisdiction in terms of turnover percentage.

In another case, the Board rendered a decision on the investigation conducted in order to determine whether nine international companies active in railway freight forwarding services market have restricted competition by sharing customers (16 December 2015, 15-44/740-267). The Board concluded that the agreements have not produced effects on the Turkish markets so declined jurisdiction. This decision shows the scope and limits of the Turkish Competition Authority's jurisdiction.

In *Diye*, the Board had ordered the involved parties to cease and desist observing the infringing activities but spared them from the fine by delivering its opinion pursuant to article 9/3 of Competition Law that is commonly called a 9/3 order (12.12.2014, 14-51/900-410). In the decision, references were made to the lack of evidence to show any oral or written agreement or mutual consensus between the buyers, and to the share of advertisers' advertisement expenses in the overall advertisement expenses. The Board's decision weighed whether (i) the cumulative effect that may occur as a result of an increase in the number of undertakings that participate in the system due to the nature of the information obtained by the advertisers within the scope of the service provided through the system under investigation, and (ii) certain competitive concerns could be raised in the relevant market in the medium and long term. As a result, the Board ordered an immediate halt of the activities in question. On appeal, the Ankara Administrative Court decided that (i) there is no violation of the Competition Law and (ii) the Board failed to substantiate its case (E.2015/101; K.2015/1371).

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Aside from the newly introduced leniency programme, article 9 of the Competition Law, which generally entitles the Board to order structural or behavioural remedies to restore the competition as before the infringement, sometimes operates as a conduit through which infringement allegations are settled before a full-blown investigation is launched. This can only be established through a very diligent review of the relevant implicated businesses to identify all the problems, and adequate professional coaching in eliminating all competition law issues and risks. In cases where the infringement was too far advanced for it to be subject to only an article 9 warning, the Board at least found a mitigating factor in that the entity immediately took measures to cease any wrongdoing and if possible to remedy the situation.

There have been cases where the Board considered the existence of a compliance programme as an indication of good faith (*Unilever*, 12-42/1258-410; *Efes*, 12-38/1084-343). However, recent indications suggest that the Board is disinclined to consider a compliance programme to be a mitigating factor. Although they are welcome, the mere existence of a compliance programme is not enough to counter the finding of an infringement or even to discuss lower fines (*Frito Lay*, 13-49/711-300; *Industrial Gas*, 13-49/710-297). In *Industrial Gas*, the investigated party argued that it has immediately initiated a competition law compliance programme as soon as it received the complaint letters, which were originally submitted to the Authority. However, the Board did not take into account this as a mitigating factor. To that end, there is room to argue that the Board does not take into account compliance initiatives undertaken after the investigation has commenced as a mitigating factor.

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

There are two principal pieces of UK legislation governing cartel activity in the UK: the Competition Act 1998 (the Competition Act) and the Enterprise Act 2002 (the Enterprise Act). Both the Competition Act and the Enterprise Act were amended in 2014 by the Enterprise and Regulatory Reform Act 2013 (the Reform Act) (see question 3). In addition, EC Council Regulation No. 1/2003 allows the UK competition authorities and courts to apply and enforce article 101 (and 102) of the Treaty on the Functioning of the European Union (TFEU).

See also question 4 for an explanation of the substantive law.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

In the UK, both the Competition Act and article 101 (and 102) TFEU are currently enforced by the Competition and Markets Authority (CMA) and certain sectoral regulators, such as those responsible for communications matters, electricity and gas, water and sewerage, civil and railway services. These sectoral regulators have concurrent competition powers, subject to the CMA's role as a central governing body. The Financial Conduct Authority (in relation to financial sector activities) and the Payment Services Regulator (in relation to participation in payment systems) are the most recent regulators to be given a full set of concurrent powers (from 1 April 2015). There is no separate prosecution authority for civil cartel infringements.

The CMA's powers of investigation and prosecution in respect of the criminal cartel offence under the Enterprise Act are shared with the Serious Fraud Office (SFO). The SFO is the intended prosecutor for this criminal offence in England, Wales and Northern Ireland in cases that involve serious or complex fraud. In Scotland, the Lord Advocate is responsible for all prosecutions and exercises the same powers as the SFO through the National Casework Division (NCD) of the Crown Office. The CMA and NCD cooperate to investigate and prosecute criminal cartel cases in Scotland.

The Competition Appeal Tribunal (CAT) hears appeals against cartel decisions taken by the CMA or the sectoral regulators under the Competition Act. The criminal cartel offence may be tried either in a magistrates' court or before a jury in the Crown Court. With regard to the criminal cartel offence, there is a right of appeal to the higher courts under the normal rules governing criminal cases. For further details of the appeals regime, see question 14.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The Reform Act, which amends the Competition Act and the Enterprise Act, came into force on 1 April 2014. It introduced a number of significant changes to the UK's competition law regime including the creation of a single competition authority, the CMA (combining the functions of the Office of Fair Trading (OFT) and the Competition Commission) with enhanced investigation powers and the lowering of the threshold for the adoption of interim measures. It also significantly amended the scope of the criminal cartel offence, by removing the requirement for dishonesty and introducing various new exclusions and defences (see question 4).

The Consumer Rights Act 2015 (the Consumer Rights Act) came into force on 1 October 2015. It significantly enhanced the CAT's private enforcement role by enabling it to hear stand-alone claims (where the alleged breach of competition law has not already been determined by the CMA, a relevant sectoral regulator or the European Commission), as well as follow-on cases (where the claim is based on an infringement decision of the CMA, a relevant sectoral regulator or the European Commission) and to grant injunctions. It also introduced a fast-track procedure for relatively simple private claims in the CAT, making the CAT's limitation periods consistent with those of the High Court, and enabling cases to be transferred to the CAT from the High Court (and vice versa). Furthermore, it introduced a new 'opt-out' collective action regime which is expected to lead to an increase in the number of competition cases heard by the UK courts (see questions 20 and 21).

See also 'Updates and trends'.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The provisions of article 101 TFEU are outlined in the EU chapter. The Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that:

- may affect trade within the United Kingdom; and
- have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom.

This prohibition, known as the Chapter I prohibition, is modelled on article 101. The Competition Act contains a non-exhaustive list of conduct that will be caught by the Chapter I prohibition, mirroring the equivalent provisions of article 101. This includes agreements, decisions or practices that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, technical development or investment; or
- share markets or sources of supply.

As a matter of practice, any agreement that fixes prices, limits output, shares markets, customers or sources of supply or involves other cartel behaviour such as bid rigging will almost inevitably be regarded as an agreement restricting competition within the meaning of Chapter I. The CMA's view is that these types of restriction are 'hard-core' and may be presumed to have negative market effects.

If, however, the criteria set out in section 9 of the Competition Act are satisfied, an agreement that is otherwise caught by the Chapter I prohibition will be exempt. This provision mirrors article 101(3) TFEU and requires that the efficiencies flowing from the agreement outweigh

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the anticompetitive effects. It is, however, almost inconceivable that a hard-core cartel agreement could qualify for such an exemption.

The Competition Act provides that, as far as possible, it is to be interpreted consistently with the corresponding EU rules.

Under the Enterprise Act, it is a criminal offence if an individual agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements relating to at least two undertakings involving the following prohibited cartel activities: price fixing, market sharing, limitation of production or supply, and bid rigging. Generally, the offence only applies to horizontal agreements (although it may also apply, for example, where a supplier procures or facilitates a horizontal arrangement between retailers). An offence may be committed regardless of whether the agreement is actually implemented.

The Reform Act has removed the requirement in the cartel offence for individuals to have acted 'dishonestly' in order for a conviction to be secured. The only mental elements that the prosecution has to prove are the intention to enter into an agreement and the intention as to the agreement's effect. To counter-balance the broader scope of the reformed cartel offence, the Reform Act has introduced new exclusions and defences. The exclusions provide that no offence will be committed where:

- in a case where the arrangements would affect the supply of a product or service in the UK, customers are given relevant information regarding such arrangements prior to purchasing the product or services;
- in the case of bid-rigging arrangements, the person requesting bids is given relevant information regarding the arrangements before the bids are made; or
- in any case, if relevant information about these arrangements is published in a specified manner.

Relevant information includes the names of the relevant undertakings, the nature of the agreements between them, and the products or services (or both) to which the agreements relate. The Enterprise Act 2002 (Publishing of Relevant Information under Section 188A) Order 2014 specifies that relevant information is published if it is advertised once in any of the London Gazette, the Edinburgh Gazette or the Belfast Gazette.

Similarly, the defences provide that an individual shall not be convicted:

- in a case where the arrangements would affect the supply of a product or service in the UK but the defendant did not intend that the nature of the arrangements would be concealed from customers before they acquired the product or service;
- if, at the time of making the agreements, the defendant did not intend the nature of the agreements to be concealed from the CMA; or
- if, before making the agreements, the defendant took reasonable steps to ensure that the nature of the agreements was disclosed to professional legal advisers to obtain advice about the making or implementation of the agreements.

Note that arrangements or agreements made before the new cartel offence came into force on 1 April 2014 remain subject to the previous version of the offence, which requires an element of dishonesty.

The CMA has published guidance relating to the exercise of its prosecutorial discretion in relation to the criminal cartel offence (see *Cartel offence prosecution guidance* (CMA9)). The CMA intends to apply the Full Code Test, as set out in the Code for Crown Prosecutors, in deciding whether or not to prosecute the offence. This is composed of: (i) the evidential stage; and (ii) the public interest stage. If the evidential stage is passed (ie, the CMA considers that there is sufficient evidence against a suspect to provide a realistic prospect of conviction), the CMA will go on to consider whether a prosecution is in the public interest. In doing so, it will pay particular attention to: (i) the severity of the offence; (ii) the level of culpability of the suspect; (iii) the impact on the community; and (iv) whether prosecution is a proportionate response.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

The Competition Act excludes from the scope of the Chapter I prohibition certain agreements relating to the production of, or trade in, agricultural products. Certain types of public transport ticketing schemes are also exempt (pursuant to a block exemption expiring in February 2026). In addition, the Competition Act excludes agreements that are subject to competition scrutiny under other legislation (the Broadcasting Act 1990 and the Communications Act 2003). Provision is also made for other non-industry-specific exclusions. The Secretary of State may exclude further categories of agreement if satisfied that there are exceptional and compelling public policy reasons for exclusion. There is no blanket exemption for government-sanctioned activity or regulated conduct – such conduct must be assessed in accordance with any sector-specific legislation or, if there is none, the Competition Act.

6 Application of the law

Does the law apply to individuals or corporations or both?

Both article 101 and the Chapter I prohibition apply to agreements and practices between undertakings as defined in EU case law. An undertaking includes any natural or legal person engaged in commercial or economic activity, whatever its legal status and the way in which it is financed. It includes companies, firms, businesses, partnerships, individuals operating as sole traders, agricultural cooperatives, trade associations and non-profit-making organisations.

In contrast, the criminal cartel offence only applies to individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The Chapter I prohibition applies only if the agreement, decision or practice is, or is intended to be, implemented in the UK.

Article 3(1) of EC Council Regulation No. 1/2003 provides that, where the CMA applies national competition law to agreements or practices that may affect trade between member states, it must also apply article 101. In practice, the CMA will usually apply both article 101 and the Chapter I prohibition in parallel (although an undertaking will not be penalised twice for the same anticompetitive conduct).

In accordance with the European Commission notice on cooperation within the Network of Competition Authorities (2004/C 101/03), the CMA can be considered well placed to act in a particular article 101 case if the following three criteria are all met:

- the agreement or practice has substantial, direct, actual or foreseeable effects on competition within the UK, is implemented within or originates from the UK;
- the CMA is able effectively to bring an end to the entire infringement; and
- the CMA can gather, possibly with the assistance of other national competition authorities (NCAs), the evidence required to prove the infringement.

The criminal offence under the Enterprise Act only applies to an agreement outside the UK if it has been implemented in whole or in part in the UK.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The CMA has published guidance on its investigation procedures in Competition Act 1998 cases from 1 April 2014.

The key stages in an investigation are set out below.

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The sources of the CMA's investigations
The CMA obtains information about possible competition law breaches through a number of sources: (i) its own research and market intelligence functions; (ii) other workstreams, such as the CMA's merger or markets functions, or use of the CMA's powers under the Regulation of Investigatory Powers Act 2000, or information received via the European Competition Network or the European Commission; (iii) individuals with 'inside' information about a cartel who apply for leniency; and (iv) complaints.

What the CMA does when it receives a complaint
The CMA decides which cases to investigate on the basis of the principles laid out in its publication *Prioritisation principles for the CMA* (CMA 16). These take into account the likely impact of the investigation in the form of direct or indirect benefits to consumers, the strategic significance of the case, the risks involved in taking on the case, and the resources required to carry out the investigation.

The CMA Enforcement Directorate is responsible for investigating and enforcing suspected civil cartel infringements of the Competition Act and criminal cartel and consumer law infringements.

Once the CMA has decided to take forward a case within the Enforcement Directorate, it may gather more information from the complainant, the company or companies under investigation and any third parties on an informal basis. On the basis of the information it has gathered at that time, if the CMA considers that it has reasonable grounds for suspecting that competition law has been breached, it can open a formal investigation.

Opening a formal investigation
The decision to open a formal investigation depends on whether: (i) the legal test that allows the CMA to use its formal investigation powers has been satisfied (ie, there are reasonable grounds for suspecting that competition law has been breached); and (ii) the case continues to fall within the CMA's casework priorities.

When the CMA opens a formal investigation, the case is allocated a Team Leader (responsible for the day-to-day running of the case), a Project Director (directs the case and is accountable for delivery of high quality timely output), and a Senior Responsible Officer (SRO) (responsible for authorising the opening of the formal investigation and taking certain other decisions including, where the SRO considers that there is sufficient evidence, authorising the issue of a statement of objections).

Once the decision has been taken to open a formal investigation, the CMA will send the businesses under investigation a case initiation letter, setting out brief details of the conduct that the CMA is looking into, the relevant legislation, the case-specific timetable and key contacts. The CMA will also generally publish a notice of investigation on its website, containing basic details of the case, a brief summary of the suspected infringement and the industry sector involved. The CMA will also outline the administrative timetable for the case. It may include the names of any businesses it is investigating. CMA guidance notes that it would not generally expect to publish the names of the parties under investigation other than in exceptional circumstances (eg, where the parties' involvement in the CMA's investigation is already in the public domain or subject to significant public speculation and the CMA therefore considers it appropriate to publish details of the parties).

The CMA will keep parties under investigation (and any complainants) updated about the progress of the investigation, either by telephone or in writing. Parties under investigation will also have an opportunity to meet with representatives of the case team at 'state of play' meetings, at which the CMA will update the party of the progress it has made and its provisional thinking.

The CMA's formal powers of investigation are set out in response to question 9 below.

Investigation outcomes
CMA investigations can be resolved in a number of ways. The CMA may (i) close an investigation on grounds of administrative priorities; (ii) issue a decision that there are no grounds for action if the CMA has not found sufficient evidence of an infringement of competition law; (iii) accept commitments from a business relating to its future conduct where the CMA is satisfied that these commitments fully address the competition concerns; or (iv) issue a statement of objections where its provisional view is that the conduct under investigation amounts to an infringement of competition law – after allowing the parties under investigation to make representations, if the CMA still considers that they have committed an infringement, the CMA may issue an infringement decision against them and impose fines and/or directions to bring the anticompetitive conduct to an end (enforceable by court order). Infringement decisions are generally extensive and detailed (eg, the non-confidential version of the OFT decision in the *Tobacco* Chapter I infringement case runs to 715 pages). A non-confidential version of the decision will be published on the register kept at the CMA and on the CMA's website.

If the decision is taken to prosecute an alleged criminal cartel offence under the Enterprise Act, the case will be tried either in a magistrates' court or before a jury in the Crown Court.

9 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

Information requests
Where the CMA has reasonable grounds for suspecting that an agreement or concerted practice falls within article 101 or the Chapter I prohibition, it may, by written notice, require any person (not only the alleged cartel members but also third parties) to provide specified documents or information relevant to the investigation. This is the power that the CMA will rely on most frequently. The power to require the provision of information is subject to legal professional privilege and the privilege against self-incrimination (except in relation to existing documents). The CMA can fine any person who fails, without reasonable excuse, to comply with a formal information request. It is a criminal offence, punishable by fine and/or imprisonment, to provide false or misleading information, or to destroy, falsify or conceal documents.

The Reform Act has also given the CMA the power to require individuals connected to a business which is a party to an investigation to answer questions (in the form of a compulsory interview) during an article 101 or Chapter I investigation, similar to the power under the Enterprise Act for criminal investigations (see below). Any information obtained by virtue of the exercise of this power will not be able to be used against that person in a criminal prosecution, except in certain limited circumstances. Any person being formally questioned or interviewed by the CMA may request to have a legal adviser present to represent their interests. In some cases, an individual may choose to be represented by a legal adviser who is also acting for the undertaking under investigation; however, the CMA's starting point is that it will generally be inappropriate for a legal adviser acting only for the undertaking to be present at the interview.

Dawn raids
In addition, the CMA may at the outset of or during an article 101 or Chapter I investigation, conduct on-site investigations to:

- require the production of any relevant document or information (including relevant information that is held on a computer and accessible from the premises);
- take copies of, or extracts from, any document produced;
- require an explanation of any such document; and
- if a document is not produced, require a statement as to where it can be found.

The procedure for, and scope of, an on-site investigation or 'dawn raid' differs according to whether the investigation is made with or without a court-obtained warrant, and whether the premises concerned belong to a person being investigated or to a third party.

The type of on-site investigation described above may be carried out at any business premises without a warrant.

In addition, where certain conditions are met, the CMA has a power of entry in respect of both business and domestic premises with a warrant issued by the CAT or by a judge of the High Court (or of the Court of Session in Scotland). Where a warrant has been issued, reasonable force may be used to obtain entry. The warrant will specify the kind of documents in respect of which the authorised officer may search the premises and take copies and extracts. The officer has available to him or her those powers that apply in the case of entry without warrant and can, in addition, take away originals of documents and retain them for three months if copying on the premises is not practicable, or if taking them

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away appears necessary to prevent their disappearance. The investigating officer can also take any other steps necessary to preserve the existence of documents. The officer can also take away copies of computer hard drives, mobile phones, mobile email devices and other electronic devices. The CMA can exercise similar powers of investigation when assisting a European Commission investigation in the UK and when carrying out an inspection in the UK on behalf of the European Commission or another NCA.

Powers of investigation under the Enterprise Act

The CMA may only commence a formal investigation in respect of an alleged criminal cartel offence under the Enterprise Act where there are reasonable grounds for suspecting that such an offence has been committed. Although it is likely that a criminal cartel investigation will initially be led by the CMA in cooperation with the SFO, the SFO may, at a later stage in the investigation, decide to carry out additional inquiries using its powers of investigation under section 2 of the Criminal Justice Act 1987. These powers are broadly equivalent to the CMA's powers of investigation under the Enterprise Act. The power to require the provision of information is subject to legal professional privilege and the privilege against self-incrimination (except in relation to existing documents).

Power to require information and documents

For the purposes of a criminal cartel investigation, the CMA may by written notice require the person under investigation or any other person, at a specified time and place, to:

- answer questions or otherwise provide information related to the investigation (including in the form of a compulsory interview);
- produce documents related to the investigation (the CMA may take copies of such documents or extracts from them and may require an explanation of them); and
- if such documents are not produced, provide a statement as to where they are.

Where individuals are required to participate in a compulsory interview, they are entitled to seek legal advice but will face criminal sanctions if they fail to answer all questions put to them (or provide false or misleading answers). However, the information obtained under a compulsory interview cannot be used against that person in a criminal prosecution except in certain limited circumstances.

Alternatively, when investigating a potential criminal cartel offence, the CMA may conduct a voluntary interview under caution. In this case, the interviewee will be given the standard criminal caution before being questioned and is again entitled to legal advice: interviewees may refuse to answer some or all of the questions but their answers (or failure to answer) may be given as evidence in court.

Power to enter premises under a warrant

For the purposes of a criminal investigation and on specified grounds, the CMA may apply to the CAT or to the High Court (or in Scotland, the procurator fiscal may apply to the sheriff) for a warrant. Where a warrant has been issued, a named officer of the CMA, accompanied by other named CMA officers and specified persons (such as IT experts) will be authorised to:

- enter and search premises, using such force as is reasonably necessary;
- take possession of relevant documents (including original documents) or take necessary steps to preserve or prevent interference with such documents;
- require any person to provide an explanation of a relevant document or to state, to the best of his or her knowledge and belief, where it may be found; and
- require any relevant information that is stored electronically and is accessible from the premises to be produced in a form that is legible and in which it can be taken away.

CMA officials also have the power, on giving written notice to the occupier of the premises, to remove material where it is not reasonably practicable to determine on the premises the extent to which it may be seized (eg, where there is a large bulk of material or where special technical equipment is needed to separate material that the CMA would be entitled to take, such as a computer hard drive). At the time of writing, the UK government has concluded its consultation on the Competition Appeal Tribunal (Warrants) (Amendment) Rules 2014 (Draft Warrant Rules), which prescribe the procedure to be followed on an application by the CMA (or one of the sectoral regulators with concurrent powers) to the CAT for a warrant to enter premises. The Draft Warrant Rules draw on existing practice directions dealing with warrant applications under the Competition Act and the Enterprise Act, but are tailored to the particular procedures of the CAT and will be adapted for application outside England and Wales. The final rules are still to be published.

Surveillance and access to communications data

The CMA can authorise directed surveillance (such as the watching of business premises) and covert human intelligence sources (informants) in cartel investigations under both the Competition Act and the Enterprise Act (ie, in relation to both civil and criminal cartel investigations).

The Enterprise Act also gives the CMA additional powers of surveillance solely to investigate the criminal cartel offence. These powers enable the CMA to carry out intrusive (covert) surveillance in respect of residential premises and private vehicles and to interfere with property for the purpose of covert installation of surveillance devices. The CMA is also authorised to obtain access to communications data (such as records of telephone numbers called) in criminal investigations under the Enterprise Act.

Use of evidence obtained under the Competition Act and the Enterprise Act

Any information obtained from an individual by the CMA using its compulsory interview powers under the Enterprise Act will not be used as evidence in a Competition Act investigation against the undertaking that employs that individual. However, information provided during a voluntary interview under caution in the course of a criminal investigation may also be used in a Competition Act investigation.

Any statement obtained from an individual by the CMA using its compulsory powers of investigation under the Competition Act cannot be used in a criminal prosecution against that person except in certain limited circumstances.

Original documents seized by the CMA or SFO during a criminal investigation under the Enterprise Act may also be used by the CMA in proceedings against undertakings under the Competition Act. Equally, any documents obtained by the CMA using its powers of investigation under the Competition Act may be admissible in a subsequent criminal prosecution of the cartel offence under the Enterprise Act (subject to the rules regarding the standard of evidence used in criminal prosecutions). In addition, the CMA can use its powers under the Enterprise Act to obtain original versions of documents copied during a Competition Act investigation.

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation

The CMA cooperates extensively with the European Commission and with the NCAs in the other member states through the European Competition Network (see the EU chapter).

The CMA has a memorandum of understanding with the authorities in Scotland in respect of cooperation in criminal cartel cases over which Scottish courts may have jurisdiction.

In addition, the Enterprise Act permits the CMA, in certain circumstances, to disclose confidential information to agencies in other jurisdictions to facilitate the performance of their respective enforcement functions. This takes into account existing mutual assistance arrangements relating to competition law enforcement such as those in force between the UK and each of the United States, Australia, Canada and New Zealand.

As noted in question 2, UK competition law is enforced by both the competition regulators (the CMA) and sectoral regulators. Under the Reform Act, sectoral regulators are required to consider whether their cartel powers are more appropriate than their sector-specific powers to promote competition. The Reform Act also requires the CMA and sectoral regulators to work more closely in competition cases. The CMA has published a guidance document, *Regulated industries: Guidance on*

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concurrent application of competition law to regulated industries (CMA10), which sets out the proposed arrangements for cooperation between the CMA and the sectoral regulators in connection with the enforcement of competition law.

11 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

If a cartel has an effect on trade within the UK and on trade between EU member states, it may be caught by both article 101 and the Chapter I prohibition. In these circumstances, Council Regulation No. 1/2003 requires the CMA to apply article 101 in parallel with the Chapter I prohibition (see the EU chapter).

In cases where the European Commission is investigating an infringement of article 101 involving a potential criminal cartel offence in the UK under the Enterprise Act, the CMA and the European Commission will cooperate to coordinate their investigations.

When the CMA is investigating a suspected infringement of article 101 in the UK on its own behalf or on behalf of the European Commission or another NCA, the UK rules on legal professional privilege will apply. However, when CMA officials assist the European Commission in its investigations, the European Commission's privilege rules (which do not extend to in-house lawyers or non-EU qualified lawyers) apply.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

See questions 8 and 14.

13 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In its judgment in *Napp* (2002) [CAT 1], the CAT confirmed that, throughout the procedure, the burden is on the OFT (now the CMA) to prove its case according to the normal civil standard (balance of probabilities) but that, given the seriousness of the penalties for infringement of the Competition Act, strong and convincing evidence would be required. In criminal cartel cases, the onus will be on the prosecution to prove its case according to the normal criminal standard (beyond reasonable doubt).

14 Appeal process

What is the appeal process?

Decisions of the CMA and the sectoral regulators made under the Competition Act may be appealed to the CAT, an independent judicial tribunal, on a point of law or fact or as to the amount of any fine. An appeal to the CAT in respect of a decision made under the Competition Act is a full appeal on the merits of the case. There is a further right of appeal from judgments of the CAT, either on a point of law or as to the amount of any fine, to the Court of Appeal (or the Inner House of the Court of Session in Scotland). Permission must be granted either by the CAT or the Court of Appeal. Further appeal lies to the Supreme Court (formerly the House of Lords) on a point of law of general public importance. Permission must be granted by the Court of Appeal or the Supreme Court. Appeals may be made by any party to an agreement in respect of which the CMA has made a decision, and by third-party applicants who can show a sufficient interest in relation to any such decision (although third-party applicants cannot appeal the quantum of any fine imposed). Interested parties may also apply to intervene in appeal proceedings in the CAT.

Appeals are initiated by filing a notice of appeal, containing details of the parties and the case, summarising the issues in dispute and stating the relief sought. The notice must be filed with the CAT registrar within two months of the appellant being notified of the decision. The CAT registrar will then send the notice to the respondent (eg, the CMA), which will have six weeks to file a defence. Once a notice of appeal has been served on the respondent, the CAT will normally convene a case-management conference to fix the timetable for the case and deal with other procedural issues. The CAT aims to deal with the more straightforward cases in nine months, although more complex cases may take longer.

In respect of criminal cartel offences, there is a right of appeal to the higher courts under the normal rules governing criminal cases. It is also possible to challenge procedural issues, either by way of an application to the CMA's Procedural Officer or by an application to the High Court for judicial review.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Any individual found guilty of committing the criminal cartel offence under the Enterprise Act may be imprisoned for up to six months and receive a fine of up to the statutory maximum (up to £5,000 for offences committed before 12 March 2015 and unlimited for offences committed on or after 12 March 2015) if tried and convicted in a magistrates' court, and may be imprisoned for up to five years and receive an unlimited fine if tried and convicted in the Crown Court. Criminal sanctions may also be imposed on individuals who fail to comply with or frustrate CMA or SFO criminal cartel investigations under the Enterprise Act. The offences and sanctions range in severity, with the most serious (falsification, destruction or concealment of relevant documents in the knowledge that an investigation is being, or is likely to be, carried out) attracting a prison sentence of up to five years and an unlimited maximum fine if tried and convicted in the Crown Court.

The longest sentence that a court has imposed so far on a defendant convicted of the cartel offence is two-and-a-half years, in the *Marine Hose* cartel case (*R v Whittle & Others* [2008] EWCA Crim 2560 (14 November 2008)). The case was highly unusual in that the defendants had entered into plea agreements with the US authorities. Under these plea agreements, the defendants' US sentences were reduced by the number of days of imprisonment to which they would be sentenced in the UK. As part of these agreements, the defendants had committed not to seek terms of imprisonment in the UK shorter than those provided for in the US plea agreements. The Crown Court initially imposed sentences of three years on two of the defendants and two-and-a-half years on the third defendant. The defendants appealed, seeking sentences that were no longer than their respective US terms of imprisonment. On appeal, the Court of Appeal suggested that the extensive cooperation of the defendants with the authorities was a significant mitigating factor which could warrant a reduction of the sentences beyond that which was sought by the defendants. However, the Court of Appeal was constrained by the absence of submissions to reduce the sentences below the levels of the US plea agreements. It therefore reduced each of the sentences to a level equivalent to that of the US plea agreements: two-and-a-half years, two years and 20 months respectively.

In June 2014, the CMA announced that an individual who had been charged under the cartel offence for dishonestly agreeing with others to divide customers, fix prices and rig bids between 2004 and 2012 in respect of the supply in the UK of galvanised steel tanks for water storage had pleaded guilty. In September 2015, this individual received a six month suspended sentence (suspended on the condition that the defendant completes 120 hours of unpaid work and does not commit any offence punishable by imprisonment for the next 12 months). The individual was not subject to a fine and was not disqualified from serving as a director due to mitigating factors (eg, no previous convictions; not motivated by personal gain; cooperated with the authorities to a 'very substantial degree').

Most recently, in March 2016, an individual pleaded guilty to dishonestly agreeing with others to divide supply, fix prices and divide customers between 2006 and 2013 in respect of the supply in the UK of precast concrete drainage products.

In all of the above cases, the applicable cartel offence was as it existed before April 2014. There have been no cases under the new cartel offence (introduced by the Reform Act in April 2014 (see questions 3 and 4)).

Criminal sanctions (fines and, in certain cases, imprisonment for up to two years) also exist for failing to comply with or frustrating a CMA investigation under the Competition Act. Under the Reform Act, the criminal offences for failing to comply with certain CMA investigative

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powers have been replaced with civil penalties, but criminal liability still attaches to certain frustrating actions, including obstructing an officer in the exercise of powers to enter premises, destroying or falsifying documents, and providing false or misleading information.

There are no criminal sanctions under the Competition Act for cartel activity itself in the UK (although the CAT has confirmed (in *Napp*) that the scale of the civil fines that may be imposed for breaches of the Competition Act is such that cartel proceedings should be treated as criminal proceedings for the purposes of the procedural right to a fair trial under article 6(1) of the European Convention on Human Rights).

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

On making an infringement decision under the Competition Act in respect of a breach of article 101 or the Chapter I prohibition, the CMA may impose a fine of up to 10 per cent of the infringing undertaking's worldwide turnover in its last business year. In addition, the CMA or the relevant sectoral regulator may apply to the High Court (or Court of Session in Scotland) for the disqualification of a company director in certain circumstances (see below for further details). Directors may be disqualified for up to 15 years.

Fines are levied in the majority of cases in which the CMA finds that there has been a breach of the article 101 or Chapter I prohibition, although disqualification of directors is less common. Nevertheless, the CMA decides each case on its facts: the nature and the level of the sanctions imposed on parties to cartel arrangements are determined by the nature of the anticompetitive arrangements between the parties, the impact of these arrangements on consumers, whether the parties have applied for leniency and, if so, the conditions under which they have applied.

Penalties recently imposed include:

- £58.5 million on British Airways for its role in an alleged transatlantic passenger air transport fuel surcharge price-fixing agreement with Virgin Atlantic in April 2012;
- £2.8 million on Mercedes-Benz and four of its dealers for market-sharing, price co-ordination and exchange of commercially sensitive information, with the object of restricting competition for sales of vans and trucks in March 2013;
- £737,336 on Three Counties Estate Agents, three of its members and a local newspaper for agreeing to prevent estate and lettings agents from advertising their fees or discounts in the local property newspaper in May 2015;
- £44.99 million on GlaxoSmithKline and two suppliers of generic medicines for entering into a series of agreements that delayed generic entry of the drug paroxetine in February 2016 (the CMA also found that GSK's conduct infringed the Chapter II prohibition);
- £786,668 on Ultra Finishing for online resale price maintenance in the bathroom fittings sector in May 2016; and
- £2.29 million on ITW for resale price maintenance in internet sales of its commercial fridges in May 2016.

Under the Company Directors Disqualification Act (as amended by the Enterprise Act) the court must make a competition disqualification order (CDO) on the application of the CMA or a sectoral regulator if the following two conditions are satisfied:

- the company of which the individual is a director has committed a breach of competition law (including, for these purposes, a breach of the Chapter I prohibition and a breach of article 101); and
- the court considers that his or her conduct as a director makes him or her unfit to be concerned in the management of a company.

As regards this second condition, the court must have regard to the following considerations:

- whether the director's conduct contributed to the breach of competition law;
- whether, even if his or her conduct did not contribute to the breach, he or she had reasonable grounds to suspect that the conduct of the company constituted a breach of competition law and he or she took no steps to prevent it; and
- whether he or she did not know but ought to have known that the company's conduct constituted such a breach.

Moreover, the court may have regard to the individual's conduct as a director of a company in connection with any other breach of competition law.

CMA guidance on the circumstances in which it and sectoral regulators will exercise their powers to apply for a CDO (Director disqualification orders in competition cases, OFT 510), identifies five factors relevant to the decision of whether to apply for a CDO:

- whether the company has committed a breach of competition law proven by a competition authority decision or the courts. In exceptional circumstances, the CMA (or sectoral regulator) may also apply for a CDO against a director even where there is no prior infringement decision (but they will then still have to satisfy the court that there has been an infringement of competition law);
- the nature of the breach of competition law. The CMA (or sectoral regulator) is more likely to consider an application for a CDO to be appropriate in cases involving serious breaches, such as those in which a financial penalty has been imposed;
- whether the company has made a successful leniency application. The CMA (or sectoral regulator) will not apply for a CDO against any current director whose company has benefited from leniency in respect of the activities concerned, unless the director has been removed or otherwise ceases to act as a director of a company owing to his or her role in the breach of competition law in question or for opposing the relevant application for leniency, or both; or the director fails to maintain continuous and complete cooperation throughout the leniency process. The CMA (or sectoral regulator) will not apply for a CDO against any beneficiary of a no-action letter in respect of the cartel offences specified in the letter;
- the extent of the director's responsibility for, or involvement in, the breach. The CMA (or sectoral regulator) will consider: whether the director's conduct contributed to the breach; whether the director had reasonable grounds to suspect there was a breach but took no steps to prevent it; and whether the director ought to have known of the breach. The CMA and sectoral regulators do not expect directors to have specific expertise in competition law. However, they do expect all company directors to appreciate the importance of complying with competition law and, more specifically, that price-fixing, market-sharing and bid-rigging agreements are likely to breach competition law; and
- the presence of any aggravating or mitigating factors. Aggravating factors increase the likelihood that the CMA (or sectoral regulator) will apply for a CDO, and include evidence that the director destroyed or advised others to destroy records relating to the breach of competition law. Conversely, the presence of mitigating factors, for example, evidence that there was genuine uncertainty as to whether the activity was illegal, may reduce the likelihood that an application for a CDO will be made.

The maximum period of disqualification under a CDO is 15 years. During the disqualification period it is a criminal offence for the individual to be a director of a company, act as a receiver of a company's property, in any way (whether directly or indirectly) be concerned with or take part in the promotion, formation or management of a company without the leave of the Court or act as an insolvency practitioner. In addition, details of a CDO will be entered in a public register.

Instead of applying for a CDO, the CMA or sectoral regulator may accept a competition disqualification undertaking (CDU). In this case the person giving the CDU undertakes for a specified period (not exceeding 15 years) not to perform any acts that would breach a CDO as listed above. Breach of a CDU has the same consequences as breach of a CDO but engaging with the CMA voluntarily through the CDU process may result in a shorter period of disqualification than under a CDO. As with a CDO, details of a CDU will be entered in a public register.

Additionally, where an individual company director has been convicted of the criminal cartel offence under the Enterprise Act and that offence has been committed in connection with the management of a company, the convicting court has the power to make a disqualification order against that individual director.

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17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

According to the CMA's guidance on penalties, any financial penalty imposed in respect of an article 101 or a Chapter I infringement will be calculated according to the six-step approach set out below. The Competition Act requires both the CMA and the CAT to 'have regard' to this penalty guidance.

Step 1: calculation of the starting point
The starting point will be calculated with regard to the seriousness of the infringement and the 'relevant turnover' of the undertaking.

Price-fixing or market-sharing agreements and other cartel activities are considered among the most serious infringements of article 101 and the Chapter I prohibition. The relevant turnover is that of the undertaking in the relevant product and geographic markets affected by the infringement in the last full financial year before the infringement ended. This may include turnover generated in another member state if the relevant geographic market is wider than the UK and the express consent of the relevant member state or the NCA is given. The starting point may not exceed 30 per cent of the relevant turnover of the infringing undertaking. The starting point for hard-core cartel activity will generally be at the upper end of the range.

Step 2: adjustment for duration
The starting point may then be increased (or, exceptionally, and only in the case of infringements lasting less than one year, decreased) to take account of the duration of the infringement, provided that it is not multiplied by more than the number of years of the infringement. Part years may be treated as full years.

Step 3: adjustment for aggravating and mitigating factors
Aggravating factors include:
- persistent and repeated unreasonable behaviour that delays the CMA's enforcement action (including missing deadlines);
- the role of the undertaking as a leader in, or instigator of, the infringement;
- the involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuing the infringement after the start of the investigation;
- repeated infringements by the same undertaking or other undertakings in the same group (recidivism);
- infringements which are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisals sought by the undertaking against a leniency applicant.

Mitigating factors include:
- the role of the undertaking, for example, where the undertaking is acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps having been taken with a view to ensuring compliance with competition law (the mere existence of compliance programmes is not sufficient, but a clear and unambiguous commitment to competition compliance throughout the organisation from the top down may be given some weight);
- termination of the infringement as soon as the CMA intervenes (unless the CMA directs otherwise); and
- cooperation which enables the enforcement process to be concluded more effectively or speedily than would otherwise be the case.

Step 4: adjustment for specific deterrence and proportionality
The penalty figure may be increased to ensure that the infringing undertaking will be deterred from breaching competition law again in the future, having regard to the undertaking's size and financial position, and any other relevant circumstances. The penalty figure may also be increased under this head to take account of any gain made by the undertaking from the infringement. The CMA will then assess whether, in its view, the overall penalty proposed is proportionate and appropriate in the round.

Step 5: adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy
The overall penalty figure may not exceed 10 per cent of the worldwide turnover of the undertaking in the previous business year. The penalty will therefore be adjusted if necessary to ensure that it does not exceed this maximum. If a penalty has already been imposed by the European Commission or by another member state in respect of the same agreement or conduct, the CMA must take that penalty into account.

Step 6: adjustment for leniency or settlement discounts
The CMA will reduce the penalty where an undertaking has entered into a leniency or settlement agreement with the CMA. In exceptional circumstances, the CMA may reduce the penalty where the undertaking is unable to pay the proposed amount due to financial hardship. Parties will have the opportunity to make written and oral representations in response to the draft penalty statement that will be issued by the CMA before it makes any infringement decision. On 14 August 2015 the CMA published the final version of its guidance on its new powers under the Consumer Rights Act to approve voluntary redress schemes (CMA40). The CMA may take any voluntary redress schemes established by the infringing party (see question 28) into account when assessing the level of the fine to be imposed and grant a fine reduction (likely to be up to 20 per cent of the penalty that would otherwise have been imposed).

The sentencing limits in respect of the criminal cartel offence are set out in the Enterprise Act (see question 15). The UK courts have sentencing guidelines regarding criminal offences generally which also apply to the cartel offence. The sentencing limits in respect of the criminal cartel offence under the Enterprise Act are binding.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Automatic debarment from government procurement procedures is not available as a sanction for cartel infringements. Under the Public Contracts Regulations 2015, which took effect from 26 February 2015 for public procurements that commenced on or after 26 February 2016, there is the possibility of discretionary debarment by the contracting authority where it has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition. For discretionary debarment, the period during which the economic operator may be excluded is three years from the date of the relevant event.

An exclusion from the tendering process may also be possible under the EU rules on public procurement with regard to grave professional misconduct (article 57(4)(c) Directive 2014/24/EU) (see the EU Chapter).

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Criminal and administrative sanctions can be pursued in respect of the same conduct, although as noted above the criminal offence applies only to individuals and the Chapter I prohibition applies only to undertakings (see question 6).

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Private actions for damages for breach of the Chapter I prohibition or article 101 may be brought in the High Court. In addition, under section 47A of the Competition Act, the CAT may hear claims for damages

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in cases where the authorities have already issued a decision that there has been a breach of the Chapter I prohibition or of article 101 ('follow-on' action) or in cases where no such decision has been reached but there is an alleged infringement ('stand-alone' action). The possibility of bringing a 'follow-on' action is intended to create a quicker and cheaper route for aggrieved persons – both consumers and businesses – to obtain compensation. Representative bodies may also bring damages actions before the CAT on behalf of groups of named and identifiable consumers (see question 21).

For both the High Court and the CAT, claims may be brought by any individual or business who has suffered loss as a result of an infringement of competition law. This includes both direct and indirect purchasers, as well as other parties who have suffered loss.

Where an action for damages is brought in a UK court in respect of a breach of the Chapter I or article 101 prohibition, the court is bound by a prior decision of the CMA, European Commission or CAT that the relevant provision has been infringed, provided that any period for appeal has expired. Similarly, under EC Council Regulation No. 1/2003, a UK court cannot take a decision that runs counter to a prior European Commission decision relating to the same agreement or practice.

In April 2014, the Supreme Court considered the issue of whether it was possible to bring a private action where some, but not all, of the parties to a cartel had appealed against a decision of the European Commission (*Deutsche Bahn AG v Morgan Crucible Co Plc* [2014] UKSC 24). The Supreme Court held that, as a successful appeal by an addressee of a European Commission decision would deprive an addressee who had not appealed of a potential contributing party, it might be appropriate to adjourn the determination of the contribution proceedings until all appeals by other addressees had been determined. However, it remained the case that, as against a non-appealing addressee, the Commission decision that there had been a cartel involving all addressees stood, even though some of them might appeal successfully. As a result, a non-appealing addressee might, at least theoretically, find itself carrying full civil liability (without any fellow cartel members from which it might seek contribution) in respect of a cartel. However, if there really was no cartel, it might be difficult for a claimant to prove that it had suffered any loss caused by the conduct.

The UK government has implemented a raft of measures, including the encouragement of alternative dispute resolution and changes to the role of the CAT. The Consumer Rights Act widens the CAT's scope and improves its operations, by:

- enabling the courts to transfer competition law cases from the High Court to the CAT and vice versa (irrespective of whether such cases are stand-alone, follow-on, or hybrid cases involving both stand-alone and follow-on aspects);
- harmonising the limitation periods for the CAT with those of the High Court;
- enabling the CAT to grant interim and final injunctions; and
- introducing a 'fast-track' procedure for simpler private claims in the CAT.

The level of damages that may be recovered is assessed by reference to the victim's loss. Damages are therefore usually calculated by reference to what is necessary to restore the victim to the position in which he or she would otherwise have been had the infringement not occurred. It would seem to follow (although this has not been definitively decided) that, where the defendant can show that the claimant has avoided or mitigated its loss by passing on the loss, the defendant may be able to claim a defence or a reduction in the damages otherwise payable. In December 2014, the European Commission published Directive 2014/104/EU (the Damages Directive), which codifies the passing-on defence and requires member states to transpose it into their national laws by 27 December 2016.

The UK government recently considered introducing treble damages but has since rejected this idea. Exemplary damages are available, but the Court of Appeal has confirmed that the award of such damages is at the courts' discretion, which must be exercised with caution (*Devenish Nutrition Limited and Others v Sanofi-Aventis SA and Others* [2008] EWCA Civ 1086). The Consumer Rights Act explicitly provides that exemplary damages will not be available in collective actions.

As regards costs awards, in the High Court, the general rule is that the losing party must pay the winning party's costs. There is no general rule on costs in the CAT; the 'loser pays' principle is not necessarily the starting point (although it is often applied in practice) and the CAT may make any order it thinks fit in relation to costs. Section 47C of the Competition Act (inserted by the Consumer Rights Act) does, however, make special provision in relation to the costs of collective proceedings: any unclaimed part of aggregated damages in opt-out collective proceedings may be used by the class representative to pay legal costs or expenses.

21 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

Section 47B of the Competition Act provides that a specified consumer body can bring a representative action before the CAT on behalf of two or more consumers. Schedule 8 of the Consumer Rights Act amends the Competition Act to introduce a new collective proceedings regime, which covers both opt-in and opt-out actions.

In the new 'opt-out' collective action regime, affected consumers are automatically included in a claim and have to take positive steps to exclude themselves from it (should they wish to do so). The regime covers both follow-on and stand-alone cases and is available to both consumer and business complainants. The opt-out aspect of a claim only applies to UK-domiciled claimants, but non-UK claimants are able to opt in to a claim.

Collective proceedings must be commenced by a person who will act as the representative of the claimants. The CAT may authorise a person to act as representative whether or not that person is also a class member. However, proceedings may only be commenced if the CAT grants a collective proceedings order following a hearing to certify the representative claimant. The collective proceedings order authorises the person bringing the proceedings to act as representative, it provides a description of the class of persons whose claims may be included in the proceedings and it specifies whether the proceedings are to continue on an opt-in or opt-out basis. A collective proceedings order is only granted if:

- the CAT considers that it is just and reasonable for the person bringing the proceedings is to act as the representative (whether or not they are a claimant); and
- the claims raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.

If an opt-out action results in the award of damages to the class of claimants, any unclaimed damages will not be returned to the defendants. Rather, these unclaimed sums will be paid to the Access to Justice Foundation (an organisation which supports pro bono legal assistance). Defendants will be free to settle on other terms, subject to the approval of the CAT judge.

In addition, the Consumer Rights Act provides for a new opt-out collective settlement regime to allow for rapid settlement of opt-out cases in relation to which a collective proceedings order has been made. Under this system, a representative of those who have suffered loss and a potential defendant can jointly apply to the CAT, providing agreed details of the claims to be settled and the proposed terms of the settlement. The CAT can approve such mutually agreed settlement agreements on an opt-out basis if it is satisfied that the terms of the relevant agreement are just and reasonable.

The CMA has published guidance relating to taking action for breaches of competition law (see *Competition law redress: A guide to taking action for breaches of competition law* (CMA55)).

Cooperating parties

22 Immunity

Is there an immunity programme? What are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The CMA's immunity programme is set out in the OFT-published document *Applications for leniency and no-action in cartel cases* (OFT 1495; published July 2013 (and adopted in full by the CMA)). This provides different types of protection to an applicant depending on its position in the queue and whether an investigation has already commenced:

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Type A immunity
Available where the undertaking is the first to apply and there is no pre-existing civil or criminal investigation into such activity. Type A immunity provides automatic immunity from civil fines for an undertaking, and criminal immunity for all current and former employees and directors who cooperate with the CMA. Cooperating individuals should also avoid director disqualification.

Type B immunity
Available where the undertaking is the first to apply but there is already a pre-existing civil or criminal investigation into such activity. In such circumstances, the CMA retains discretion regarding whether to provide civil immunity to the undertaking and criminal immunity to current and former employees and directors who cooperate with the CMA. Cooperating individuals should also avoid director disqualification. Type B immunity will no longer be available where the CMA has sufficient information to establish an infringement, where another undertaking has been granted Type B immunity, or when the CMA already has, or is in the course of gathering, sufficient information to bring a successful criminal prosecution.

Type B leniency
Where the CMA decides not to grant Type B immunity to an undertaking, it may still provide a reduction from any financial penalty imposed under the Competition Act. There is no limit to the level of reduction that may be granted under Type B leniency. The CMA will consider whether it is in the public interest to grant immunity (from criminal sanctions) on a blanket or individual basis. Cooperating individuals should also avoid director disqualification.

Type C leniency
Available to undertakings which are not the first to apply but provide evidence of cartel activity before a statement of objections is issued (provided such evidence genuinely advances the investigation). Recipients of Type C leniency may be granted a reduction of up to 50 per cent of the level of a financial penalty imposed under the Competition Act. The CMA may exercise its discretion to award immunity from criminal prosecution for specific individuals. Cooperating individuals should also avoid director disqualification.

In addition to fulfilling the criteria above, an undertaking must fulfil the following conditions to be granted Type A or Type B immunity or leniency:

- accept that it participated in cartel activity in breach of law;
- provide the CMA with all information, documents and evidence available to it regarding the cartel activity;
- maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CMA as a result of the investigation;
- refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CMA (except as may be directed by the CMA); and
- not have taken steps to coerce another undertaking to take part in the cartel activity.

In order to be granted Type C leniency, an undertaking must also fulfil each of the above conditions, except the non-coercion condition, which does not apply.

When it comes to vertical agreements, the CMA's leniency policy only applies to vertical price fixing such as resale price maintenance (although leniency is in principle also available for vertical behaviour that facilitates horizontal cartel activity). This is justified on the basis that other vertical restrictions on competition are visible on the market and are therefore, over time, self-detecting.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

See question 22.

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Importance of going in second
See question 22.

Any reduction in the financial penalty in these circumstances is discretionary and will be calculated taking into account the stage at which the undertaking comes forward, the evidence in the CMA's possession, the evidence provided by the undertaking and the overall level of cooperation provided. The guidance on leniency and no-action notes that type C leniency will generally involve discounts in the range of 25 to 50 per cent, although it is possible that low value or late applications may gain awards of less than 25 per cent. Blanket criminal immunity will not be granted in type C leniency cases, but the CMA will consider whether it is in the public interest to grant immunity on an individual basis.

Immunity or amnesty plus
The leniency programme under the Competition Act provides an incentive for applicants to come forward with information about other cartels they may be involved in. If an undertaking is cooperating with an investigation in respect of one cartel activity and comes forward with information such that it obtains total immunity from (or a reduction in) fines in relation to a completely separate cartel activity (on the basis that it is the first undertaking to come forward with evidence regarding that second cartel activity), it will also receive a reduction in the fine imposed in respect of the first cartel (over and above the reduction it would have received for its cooperation in relation to the first cartel alone). The additional reduction granted in relation to the first market because of the successful application in the second market is known as 'leniency plus'. However, the guidance on leniency and no-action makes clear that leniency plus should be regarded as a secondary benefit and, as such, reductions to financial penalties granted under leniency plus are unlikely to be high. The most recent example was in 2011 in the context of the dairy retail price initiatives investigation, when the OFT granted Asda a 10 per cent discount on the basis that it had been granted total immunity from financial penalties in respect of a completely separate suspected infringement of the Chapter I prohibition in relation to its activities in other, separate markets.

25 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

If an undertaking or individual wishes to apply for leniency, it is advisable to approach the CMA as soon as possible to secure the benefits of being the first to come forward as described above. In particular, type A immunity is only available before the CMA has commenced an article 101 or Chapter I investigation. The CMA will not accept leniency applications from undertakings after it has issued a statement of objections in relation to the reported cartel activity. Similarly, the CMA will not accept leniency applications from an individual after that individual has been charged with a cartel offence in relation to the reported activity. Additionally, financial incentives are offered to individuals to come forward with information about cartels – the CMA offers to pay up to £100,000 to individuals in return for information that helps the CMA to identify and take enforcement action against cartels (this is separate from the leniency-immunity programme).

While it is preferable to approach the CMA as soon as possible to be the 'first in', there may be some disadvantages to seeking leniency or immunity that need to be considered carefully before approaching the CMA:

- It is not possible for an undertaking to know for sure whether it will be the first to provide the CMA with evidence of the existence and activities of a cartel (although it is possible to seek confirmation as to whether type A immunity is available on a confidential, no-names basis provided that the legal adviser making such contact with the CMA can confirm that he or she has instructions to apply for type A immunity if it is available).
- Similarly, it is not possible to know in advance whether the information being provided to the CMA is new, or indeed what the precise

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state of the CMA's existing knowledge is (although, as noted above, it is possible to seek confirmation as to whether type A immunity – and, if not, type B immunity – is available).
- The CMA does not (and cannot) provide immunity from third-party damages actions (see question 20).

Any undertaking considering an approach to the CMA ought first to assess carefully its exposure risk, not only in the UK but in all jurisdictions in which the cartel is active, thus recognising the impact of the likely cooperation that will occur between competition authorities. The exposure assessment will need to take account of the degree of consumer detriment that has resulted from the cartel, the impact of the cartel on the relevant market and the likelihood that the CMA will otherwise discover the existence of the cartel, either independently or through a third party. Account will also need to be taken of the exposure of individuals to criminal prosecution under the Enterprise Act if they do not secure leniency. Before conducting internal investigations into possible cartel conduct, undertakings should refer to the CMA guidance on leniency and no-action, which sets out guidelines designed to ensure that internal investigations do not prejudice any subsequent CMA investigation or enforcement action. The undertaking should ensure, before approaching the CMA, that it is able to prove positively that it has withdrawn from the cartel, and also that it can provide a sufficiently complete document trail to meet the stringent conditions for leniency.

In a case involving cartel activity that may have an effect on trade between member states, the undertaking should also consider as a matter of urgency whether it is appropriate to make simultaneous leniency applications to the European Commission and other competition authorities within the ECN. An application for leniency to the CMA will not be considered as an application for leniency to the European Commission or another NCA within the ECN. The ECN Model Leniency Programme has been established to ensure that potential leniency applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes within the ECN. The ECN Model Leniency Programme therefore sets out the treatment that an applicant can anticipate in any ECN jurisdiction once the alignment of all programmes has taken place. In addition, the ECN Model Leniency Programme aims to alleviate the burden associated with multiple filings in cases with which the European Commission is particularly well placed to deal by introducing a model for a uniform summary application system.

26 Cooperation

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?

The CMA has adopted the OFT's guidelines on applications for leniency and no action in cartel cases published in July 2013 (OFT 1495). These provide that all leniency applicants, whether they are applicants for immunity or leniency, have a duty to maintain 'continuous and complete' cooperation throughout the CMA's investigation and any subsequent proceedings (including criminal proceedings and defending civil or criminal appeals) by the CMA as a result of the investigation. This requires applicants to engage positively, proactively and in a timely manner with the CMA to assist it in effectively detecting, investigating and taking enforcement action against cartel conduct. In particular, leniency applicants must provide the CMA with all non-legally privileged information, documents and evidence available to them regarding the existence and activities of the reported cartel. They must also, where appropriate, make current and former directors, employees and agents available for interviews and use their best endeavours to ensure that relevant individuals respond completely and truthfully to the CMA and not attempt to falsely protect or implicate any undertaking in relation to any infringement or any individual in relation to a cartel offence. Failure to comply could lead to a loss of all protection under the leniency programme.

Furthermore, leniency applicants must accept that the activity in which they engaged amounts to cartel activity in breach of article 101 or the Chapter I prohibition, or, in the case of individual applicants, amounted to commission of the cartel offence. This will ultimately be reflected in the leniency agreement. The CMA will regard any of the applicant's representations following the issue of a statement of objections which amount to a denial of cartel participation as inconsistent with the grant of leniency.

See also question 24.

27 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The CMA will endeavour, to the extent that it is consistent with its statutory obligations to disclose information, and its obligations to exchange information with the ECN, to keep the identity of cooperating undertakings confidential throughout the course of the investigation until the issue of a statement of objections. These protections apply both to applicants for immunity and to other leniency applicants.

In practical terms, the rights of access to the file afforded to the undertakings under investigation and the eventual publication of a reasoned decision will normally result in the identity of an immunity applicant becoming apparent both to other members of the cartel and, more widely, to others operating in the industry and to the public. Details of a leniency application may also be disclosed during an appeal to the CAT in respect of the infringement decision. Similarly, the fact that an individual has received a no-action letter may become evident because of disclosure obligations during the prosecution of other participants in a criminal cartel offence.

While the CMA's guidance emphasises that the CMA will 'firmly resist' requests for disclosure of leniency materials, private litigants are becoming more aggressive in their attempts to gain access to leniency applications, supporting documents and evidence. In April 2012, the High Court applied the guidance set down by the ECJ in *Pfleiderer* (that, in the absence of EU law, it is for the national court to decide on the basis of national law, and on a case-by-case basis, whether to allow the disclosure of leniency documents by balancing the need to ensure effective public enforcement with the need to ensure that the right to full compensation can be effectively exercised) in *National Grid Electricity Transmission plc v ABB Ltd and Others* [2012] EWHC 869 (Ch), a follow-on damages claim against participants of a gas insulated switchgear cartel (which had been fined by the European Commission). The High Court decided that some redacted parts of the European Commission's infringement decision (which contained extracts of the oral leniency statements made by the defendant) should be disclosed, but only very limited disclosures should be made in respect of other leniency documents. The High Court stressed that this decision was specific to the facts of the case, and that any application for the disclosure of leniency documents would be considered on a case-by-case basis. However, in contradiction to the ECJ's guidance in *Pfleiderer*, the Damages Directive makes clear that there should be absolute protection from disclosure for corporate leniency statements and settlement submissions. Member States are required to implement the Damages Directive into national law by 27 December 2016 (see the EU chapter for further details).

The CMA's guidelines confirm that the CMA will not require the waiver of legal professional privilege as a condition for leniency either in civil or criminal proceedings. However, the CMA has decided that it will require a review of any relevant information in respect of which legal professional privilege is claimed by external independent counsel who will be selected, instructed and funded on a case by case basis by the CMA. While external independent counsel will be instructed by the CMA, the relevant information in respect of which legal professional privilege is claimed will not be provided to the CMA (unless independent counsel concludes that it is not privileged).

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

In March 2014, the CMA published guidance on its investigation procedures which includes the first formal guidance on the settlement

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process (the OFT had previously covered the issue only very briefly, in response to a consultation which took place in 2012). The CMA will consider settlement for any case falling under the Chapter I prohibition or article 101 as long as the CMA considers that the evidential standard for giving notice of its proposed infringement decision is met. There is no 'right' to settle – the CMA retains broad discretion in determining which cases to settle. Should the CMA decide to proceed with settlement, at a minimum, it will require the settling parties to: (i) make an admission of liability; (ii) cease the infringement immediately; and (iii) confirm that they will pay a penalty set at a maximum amount.

Settlement discussions can be initiated either before or after the statement of objections is issued. Businesses may wish to approach the CMA during an investigation to discuss the possibility of settlement – the CMA will not make any assumptions about a business' liability from the fact that it is interested in engaging in settlement decisions. Before the CMA case team can commence settlement discussions, the SRO will be required to obtain a mandate from the CMA's Case and Policy Committee to engage in settlement discussions. Once this is received, the settlement discussions themselves will be overseen by the SRO. There may, however, be exceptional circumstances where the CMA considers it appropriate for the Case Decision Group to oversee the settlement discussions and remain decision-maker on the case.

In exchange for settling a case, the CMA will grant settling parties a discount of up to 20 per cent (if settlement took place pre-statement of objections) or 10 per cent (if settlement took place post-statement of objections). The actual discount awarded will take account of the resource savings achieved.

Previous OFT practice suggests that there is a growing appetite for flexible, 'settlement-type' arrangements in cartel cases. For example, in December 2013, the OFT announced that it had reached a settlement with Hamsard 3149 Limited, which had agreed to pay a fine of £380,000 for breaching the Chapter I prohibition in relation to a market-sharing agreement between its subsidiary, Quantum Pharmaceutical, and Lloyds Pharmacy in relation to the supply of prescription medicines to care homes between May and November 2011. The fine was reduced from £646,246 to reflect Hamsard's application for leniency and Hamsard's admission of liability/further cooperation under the settlement process which enabled the case to be resolved in a faster and more efficient manner (the case was only opened 10 months before, in March 2013). The OFT also reached a settlement with Mercedes-Benz and three of its dealers in relation to infringements relating to market sharing, price coordination and exchange of commercially sensitive information in February 2013 – each party qualified for a 15 per cent reduction from the penalties otherwise imposed.

The increasing use of early resolution illustrates a clear preference by the OFT for resolving disputes as flexibly, quickly and cost-effectively as possible. This preference has already been reflected in the CMA's decisional practice: the CMA agreed its first settlement under the formalised procedure in March 2015, in relation to its property sales and letting investigation, and granted a 10 per cent settlement discount; in July 2015, the CMA announced a settlement in relation to the private ophthalmology (information exchange and pricing agreements) investigation and granted a 15 per cent settlement discount. The CMA also reached a settlement with ITW in relation to infringements relating to online resale price maintenance in the commercial refrigeration sector in May 2016 and granted a 20 per cent settlement discount.

An interesting development in relation to the settlements in the OFT's tobacco investigation emerged following the collapse of the OFT's case on appeal by non-settling parties, when it transpired that the OFT had given certain assurances against the possible success of an appeal under the terms of the early resolution agreement with one of the parties, TM Retail. The OFT subsequently announced that it would be returning the £2.7 million fine it had imposed on TM Retail, together with a contribution to certain other costs.

Additionally, following the collapse of the OFT's case on appeal, two other settling parties, Gallaher and Somerfield, were able to obtain from the CAT a retrospective extension of the two-month deadline to file an appeal due to 'exceptional' circumstances, namely the early resolution agreements had been entered into on the basis that there was a factual basis to the finding of an infringement, which the successful appeal proved was not the case. The OFT appealed the CAT's decision to extend time (by more than two years) to the Court of Appeal which, in April 2014, ruled that the CAT had erred in finding that there were 'exceptional circumstances' justifying the extension of the time limit for bringing an appeal: the fact that third parties successfully appeal a decision is no reason for holding that there are exceptional circumstances justifying a non-appealing addressee being granted an extension of time. Gallaher and Somerfield subsequently withdrew their appeals against the OFT's decision.

Finally, it should be noted that the Consumer Rights Act provides that the CMA is able to approve voluntary redress schemes, that is to say, binding commitments entered into by infringers to provide compensation (whether monetary or otherwise) to consumers.

29 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

See question 22.

30 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

An undertaking or individual wishing to take advantage of the CMA's leniency programme must contact the senior director of cartels and criminal enforcement at the CMA (or, where appropriate, the relevant sectoral regulator).

Where a leniency application under the Competition Act regime is made on behalf of an undertaking, this step has to be taken by a person who has the power to represent the undertaking for that purpose. However, an initial approach to the CMA may be made by the undertaking's legal advisers on a hypothetical 'no names' basis to secure a marker, provided that the adviser has instructions to apply for type A immunity if the CMA confirms that it is available. The adviser must also ensure that there is a concrete basis for a suspicion that the undertaking has participated in cartel activity and the undertaking must have a 'genuine intention to confess'; that is, acceptance as a matter of law and fact that the available information suggests that it has been engaged in cartel conduct in breach of the Chapter I or article 101 prohibitions. If the CMA confirms that type A immunity is available, the adviser must identify the undertaking and apply for immunity. A discussion of the timing and process for perfecting the marker will then follow. The undertaking can also apply for automatic individual immunity for all of its current and former employees and directors.

A similar approach may be made to obtain a marker for type B immunity, although in type B cases it is possible to ask the CMA whether immunity is available without a requirement to make an immediate application if the CMA confirms that it is available. To perfect a marker for type B immunity, the undertaking must add significant value to the CMA's investigation. An undertaking can explore on a no names basis whether the information it is likely to provide would genuinely advance the CMA's investigation. Again, where a marker in a type B case has been perfected, the undertaking can also apply for automatic individual immunity in respect of all current and former employees and directors.

In the case of a separate application for a no-action letter, the approach to the CMA may be made by the individual concerned, by a lawyer representing the individual or by an undertaking on behalf of named employees where that undertaking is also seeking leniency from the CMA or the European Commission. The senior director of cartels and criminal enforcement will give an initial indication as to whether the CMA may be prepared to issue a no-action letter. The CMA will then interview the individual concerned before advising the applicant in writing whether it is prepared to issue a no-action letter. Again, the CMA may also advise on a no names basis whether a hypothetical scenario would be likely to lead to individual criminal prosecution.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

The latest version of the guidance regarding leniency and no-action letters was published in July 2013. The CMA has adopted this guidance.

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Defending a case

32 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

As a general rule, the CMA and its staff cannot disclose information obtained under the Enterprise Act, Competition Act or certain other legislation (specified in Schedule 14 of the Enterprise Act) which relates to the affairs of a living individual, or to the business of an existing undertaking during the lifetime of such individual or the existence of such undertaking, unless such information has already been previously lawfully disclosed to the public. However, the following statutory information gateways in Part 9 of the Enterprise Act allow the CMA to disclose 'specified information' (information which the CMA obtains during the exercise of any of its functions) to the defendant where:

- the CMA has obtained the required consents;
- the disclosure is for the purpose of facilitating the exercise by the CMA of its statutory function; or
- the information is disclosed to any person in connection with the investigation of a criminal offence or any criminal proceedings in any part of the UK or for the purpose of deciding whether to commence or bring to an end such an investigation or proceedings.

Where the CMA discloses information to a defendant under the gateways listed above, there are restrictions on the further disclosure or use of the information by the defendant. It is a criminal offence to breach these restrictions.

Before making a disclosure, the CMA takes the following considerations into account:

- the need to exclude from disclosure, so far as practicable, information whose disclosure would be against the public interest;
- the need to exclude from disclosure business information or information relating to an individual's private affairs, where such disclosure would significantly harm the legitimate business interests of the undertaking to which the information relates, or the interests of the individual to whom the information relates; and
- the extent to which disclosure related to the private affairs of an individual or commercial information is necessary for the purpose for which the disclosure is being made.

To safeguard the right to a fair trial, the CMA must allow defendants reasonable time (typically six to eight weeks in practice) to inspect copies of disclosable documents on its file that relate to the matters contained in the statement of objections. The CMA's guidance on its investigation procedures clarifies that confidential information (ie, commercial information whose disclosure the CMA thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual whose disclosure the CMA thinks might significantly harm the individual's interests, or information whose disclosure the CMA thinks is contrary to the public interest) and CMA internal documents are not disclosable.

Where documents are disclosable, the CMA will consider the best means to protect any confidential information (eg, it may redact, anonymise or aggregate confidential information or use confidentiality rings or data rooms). It will be a condition of access to a confidentiality ring or data room that information accessed and reviewed by any adviser is not shared with its client.

The CMA may disclose new documentary evidence or information relevant to the infringement received during settlement discussions; however, any admissions made during failed settlement discussions will not be disclosed.

33 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to seek independent legal advice?

In the absence of a conflict of interest, there is no absolute legal restriction preventing a law firm from representing both employees and the undertaking under investigation, provided that this is compatible with the law firm's own professional conduct obligations. In practice, however, it is possible that the undertaking may wish to distance itself from the conduct of individual employees and to argue that the employee was acting without authority. In addition, given the real possibility for conflicts of interest, separate representation is likely to be appropriate where individual employees face possible criminal prosecution under the Enterprise Act.

See question 9 in relation to representation of individuals being interviewed under the CMA's compulsory interview powers.

Update and trends

In December 2014, the European Commission published the Damages Directive. EU member states are required to transpose it into their national laws by 27 December 2016. At the time of writing, the Department for Business, Energy and Industrial Strategy is analysing feedback received on its consultation on implementation of the Damages Directive in the UK.

The UK electorate's recent vote to leave the EU may – depending on the model for exit that is adopted – result in changes to cartel regulation within the UK. At this stage it is not possible to predict how and when the legal framework may change, but it is not expected that there will be any changes within the next 12 months.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

Again, there is no legal restriction on counsel representing more than one member of the alleged cartel provided this is compatible with counsel's own professional conduct obligations. In practice, depending on the circumstances, single representation of multiple corporate defendants may not be advisable where conflicts of interest may be anticipated.

35 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

There is no absolute prohibition on an undertaking paying the legal costs incurred by, or financial penalties imposed on, individual employees. However, company law provisions may restrict such payments in certain circumstances.

36 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines or penalties imposed for a breach of the law are not tax-deductible in circumstances where the penalty is intended to punish. Where the payment is intended to compensate for damages caused by normal trading operations, it may be tax-deductible to the extent that it can be described as a loss connected with or arising out of trade (and wholly and exclusively so incurred).

37 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The CMA is required to take into account penalties imposed by the Commission or by another EU member state when setting the amount of penalty in relation to that conduct. However, UK authorities are not required to take into account penalties imposed on economic operators by jurisdictions outside of the EU.

There are no rules specifically preventing international double jeopardy against individuals in relation to the cartel offence (see the *Marine Hose* cartel discussed in question 15).

In the context of private damages claims, the UK courts generally award compensatory damages only (ie, to cover the amount actually lost by the claimant as a result of the defendant's breach of competition law). If the claimant has already recovered damages for exactly the same loss in another jurisdiction, it will no longer be able to prove its loss in the UK courts so damages would no longer be available (avoiding double recovery).

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38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

Avoidance or reduction of an undertaking's exposure to fines as a result of its participation in a cartel is inevitably subject to one precondition: withdrawal from the cartel. Withdrawal needs to be managed, however, in such a way as to optimise the possibility of a fine reduction. There are three key points listed below:

- Internal investigation – the undertaking should conduct an immediate and thorough internal investigation to establish the full extent of its participation in the cartel and of its exposure. This should involve the collection of all relevant documents and, to the extent possible, the gathering of witness statements from all employees with first-hand knowledge of the cartel's operation. This should place the undertaking in a position to assess its exposure fully, not only in the UK but in all jurisdictions in which the cartel is operating. Undertakings should note the section dealing with internal investigations in the CMA's guidance on leniency and no action (see questions 22 to 24).
- Paper trail – the documents and witness statements collected will provide the basis for an assessment by the undertaking, together with its external lawyers, of its ability to meet the often stringent conditions to benefit from the leniency programmes of the regulatory authorities. It is, however, important to avoid the creation of new documents that are not legally privileged.
- Whistle-blowing – where the decision is taken to 'blow the whistle' on the cartel, it will often be helpful to be able to demonstrate conclusively the undertaking's withdrawal from the cartel. Such withdrawal may, however, put the other members on notice that the undertaking may make an early approach to the CMA or other regulator for leniency. The undertaking should be prepared to act swiftly to make the most of this first-mover advantage to obtain a maximum reduction in fines. In exceptional cases, the CMA may direct that the applicant continues to participate in the cartel to protect the element of surprise of any forthcoming inspection or to obtain further evidence.

Compliance programmes may be considered as a 'mitigating factor' under the CMA's six-step approach to calculating financial penalties (see question 17). The mere existence of a compliance programme will not be sufficient to prove that a party has taken the required steps to ensure compliance with competition law and thereby qualify for a fine to be reduced. However, if the party is able to demonstrate that its senior management has taken adequate steps to achieve a clear and unambiguous commitment to competition law compliance from the top down - together with appropriate steps relating to competition law risk identification, risk assessment, risk mitigation and review activities – this is likely to be treated as a mitigating factor, warranting a fine reduction of up to 10 per cent. The CMA in its May 2015 decision in relation to its property sales and lettings investigation identified that the requirement to show that adequate steps have been taken includes 'introducing or reviewing and changing compliance activities as appropriate in the light of the events that led to the investigation in question,' thereby indicating that compliance activities undertaken after initiation of the investigations would also be taken into account as a mitigating factor. Indeed, in the same case, the CMA granted two estate agents a 5 per cent reduction on the penalties that would have been imposed on them to recognise 'identified (or proposed) compliance activities by each of these Parties,' including commitment by senior management to, and accountability for, future competition law compliance and the drafting of a compliance manual. In May 2016, the CMA also granted ITW a 10 per cent reduction on the penalties that would have been imposed on it in recognition of ITW's introduction of a comprehensive competition law compliance programme, following the initiation of the CMA's investigation, to which its board fully and publicly committed. ITW also agreed to submit an annual report to the CMA on its compliance activities for the next three years. Additionally, ITW's ultimate parent company, Illinois Tool Works Inc, committed to ensuring that a culture of compliance and awareness would be disseminated throughout its group of companies.

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United States

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Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

Section 1 of the Sherman Act (15 USC section 1) is the principal substantive statute. In addition, section 5 of the FTC Act prohibits 'unfair methods of competition' and is used to sanction conduct that may fall short of a Sherman Act violation, such as invitations to collude or cases where the pernicious effects of collusion are less clear.

2 Relevant institutions

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 US Department of Justice, Antitrust Division (DoJ) investigates and prosecutes cartels criminally and civilly. The Federal Trade Commission (FTC) also enforces the Sherman Act and the FTC Act in civil actions. Private parties may bring civil actions for monetary and injunctive relief. In addition to federal law, states have antitrust laws that usually mirror the Sherman Act, which are enforced by state attorneys general. The FTC has its own adjudicative arm, but also brings some cases in federal court; the DoJ brings cases in federal court.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

There has been proposed legislation that would expand protection for third-party whistle-blowers who report criminal antitrust activity either internally or to government authorities, but it was not passed into law. There have been no recent changes to the Sherman Act since 2004, when the statutory fines were increased (see question 15) and provisions allowing single damages for amnesty applicants were enacted (see question 22).

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Sherman Act prohibits agreements 'in restraint of trade'. While the language of section 1 is sweeping on its face, judicial decisions have narrowed its scope.

Cartel activity (ie, agreements between competitors on prices, output, or to allocate customers or territories or rig bids) is considered a per se (automatic) violation of section 1 and is presumed to have an anticompetitive effect on the market. Agreements do not need to be formal or in writing, but there must be a 'conscious commitment to a common scheme designed to achieve an unlawful objective'. *Monsanto Co v Spray-Rite Serv Corp*, 465 US 752, 768 (1984). For criminal liability, the anticompetitive conduct must have been undertaken with knowledge of its probable consequences. *United States v US Gypsum Co*, 438 US 422, 444 & n.21 (1978).

Unilateral conduct is not a cartel offence. Thus, it is not illegal for a company to observe market prices and follow them or to learn a competitor's price from a customer or other third party and decide, unilaterally, to follow it. Moreover, contacts with competitors (whether in a business or social setting), even if they involve discussions of competitively sensitive matters, are not in themselves illegal, although discussions are risky as they could be used to infer that the parties reached an agreement.

While the language of the Sherman Act appears to create criminal liability for a broad range of conduct, the DoJ's stated policy is to pursue only cartel activity criminally (DoJ, Antitrust Division Manual (Antitrust Division Manual) III-12).

Private parties (typically customers) can also sue for cartel activity. If successful, they are awarded three times actual damages, costs and attorneys' fees and, in some cases, injunctive relief.

An attempt or solicitation to collude does not violate section 1 of the Sherman Act, although in some cases the DoJ has sought to prosecute attempts as criminal mail or wire fraud. The FTC has also challenged attempts to collude in civil cases under the FTC Act.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

A number of industries have limited exemptions provided by law. These include certain labour, agriculture, energy, insurance, financial, healthcare, communications and professional sports markets. For example, the McCarran-Ferguson Act exempts state law-regulated insurance business so long as the underlying conduct does not involve an agreement to 'boycott, coerce, or intimidate' (15 USC section 1013).

The judiciary has also created exemptions to the antitrust laws. The Noerr-Pennington doctrine, based on the First Amendment to the US Constitution, provides immunity from antitrust liability to companies for certain conduct that attempts to influence the government, such as lobbying, joint petitioning and litigation. *Cal Motor Transp Co v Trucking Unlimited*, 404 US 508, 513-15 (1972), *United Mine Workers v Pennington*, 381 US 657, 661-62 (1965), *Eastern RR Presidents Conference v Noerr Motor Freight, Inc*, 365 US 127, 135-36 (1961).

The political question doctrine bars courts from adjudicating cases involving policy decisions that are more appropriately resolved by the legislative or executive branches. *Japan Whaling Ass'n v Am Cetacean Soc'y*, 478 US 221, 230 (1986). The Fifth Circuit Court of Appeals recently upheld a lower court's decision to decline jurisdiction over cartel claims against entities owned or controlled by OPEC member states. *Spectrum Stores, Inc v Citgo Petroleum Corp*, 632 F.3d 938, 943 (5th Cir. 2011). The court classified the conduct at issue (ie, state decisions in respect of crude oil production levels) as involving foreign sovereign conduct. The court held that for it to rule on the case would, in effect, require it to second guess executive branch decisions involving foreign policy, energy security and the proper level of engagement with oil-producing countries. The court held that the action was similarly barred by the act of state doctrine, under which 'the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory'. *Underhill v Hernandez*, 168 US 250, 252 (1897).

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In *In re Vitamin C Antitrust Litigation*, defendants argued that the verdict against them was barred as a matter of law by the doctrines of act of state, foreign sovereign compulsion, and international comity, under the theory that because Chinese law compelled defendants' decision to fix the price and limit the supply of vitamin C, plaintiffs' claims should never have been brought before a jury. No. 06-md-1738, 2013 WL 6191945 (E.D.N.Y. 26 November 2013). The court denied defendants' motion for judgment as a matter of law, reaffirming its prior ruling that Chinese law did not compel defendants' price-fixing decision. The court further recognised that an issue at trial was to determine, regardless of what Chinese law authorised, whether defendants' conduct was compelled by the Chinese government as a matter of fact. The court concluded that there was ample evidence at trial for the jury to find a lack of factual compulsion by the Chinese government. However, the Second Circuit recently vacated the US$147 million judgment against defendants. In a unanimous opinion, the Court of Appeals held that the defendants were required by Chinese law to set prices and reduce the supply of vitamin C sold abroad and that this conflict with US antitrust law mandated dismissal of the case on international comity grounds (No. 13-4791 (2d Cir. 30 September 2016)).

States enjoy antitrust immunity. *Parker v Brown*, 317 US 341, 350-51 (1943). This concept has been extended to private actors and local governmental entities carrying out the state's regulatory programme. However, immunity will only attach to these activities if they are taken pursuant to a clearly articulated state policy to displace competition. Additionally, private actors are subject to a requirement that the policy be actively supervised by the state. *Cal Retail Liquor Dealers Ass'n v Midcal Aluminum, Inc*, 445 US 97, 104 (1980). In *FTC v Phoebe Putney Health Systems, Inc*, a hospital authority created pursuant to Georgia law sought to acquire a second hospital. 133 S. Ct. 1003, 1005 (19 February 2013). Together, the two hospitals would account for 86 per cent of the market for acute-care services throughout six counties. The US Supreme Court unanimously held that the hospital authority was not immune from antitrust liability because there was no evidence that the state 'affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership'.

6 Application of the law

Does the law apply to individuals or corporations or both?

Both. The DoJ typically brings criminal actions against both companies and executives. Civil cases are generally brought against companies only.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

Yes, but there must be a sufficient nexus to the United States. The Foreign Trade Antitrust Improvements Act (the FTAIA) (15 USC section 6a) governs the extraterritorial application of the antitrust laws.

On its face, the Sherman Act applies to 'trade or commerce' among foreign nations. However, the FTAIA limits the extraterritorial reach of the Sherman Act. Under the FTAIA, the Sherman Act will not apply to antitrust conduct occurring outside of the United States unless that conduct is import commerce or has a direct, substantial and reasonably foreseeable effect on domestic commerce, and such effect proximately caused the plaintiff's foreign injury (15 USC section 6a; see also *F Hoffmann-La Roche, Ltd v Empagran SA*, 542 US 155, 159 (2004)).

The import commerce exception is generally viewed narrowly to apply to only direct imports by the defendants. *Hartford Fire Insurance Co v California* held that the Sherman Act applies to foreign conduct that was intended to have, and did in fact have, substantial effects on domestic or import commerce (509 US 764, 796 (1993)). *United States v Nippon Paper Industries, Co*, 109 F.3d 1, 9 (1st Cir. 1997), confirmed that the *Hartford Fire* test applies in criminal cases. The law is evolving, however, and decisions of different circuit courts highlight inconsistencies in the interpretation of the term 'direct' for purposes of the FTAIA. For example, the Seventh Circuit held that plaintiffs sufficiently pleaded a 'direct' effect on US commerce where plaintiffs alleged that a cartel established benchmark prices in other markets and then applied those prices to its US sales. Specifically, 'foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) sold that product to US customers'. *Minn-Chem, Inc v Agrium Inc,* 683 F.3d 845, 860 (7th Cir. 2012) (en banc). Given somewhat similar circumstances, the Ninth Circuit held differently. *United States v LSL Biotechnologies*, 379 F.3d 672, 681-83 (9th Cir. 2004), held that any potentially anticompetitive effect of a restrictive clause's ban on distributing certain seeds to Mexico, and the resulting fruit to the US, was not 'direct' because it did not follow as an immediate consequence of the defendant's activity but instead depended on uncertain intervening events. A district court in New York followed the Ninth Circuit's analysis of 'direct effects', *Lotes Co v Hon Hai Precision Industry Co,* No. 12 Civ. 7465, 2013 WL 2099227 (S.D.N.Y 14 May 2013), rejecting the Seventh Circuit's analysis that overseas anticompetitive conduct need only have a 'reasonably proximate causal nexus' to anticompetitive effects in the United States. The Second Circuit affirmed on other grounds, holding that even if defendants' foreign anticompetitive conduct had a 'direct, substantial, and reasonably foreseeable effect' on US domestic or import commerce, that effect did not 'give rise to' plaintiff's claims because plaintiff's injury preceded any domestic effects. *Lotes Co v Hon Hai Precision Industry Co*, 753 F.3d 395 (2d Cir. 2014).

Motorola Mobility, Inc v AU Optronics Corp focused on the issue of whether the US conduct was a proximate cause of injury to Motorola's foreign affiliates that purchased allegedly price-fixed LCD panels abroad. No. 09-6610, 2014 WL 258154, at *6-7 (N.D. Ill. 23 January 2014). Motorola sought damages from the foreign LCD panel manufacturers, but the vast majority of panels Motorola bought were shipped to Motorola's foreign subsidiaries. The court concluded that the direct cause of injury to Motorola's foreign affiliates was the foreign effects of the conspiracy, not any effects in the US. The court noted that its decision was consistent with *Minn-Chem*, because the economic effects of the US activities in this case were not felt in the US economy. On appeal, the Seventh Circuit held that for panels sold abroad and incorporated into products later sold in the US, Motorola failed to satisfy the requirement that the effect of defendants' conduct on domestic commerce 'give rise to' an antitrust claim. The Seventh Circuit characterised Motorola's claim as an improper attempt to use US antitrust laws for injuries to foreign subsidiaries. Finally, the Seventh Circuit remarked that Motorola's position would result in unreasonable interference with foreign sovereigns, which the FTAIA was designed to prevent.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

Today, most criminal investigations are triggered by information learned through an amnesty applicant (see question 22). However, the DoJ also relies on tips from customers, competitors, disgruntled employees and its own observations of unusual market behaviour. The DoJ can also learn of anticompetitive activity through investigations or litigation in other industries, press reports or inter-agency referrals. The Amnesty Plus programme (see question 24) – pursuant to which a cartel participant in one market discloses a cartel in another market – is another prime source of new investigations.

After opening a criminal investigation, the DoJ will typically issue grand jury subpoenas or execute search warrants directed to industry companies and individuals. At this point, the existence of the investigation usually becomes public.

The DoJ proceeds with criminal investigations through the grand jury process and utilises other tools of criminal enforcement (see question 9). The grand jury is a group of laypersons charged with investigating felonies (crimes punishable by more than one year in prison) and returning indictments. In practice, the grand jury is a tool for prosecutors to investigate potential criminal antitrust offences. A grand jury almost always defers to a prosecutor's decision to seek indictment. The grand jury has broad powers to subpoena documents and witnesses; witnesses may be served with subpoenas anywhere in the United States, commanding them to provide testimony under oath (Fed. R. Crim. P. 17(e)). Witnesses subpoenaed to testify before the grand jury have the right to refuse to testify under the Fifth Amendment to the US Constitution if their testimony would be potentially incriminating. The DoJ can force testimony by granting immunity, thus relieving the incrimination risk.

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An indictment is not a conclusion that a crime has been committed, but merely a finding that there is enough evidence to have a trial. Indicted companies and individuals have the right to trial by jury. At some point in the investigation, individuals or corporations may be identified as 'targets' by the DoJ. A 'target' is a person or company 'as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant' (DoJ, United States Attorneys' Manual section 9-11.151). Targets are given certain rights, such as an opportunity to meet with the DoJ before indictment and the right (rarely invoked) to testify before the grand jury.

In civil antitrust cases, the DoJ will typically begin an investigation by issuing a civil investigative demand (CID). CIDs can seek documents, interrogatory responses or sworn testimony. The DoJ has the power to serve a CID on any individual or corporation it has reason to believe has custody or control over relevant materials, or has any information relating to a civil antitrust investigation (15 USC section 1312). CIDs sometimes lead to civil litigation by the DoJ in federal court.

There are no strict time frames on criminal or civil investigations, and thus investigations may continue for an open-ended period of time, although the statute of limitations may serve as a deadline for the conclusion of an investigation.

9 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

In addition to the powers of the grand jury (see question 8), the DoJ uses search warrants, wiretaps, border searches and interviews.

A search warrant enables law enforcement officers to enter private premises to search for and seize evidence. Only a federal judge or a magistrate may execute a search warrant, upon a finding of probable cause. In antitrust cases, search warrants are used to gather documents (hard copy and electronic) that may evidence illegal conduct. In a global cartel case, the DoJ typically places key executives of foreign-based companies on 'border watch'. The request is made to immigration and border control officials, who comply automatically; no showing of guilt or knowledge about an alleged cartel is required. Border watches are used to detect the executive's entry into the United States. The person can then be subjected to a drop-in interview (usually conducted by a DoJ attorney and an agent from the Federal Bureau of Investigation). These interviews are often done unannounced at the executive's workplace or hotel. While these interviews are technically voluntary, there may be pressure on the executive to cooperate. Travel risks for overseas executives must be considered carefully by the company with counsel.

Authorities have broad investigative powers at international borders. For example, border control recently seized the personal computer, thumb drive, camera and mobile phone of an individual who helped fund-raise for the legal defence of a former armed service member who provided government files to WikiLeaks (see Susan Stellin, 'The Border Is a Back Door for U.S. Device Searches', *The New York Times*, 9 September 2013). The case was settled prior to litigation. It is possible that authorities could exercise this same power to search electronic media, such as hard disk drives, at international borders on suspicions of antitrust violations. The DoJ also uses phone or wiretaps to monitor and record conversations among suspected co-conspirators. Federal law permits the use of phone or wiretaps to gather evidence of a violation of the Sherman Act upon a showing of probable cause to a federal judge (18 USC section 2516(1)(r)).

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Coordinated investigations conducted by the DoJ, European Commission and other authorities are common. For example, the authorities may coordinate searches, service of subpoenas and drop-in interviews. The ability to collect evidence from multiple jurisdictions is important in international cartel cases, and international agencies not only coordinate on obtaining evidence, but also general theories of the case. However, they cannot share evidence in the case, except pursuant to a formal mutual legal assistance treaty (MLAT), diplomatic requests (such as letters rogatory) or consent of the parties.

MLATs are treaties and, therefore, supersede earlier promulgated domestic laws to the extent they are inconsistent (Vienna Convention on the Law of Treaties, article 27). The United States has entered into MLATs with approximately 80 jurisdictions (Antitrust Division Manual at VII-32). MLATs often contain binding provisions requiring assistance in response to a formal request, although in certain situations the obligation to cooperate is discretionary.

The United States has also entered into a number of antitrust cooperation agreements (ACAs) and memoranda of understanding (MOUs). These are 'softer' agreements that do not generally create binding obligations and are not investigatory tools for particular cases. ACAs have been entered into between the United States and Australia, Brazil, Canada, Chile, the European Union, Germany, Israel, Japan, and Mexico. In addition, the DoJ and FTC have bilateral MOUs on cooperation with the Chinese, Indian, and Russian competition agencies. ACAs and MOUs provide for cooperation on matters relating to national enforcement interests but do not override domestic laws, such as confidentiality and work-product privileges.

The DoJ and FTC also belong to the International Competition Network, and the Antitrust Division, FTC and Department of State represent the United States in the Competition Committee of the Organisation for Economic Co-operation and Development (Antitrust Division Manual at VII-33-VII-34).

In practice, while the DoJ touts its extensive cooperation with other jurisdictions and the attendant benefits, there are impediments to cooperation and each jurisdiction has its own priorities. For example, the use of MLATs to gather evidence may be cumbersome and resisted by the state receiving the request. Dual criminality requirements and discretionary provisions may make MLATs toothless in antitrust cases where the counterparty does not criminalise antitrust offences.

11 Interplay between jurisdictions

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 DoJ holds regular consultations with antitrust officials of Canada, China, the European Union, Japan, Mexico and South Korea.

Multi-jurisdictional cases can lead to troubling conflicts that raise serious sovereignty and comity concerns. For example, the DoJ has begun seeking foreign-origin documents that were produced in a parallel civil case. The DoJ's stated policy is that grand jury subpoenas do not reach beyond the borders of the United States, and the DoJ does not seek foreign-located evidence through grand jury subpoenas out of comity concerns. The DoJ's standard practice is to request the parties to produce such documents voluntarily. In the DoJ investigation into the liquid crystal display (LCD) industry, the DoJ issued a grand jury subpoena seeking the entire civil discovery record, including foreign-origin documents brought into the United States, solely for production in the civil cases. The documents had been produced under a protective order that prohibited any recipient of the documents from using them other than in connection with the civil litigation. Foregoing the usual channels for obtaining foreign-based discovery (such as MLATs, treaties and letters rogatory), the DoJ subpoenaed the documents, arguing that its grand jury subpoena trumped the civil protective order. The Ninth Circuit Court of Appeals agreed with the DoJ, holding that grand jury subpoenas automatically trump civil protective orders (, 627 F.3d 1143, 1144 (9th Cir. 2010) (citing *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995))). The Fourth and Eleventh Circuits apply a similar rule. *In re Grand Jury Subpoena*, 646 F.3d 159, 166 (4th Cir. 2011); *In re Grand Jury Proceedings*, 995 F.2d 1013, 1018 (11th Cir. 1993). These courts stand in sharp contrast to the rule of other circuits, notably the Second Circuit, which holds that 'absent a showing of improvidence in the grant of a protective order or some extraordinary circumstance or compelling need, a protective order is enforceable against any third party, including the government' (*In re Grand Jury Subpoena Duces Tecum Dated April 19, 1991*, 945 F.2d 1221, 1224 (2d Cir. 1991)). Other circuit courts – notably the First and Third Circuits – have reached intermediate approaches. Thus, whether

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a grand jury can obtain such documents will depend on the location of the grand jury.

Civil plaintiffs may also attempt to obtain documents regarding foreign regulatory proceedings, including confidential amnesty submissions. In this context, the court must balance the plaintiffs' need for materials that may go to the heart of their claims – and which may not be readily available from other sources – with the regulator's interests in safeguarding ongoing investigations and promoting cooperation by treating such materials as confidential. Foreign regulators, most notably the European Commission, have objected in various US antitrust litigations to the production of such documents. In *In re Methionine Antitrust Litigation*, the European Commission opposed the production of documents written exclusively for the purpose of leniency applications, in which a company 'describes a cartel's actions and practices obtained from its own participation in the cartel'. Order on Plaintiffs' Motion to Compel Production of Documents Submitted to Governmental Authorities, MDL No. 00-1311, at *6-7 (N.D. Cal. 17 June 2002). The Commission argued that the production of such submissions would have significant consequences for the EU Leniency Programme and would harm the Commission's effective enforcement of its competition laws. The DoJ has submitted letters in support of similar objections, noting that the European Commission is one of the DoJ's 'closest partners in the fight against international cartels and that harm to its leniency programme could similarly harm the DoJ. The issue here is one of international comity: should US courts override the wishes of foreign regulators and order the production of materials that such regulators obtained with the understanding that they would remain confidential? The case law remains divided on this issue, with some courts compelling production and other courts deferring to foreign regulators.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

Ultimately, cartel cases (both civil and criminal) are adjudicated in court. Civil and criminal defendants have the right to trial by jury. In practice, the vast majority of criminal cases are resolved by a plea bargain agreement (see question 28) or by the DoJ's decision to discontinue the investigation prior to seeking an indictment. Civil cases are often settled or resolved by a pretrial motion to dismiss the case or for summary judgment after discovery.

13 Burden of proof

Which party has the burden of proof? What is the level of proof required?

In a criminal case, the government must prove guilt beyond a reasonable doubt. In a civil case, plaintiffs must prove liability only by a preponderance (ie, greater weight) of the evidence.

14 Appeal process

What is the appeal process?

Convicted criminal defendants and losing parties in civil cases have a right to appeal. The constitutional prohibition of double jeopardy prevents the DoJ from appealing a criminal acquittal. Appeal is taken to the circuit court with jurisdiction over the trial court. Appellate review is generally focused on questions of law; however, courts of appeals may overturn factual findings should they be found to be clearly erroneous. See, eg, *In re ATM Fee Antitrust Litig*, 686 F.3d 741, 747 (9th Cir. 2012). Questions of law, on the other hand, are reviewed de novo. Id at 748. The Federal Rules of Appellate Procedure provide that a party has 30 days in suits between private parties from entry of judgment or order appealed from to file a notice of appeal. Fed. R. App. P. 4. Defendants in criminal cases have 14 days from the later of entry of judgment or appealable order or the filing of the government's notice of appeal. Id. Appeals in the federal system above the initial appeal (ie, to the Supreme Court) are discretionary. Supreme Court review is rare and reserved for important issues or where there is conflict or confusion among the lower courts.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

Under the Sherman Act, for conduct post-dating 22 June 2004, a corporation faces a maximum fine of US$100 million per offence. This means that a single antitrust offence (eg, one phone call) can be punishable by a US$100 million fine. There is no minimum fine or prison sentence. Moreover, the statutory maximum can be exceeded under the Alternative Sentencing Act (18 USC section 3571), which provides that if any person derives pecuniary gain from the offence (or others experience pecuniary loss), the defendant may be fined up to twice the gross gain or twice the gross loss, 'unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process'.

A recent district court decision held that if the government seeks a fine in excess of the Sherman Act cap, it must prove the gain or loss to a jury beyond a reasonable doubt (Order Denying United States' Motion for Order Regarding Fact Finding for Sentencing Under 18 USC section 3571(d) at 6, *United States v AU Optronics Corp*, No. C 09-00110 SI (N.D. Cal. 18 July 2011)). In the *AU Optronics* case, the DoJ proved gain or loss beyond a reasonable doubt, established by the special jury verdict form that specifically asked whether AUO and the other participants in the conspiracy derived a combined gross gain from the conspiracy of US$500 million or more. However, the DoJ's burden to prove gain or loss over US$100 million is a demanding standard that may be difficult for the DoJ to satisfy in many cases. This standard should be considered in the decision of whether to plead guilty or go to trial.

In arguing for a US$1 billion fine, the DoJ pointed to the inherent anticompetitive effect of the cartel and the company's 'history and characteristics', arguing that 'the company has been engaged in felonious conduct from its inception'. Judge Illston of the Northern District of California took a more measured approach, sentencing the company to a US$500 million fine. Reasoning that 'we need to assure that businesses producing useful products with services to provide to the community and the world not be penalised to the point where they are no longer able to do that', Judge Illston found that the fine requested by the government was 'simply substantially excessive to the needs of this matter'. The US$500 million fine imposed does not dwarf the US$400 million awarded against LG Display in the same case, a company that pleaded guilty, provided substantial assistance to the government and whose executives agreed to serve prison terms. In fact, the fine of US$500 million matches the largest fine ever imposed for antitrust violations against Hoffmann-La Roche, which was also a negotiated plea bargain. The Ninth Circuit affirmed the AUO fine on appeal, holding that a gross gain calculation based on the conspiracy as a whole is allowed and that it does not incorporate principles of joint and several liability, which would have reduced the fine by the amount already paid by AUO's co-conspirators. *United States v Hsiung*, No. 12-10492 (9th Cir. 30 January 2015).

Under the Sherman Act, individuals face a maximum of 10 years in prison and a US$1 million fine. There is no minimum fine or prison sentence. In 2012, the DoJ obtained its first trial conviction against foreign nationals in a criminal antitrust case. Two executives of AU Optronics were found guilty after a jury trial, while two others were acquitted. The jury deadlocked as to the fifth, resulting in a hung jury. Judge Illston demonstrated her reluctance to 'throw the book' at company executives. The executives were each sentenced to three years in prison. Despite having exercised their right to go to trial and put the government to its burden of proof, the defendants were issued sentences more commensurate with those imposed pursuant to guilty pleas, albeit on the more severe end of the spectrum. Their convictions were affirmed on appeal. The fifth executive was subsequently retried, found guilty, sentenced to serve two years in prison, and lost his appeal in August 2015. One more AU Optronics executive was tried and acquitted in October 2013.

Although the DoJ did not publish the total fines it obtained in fiscal year 2015 several sources report that it imposed a record $2.85 billion in fines. With respect to incarceration, individuals are increasingly sentenced to prison terms. In fiscal year 2014, the DoJ obtained prison terms for 21 individual defendants. Duration of prison sentences has increased as well, and the DoJ reported that the average prison term in fiscal year 2014 was the third-highest average ever, 26 months, in stark contrast to the eight-month average in the 1990s. In December 2013,

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a former executive of a shipping company was sentenced to serve five years in prison, the longest term ever imposed for a Sherman Act violation. The individual was convicted of price fixing by a jury in January 2013. The DoJ had requested in a sentencing memorandum a prison term of 87 months, based on a total offense level of 29 (see question 17). See United States' Sentencing Mem. at 2, *United States v Peake*, No. 03:11-cr-00512 (D.P.R. 10 September 2013).

The DoJ's power to force foreign nationals to plead guilty stems in part from an obscure memorandum of understanding between the DoJ's Antitrust Division and its Immigration and Naturalization Service (now called US Immigration and Customs Enforcement, an investigative arm of the US Department of Homeland Security) (Memorandum of Understanding Between the Antitrust Division, US DoJ, and the Immigration and Naturalization Service, US DoJ, 15 March 1996, available at www.justice.gov/atr/public/criminal/9951.htm). The memorandum states that violations of the Sherman Act will be considered 'crimes involving moral turpitude', which may subject aliens with no immigration status to deportation, exclusion, or both from the US for a minimum of 15 years. The DoJ often agrees to waive the immigration consequences if the defendant pleads guilty, a manoeuvre that has proven instrumental in securing plea agreements in many investigations. The designation of antitrust offences as 'crimes involving moral turpitude' – a category normally reserved for crimes not created by statute, and which involve 'inherently base, vile, or depraved' conduct (*Fernandez-Ruiz v Gonzales*, 468 F.3d 1159, 1165, 1169 (9th Cir. 2006)) – is dubious and has never been tested in court.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

The DoJ can bring a civil action for equitable injunctive relief (15 USC section 4). Agencies may seek novel types of injunctive remedies, as demonstrated in the recent decision, *United States v Apple, Inc*, 12-cv-2826, 12-cv-3394, 2013 WL 4774755 (S.D.N.Y. 5 September 2013). The court in the *Apple* case held that Apple had conspired with five publishers to raise the price of e-books. In its final order entering an injunction, the court ordered Apple to renegotiate its distribution agreements with the five publishers and employ an external antitrust compliance monitor for two years. Id. The DoJ and several state attorneys general had originally asked that the external monitor serve for a period of 10 years, and that the court additionally regulate Apple's conduct with respect to goods other than e-books (eg, music, other audio, films, television shows, or apps). See Pls.' Mem. of Law In Support of Proposed Injunction, Ex. 1 at 6, 16, *United States v Apple*, 12-cv-2826, 12-cv-3394 (S.D.N.Y. 2 August 2013).

The DoJ has no authority to seek civil fines, but could sue as a purchaser of price-fixed goods, although such suits are rare (15 USC section 15a). Most civil actions brought by the DoJ are resolved by consent decrees in which the defendant agrees to cease conduct or take other remedial measures.

The FTC is limited to 'equitable' remedies, which typically consist of injunctive relief and disgorgement. The most significant civil exposure comes from private suits (see question 20).

In addition, persons or companies convicted of price fixing may be debarred from federal government contracts (see question 18). Convicted US citizens may lose the right to vote. Foreign executives convicted of price fixing are routinely denied travel into the United States (unless agreed otherwise in a plea agreement) (see question 15).

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

Yes. Two parts of the Federal Sentencing Guidelines are relevant to corporate antitrust fines: section 2R1.1 governs antitrust offences, and chapter 8 contains guidelines for organisations (USSG section 8A1.1 et seq). The Sentencing Guidelines attempt to narrow the discretion of federal judges in sentencing antitrust offenders by dictating a sentencing range within which the sentence should fall, absent significant aggravating or mitigating circumstances. The guidelines apply to individuals and organisations.

Individuals may be imprisoned and fined for antitrust offences. For the imprisonment component, the Federal Sentencing Guidelines assign a base offence level of 12 to antitrust offences, and then adjust the offence level for aggravating or mitigating factors. A base offence level of 12 translates to 10 to 16 months in prison (United States Sentencing Commission, 2014 Federal Sentencing Guidelines Manual, available at www.ussc.gov/sites/default/files/pdf/guidelines-manual/2014/GLMFull.pdf). The Guidelines recommend that the base level of 12 be increased by one level for bid rigging and by two level increments depending upon the volume of commerce attributable to the offence. At lower offence levels (ie, 12 or lower), defendants are generally eligible to serve a portion of the sentence in community confinement or home detention. With regard to recommended fine amounts, individuals may be fined from 1 to 5 per cent of the affected volume of commerce but no less than US$20,000.

Unlike individuals, organisations cannot be imprisoned but they can still be fined for their criminal conduct. The starting point for fines for convicted organisations is 20 per cent of the volume of commerce. The base fine is then multiplied based on the 'culpability' score of the organisation, which is determined by factors such as prior history of criminal conduct by the organisation, obstruction of justice, implementation of an effective compliance and ethics programme, and self-reporting. The Sentencing Guidelines set the minimum multiplier at 0.75. In practice, fines are heavily influenced by negotiations, as most cases are resolved by plea bargain agreements.

In 2005, the Supreme Court held that sentencing guidelines were not binding on federal judges. *United States v Booker*, 543 US 220, 226 (2005). In 2011, however, the Supreme Court held that the district court must still give 'respectful consideration' to the Sentencing Guidelines. *Pepper v United States*, 131 S. Ct. 1229, 1241 (2011).

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Yes, contractors may be suspended or debarred under the Federal Acquisition Regulation, which directs agencies to 'solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only'. 48 CFR section 9.402(a). The decision-making authority is the debarring official, which is the agency head or designee authorised by the agency head to impose debarment, 48 CFR 9.403. Should the debarring official determine it be 'in the government's interest', the debarring official may debar a contractor for a conviction or civil judgment for a violation of federal or state antitrust laws relating to the submission of offers. Id section 9.406-1, -2. Debarment is discretionary, as 'the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision'. Id section 9.406-1(a). Debarment is to last for 'a period commensurate with the seriousness of the cause(s)', but usually should not exceed three years. Id section 9.406-4.

Additionally, before a contractor is found to have violated the antitrust laws, it may be suspended from government contracts if the contractor is suspected of or indicted for a violation of state or federal antitrust laws. Id section 9.407-2(a)-(b). Suspension lasts for the duration of the investigation and any ensuing legal proceedings, unless legal proceedings have not been initiated after 18 months. Id section 9.407-4.

Contractors must be notified and given an opportunity to be heard before being debarred, unless debarment is based on a prior conviction; however, contractors may be suspended upon notice of suspension before being given an opportunity to be heard. Id sections 9.406-3, 9.407-3. Conduct by a contractor's officers, directors, shareholders, partners, employees, other associated individuals or joint venture partners may be imputed to the contractor, and vice versa. Id sections 9.406-5, 9.407-5.

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19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

The DoJ normally reserves criminal prosecution for price fixing, bid rigging, and market allocations. The DoJ is unlikely to prosecute if the case involves unsettled law; 'novel issues of law or fact'; past prosecutorial decisions that may have reasonably caused confusion as to the legality of the conduct; or 'clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action' (Antitrust Division Manual at III-12). Conduct not pursued criminally may be pursued civilly (see question 8).

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Yes, and there is a very active plaintiffs' bar in the United States. Almost all criminal investigations that become public lead to parallel private civil suits. While brought on behalf of purchasers, the cases are instituted and driven by plaintiffs' lawyers, who generally work on a contingency fee basis. Some cases are brought even where there is no government investigation.

An injured private party may bring a civil suit to redress violations of the antitrust laws. Plaintiffs typically are purchasers of the allegedly price-fixed product or products. While only direct purchasers may sue under the Sherman Act, many state statutes allow indirect purchaser suits. Private actions can be brought in addition to any criminal inquiry or proceeding initiated by the DoJ. Antitrust plaintiffs' counsel in the United States constantly monitor news sources for announcements regarding criminal antitrust investigations and usually commence lawsuits shortly after such announcements. Typically, such private antitrust lawsuits are pursued on a class action basis; under this procedure, a single plaintiff can sue on behalf of all similarly situated plaintiffs (see question 21).

Damages in private actions typically are measured by the 'overcharge' resulting from the cartel. Actual damages are automatically trebled. Liability is joint and several, which means that a plaintiff may collect three times the entire damage caused by the cartel, from one or more defendants, as it wishes. Successful plaintiffs are entitled to recover attorneys' fees and costs. Private damages awards are offset by any settlements the plaintiff has received from other parties. *Zenith Radio Corp v Hazeltine Research, Inc*, 401 US 321, 348 (1971); see also Order re Post-Trial Motions, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal. 20 November 2013), ECF No. 8786.

In a recent trial involving allegations of price fixing in LCDs, pass-on was a key issue at trial. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal. 4 September 2013). In addition to its Sherman Act claims based on direct purchases, the major electronics retailer Best Buy had sued Toshiba and HannStar in its capacity as an indirect purchaser under Minnesota law, which allows plaintiffs to recover 'three times the actual damages sustained'. Minn. Stat. section 325D.57. For the indirect purchaser claims, the Court concluded that whether the overcharge was passed on from the direct purchasers to Best Buy ('upstream pass on') and whether Best Buy suffered all or part of the damages claimed because it did not pass on all or part of the overcharges downstream to its customers ('downstream pass on') were both relevant. The jury returned a verdict finding that Best Buy did not suffer any damages with respect to its indirect purchases, presumably based on the defence experts that concluded that Best Buy would have passed on any overcharges to consumers. One of the issues that Best Buy raised on appeal to the Ninth Circuit is whether the district court properly ruled that defendants could assert a pass-on defence under Minnesota law, which could have the effect of wiping out damages to a retailer. The Ninth Circuit affirmed the district court decision on 7 January 2016.

Multiple lawsuits alleging the same misconduct are often commenced by different plaintiffs in federal and state courts around the country. Typically, such cases are consolidated in one court, at least for pretrial proceedings. Multiple recovery should be avoided and is supposed to be resolved by the court. *Clayworth v Pfizer, Inc*, 49 Cal. 4th 758, 787 (Cal. 2010). A guilty plea in the criminal case will bind a defendant as to liability in the related private lawsuits, although these defendants can (and often do) litigate the scope of the conspiracy and damages.

21 Class actions

Are class actions possible? If yes, 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?

Private civil actions are usually brought on a class basis. This means that one or several purchaser plaintiffs can sue on behalf of all purchasers of the allegedly price-fixed product in the United States during the period of the conspiracy, thus greatly increasing potential exposure. A plaintiff must make certain showings before a case may proceed on a class action basis. Specifically, the proposed class must be so numerous that joinder of all of its members would be impractical; there must be common questions of law or fact to the class; the claims or defences of the representative parties must be typical of the claims or defences of the class; and the representative parties must be capable of fairly and adequately protecting the interests of the class. FRCP 23(a). Additionally, the court must make a finding that prosecuting separate actions by or against individual class members would create a risk of inconsistent adjudications or adjudications with respect to an individual class member that would be dispositive of the interests of other members not parties to the individual adjudications; final injunctive or declaratory relief would be appropriate respecting the class as a whole; or questions of law or fact common to class members predominate over any questions affecting only individual members, and thus a class action would be superior to other methods of adjudication. Id 23(b).

For many years, courts were willing to grant class action status to antitrust plaintiffs based on very minimal showings. More recently, courts have begun to scrutinise class action applications with greater care. Defeating class certification can be tantamount to an outright victory. Members of the class may opt out of the class, a right sometimes invoked by large purchasers who are then free to pursue individual actions against the alleged conspirators. Thus, in addition to one or more class action cases, a company accused of fixing prices often faces several opt-out actions.

Cooperating parties

22 Immunity

Is there an immunity programme? What are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The DoJ administers a formal amnesty programme (technically called the leniency programme), which provides for complete immunity from criminal prosecution. The programme can also result in the de-trebling of damages and no joint and several liability in parallel civil cases, if the amnesty applicant satisfies the requirements of the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), Pub. L. No. 108-237, 118 Stat. 661 (22 June 2004), including providing satisfactory cooperation to plaintiffs in civil actions.

A corporation that comes forward to report illegal activity prior to a government investigation qualifies for leniency if it meets the following conditions: the corporation is the first in to cooperate, was not the ringleader, took prompt and effective action to terminate its role in the illegal activity, reports the illegal activity with candour and continues to cooperate with the DoJ's investigation, makes restitution where possible, confesses as a truly corporate act (as opposed to isolated confessions of individual directors and officers) and the DoJ determines that granting leniency would not be unfair to others (Antitrust Division's Leniency Program, available at www.justice.gov/atr/public/criminal/leniency.html).

A corporation that comes forward after a government investigation has begun can still qualify for leniency if it meets the above conditions, and if the DoJ does not have evidence against the corporation that will likely warrant a sustainable conviction and determines that it would not be unfair to other parties to grant leniency (Id).

Leniency is also available to individuals. To receive leniency, an individual must report the activity before the investigation has begun,

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be the first to report the illegal activity, report the illegal activity with candour and completeness and continue to cooperate with the DoJ, and must not have been the ringleader. If an individual does not meet these conditions, the DoJ will consider him or her for statutory or informal immunity from criminal prosecution, which is discretionary and generally more limited.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, 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 formal partial leniency programme for parties that cooperate after the immunity application, but a subsequent cooperating party may be considered for more lenient treatment by the DoJ and under the Sentencing Guidelines (see questions 17 and 24).

24 Going in second

What is the significance of being the second versus third or subsequent cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Amnesty is not available, but the second company in could be considered for more lenient treatment by the DoJ. Early cooperation is often noted by the DoJ in plea agreements as a factor mitigating sentences.

The Amnesty Plus programme provides for more lenient treatment in one cartel investigation if a party discloses the existence of a second cartel. Under the Amnesty Plus programme, a party that is the first to report the second cartel will be rewarded with both full amnesty for the second cartel, and more lenient treatment in the first cartel. The DoJ's policy is to pursue a fine or jail sentence at or above the upper end of the Sentencing Guidelines range if a company is aware of a second cartel but chooses not to report it (known as Penalty Plus).

25 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

If a company uncovers evidence suggesting that it has engaged in a criminal violation and wants amnesty, time is of the essence; it must act quickly to get a marker that establishes its place as the first in line at the DoJ. Only the first in will receive a marker and thus be eligible for amnesty. A marker is provided for a finite period which is based on factors such as the necessary scope of the internal investigation and whether the DoJ is already investigating the wrongdoing. Where the DoJ does not already have an ongoing investigation, a 30-day period for an initial marker is common. The marker may be extended if the applicant demonstrates it is making a good-faith effort to complete its application.

Other cases are a judgement call and will depend on the strength of the evidence, whether the company wishes to defend itself and whether counsel believes there is a benefit to be gained from early cooperation. The earlier an entity enters into a plea agreement, the more credit the entity will receive when the DoJ seeks penalties. If amnesty is not available, and particularly if evidence of per se conduct is ambiguous, it may be advisable to prepare a strong defence rather than to enter a plea agreement. Absent a plea agreement, the government may find it difficult to prove criminal liability and fines beyond the statutory maximum beyond a reasonable doubt (see question 15). In addition, a plea agreement is deemed an admission of liability in civil cases. Thus, the decision to cooperate should be considered carefully with counsel.

26 Cooperation

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?

Successful amnesty applicants must report the illegal activity with candour and continue to cooperate with the DoJ's investigation. Under ACPERA, a leniency applicant may qualify for detrebling of damages in civil cases if the applicant cooperates with plaintiffs (see question 22). Subsequent cooperating parties would normally be required to take direction from the DoJ as to what is required for cooperation (eg, producing documents or witness interviews). The parameters are not strictly defined, but are instead the subject of negotiation with the DoJ. Should the party plead guilty, cooperation obligations will typically be included in the plea agreement.

27 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

The DoJ is obligated to keep confidential the fact of amnesty and any negotiations with amnesty applicants. This also applies to negotiations with subsequent cooperating parties. If a subsequent cooperating party agrees to plead guilty, however, the plea agreement, which often contains cooperation provisions, is made public. Additionally, underlying documents of an applicant or subsequent cooperating party that are created or maintained in the regular course of business may be discoverable in civil cases. Moreover, the fact of amnesty becomes discoverable in parallel civil litigation. Although such information is typically governed by a protective order limiting its use to the litigation, the information will usually become public if the case goes to trial, or sometimes sooner in the discovery process.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The DoJ can enter into plea bargains, but they must be approved by the court (Fed. R. Crim. P. 11(c)(3)). In most cases, federal judges defer to the DoJ and approve antitrust plea bargains.

29 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

All current officers and directors are protected by amnesty. In general, former employees are protected for their time working at the company, although this protection may be subject to negotiation between the DoJ and company counsel or the individual's separate counsel. In a typical plea bargain, the DoJ will insist that a small number of executives be carved out of the agreement, meaning they are not protected and are still subject to prosecution. However, the DoJ does not automatically pursue all carved out executives.

30 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

Where amnesty is sought, it is essential to move quickly to obtain a marker. Next, the corporation must conduct a thorough internal investigation to assess whether illegal conduct took place. Thereafter, attorneys for the company must make a proffer of evidence to the DoJ. If the DoJ is satisfied that illegal conduct has taken place and the other conditions of amnesty are met, it will grant conditional amnesty. At that point, it is critical that the company complies strictly with the conditions in its amnesty letter agreement.

Attorneys and witnesses should always be truthful in dealings with the DoJ. In addition, witnesses appearing before the grand jury are subject to the risk of perjury for untruthful statements. It is critical to avoid destroying relevant documents or otherwise obstructing justice. Obstruction carries stiffer penalties than price fixing, and the DoJ may pursue an obstruction or perjury investigation in parallel with the underlying price-fixing investigation. The most recent model

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Update and trends

Conduit theory of competitor contacts

An emerging theory of antitrust liability advanced by plaintiffs in recent years is that third-party consultants or other intermediaries acted as a facilitator or 'conduit' for the exchange of sensitive information between competitors. In February 2016, a federal judge in Pennsylvania denied summary judgment for all but one defendant in *In re Domestic Drywall Antitrust Litigation* MDL No. 2437, 2016 US Dist. LEXIS 19487 (E.D. Pa. 18 February 2016). The court held that with the exception of defendant CertainTeed, plaintiffs submitted sufficient conspiracy evidence to conclude that the other defendants in the drywall industry entered a price-fixing agreement in violation of the Sherman Act.

In support of their conspiracy claim, plaintiffs advanced a 'conduit theory' whereby defendants allegedly signalled to one another that they continued to fix prices by relaying information through third parties. Citing *In re Titanium Dioxide Antitrust Litigation* and *In re Polyurethane Foam Antitrust Litigation*, the court concluded that the conduit theory could establish a Sherman Act claim. In *Titanium Dioxide*, the court denied the defendants' motion for summary judgment based in part on evidence that a third-party consultant facilitated the alleged price-fixing conspiracy (959 F. Supp. 2d 799, 812-13, 829 (D. Md. 2013)). Similarly, the court in *Polyurethane Foam* recognised that defendants may have used a broker to coordinate prices (152 F. Supp. 3d 968, 991, 994 (N.D. Ohio 2015)).

In *Domestic Drywall*, plaintiffs argued that defendants communicated sensitive information to third-party research analysts, only for those analysts to reprint that information in reports that other defendants obtained. The court determined that such 'conduit evidence…could lend a jury support in analysing whether a conspiracy existed' (2016 US Dist. LEXIS 19487, at *178). The decision may result in more allegations that antitrust conspiracies were facilitated through the conduct of third-party intermediaries.

Social media and antitrust compliance

The proliferation of social media platforms such as Facebook, Twitter, and LinkedIn has posed new challenges for companies facing antitrust prosecution or implementing antitrust compliance programmes. In addition to the trove of publicly available information on such platforms, plaintiffs in cartel cases now routinely seek discovery of social media communications as potential evidence of anticompetitive conduct. Accordingly, firms should consider the risks posed by their employees' use of social media. Employees may share competitively sensitive business information through these platforms that the company would not have disclosed otherwise, such as in press releases or other public disclosures. Employees may maintain contacts at competitor companies, such as through industry 'chat rooms' that could raise suspicion. Firms can, and should, expect such communications to constitute discoverable information and potential evidence of price-fixing agreements.

amnesty letter states that an amnesty applicant can be prosecuted for making false statements or obstructing justice when it fails to truthfully respond to DoJ inquiries.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

No. The DoJ changed its model conditional and final leniency letters for corporations and individuals in 2008, but there is no ongoing or proposed leniency or immunity policy assessment or review.

Defending a case

32 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

The general practice of the DoJ is to provide the large majority of investigative materials, but there are certain categories of evidence that the government is legally obligated to disclose. Following *Brady v Maryland*, 373 US 83 (1963), the government must disclose evidence or information that would be favourable to a defendant who has requested it. This includes evidence that would prove the innocence of the defendant, enable the defence to more effectively impeach the credibility of government witnesses, or reduce the defendant's sentence. Additionally, under the Jencks Act, 18 USC section 3500, documents relating to government witnesses who testify at trial must be disclosed under certain circumstances. Specifically, after the witness testifies, the court must, upon motion of the defendant, order the disclosure of any statement of the witness in the government's possession relating to the subject matter as to which the witness testified.

33 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to seek independent legal advice?

This issue generally arises only in criminal cases, because individuals are not normally sued or the targets of civil investigations. Counsel can represent the company and individuals if there is no conflict or potential conflict of interest. If there is a potential conflict, the individuals may need separate counsel. A potential conflict may arise when an individual is identified as a subject or a target of the investigation. In that situation, the individual may want to blame others in the company, and the company may want to blame the individual or characterise him or her as a rogue employee. However, employees identified as subjects or targets do not always have conflicting interests with the company.

As a practical matter, it is sometimes advisable to retain separate counsel for anyone who appears before the grand jury, even someone not a subject or target of the investigation or who has immunity. The company and its counsel must weigh the pros and cons of separate counsel carefully in each situation. On the one hand is added cost, loss of control over the employee when separate counsel is retained and the risk that the separately represented employee could decide to cooperate with the government and incriminate the company. On the other hand, separate counsel should be retained where there is an immediate apparent conflict or where a future conflict appears likely. The DoJ will often demand separate counsel for certain executives and claim that there is a conflict of interest. This demand is often a tactical move to separate individuals from company counsel. The DoJ might then seek to pressure the individual separately to cooperate and incriminate the company. Counsel for the company must also consider whether the DoJ will make a motion at a later date to disqualify company counsel, a risk in certain situations. While DoJ statements about conflicts need to be taken seriously, they are not conclusive.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

A counsel may represent multiple corporate defendants in a civil case, although there needs to be a fairly clear unity of interest. In a criminal case, representation of multiple corporate defendants may violate the defendant's right to effective assistance of counsel under the Sixth Amendment to the Constitution. Generally, a corporate family may be represented by the same counsel in both civil and criminal cases.

35 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

A corporation may indemnify or advance employees money for legal fees provided that the corporation's by-laws provide for such indemnification. Most company by-laws provide for indemnification. A corporation may not indemnify an employee for future criminal activity. However, courts have upheld indemnification for criminal activity that occurred before the parties entered into the indemnification agreement. See, for example, *Brown v Gallagher*, 902 N.E. 2d 1037, 1040 (Ohio Ct. App. 2008).

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36 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

In general, taxpayers are not permitted to deduct a fine or penalty (or a settlement paid with respect to potential liability for such a fine or penalty, or an amount forfeited as collateral posted in connection with a proceeding which could result in the imposition of such a fine or penalty) paid to a government or a political subdivision thereof. Compensatory damages (including damages under section 4A of the Clayton Act) paid to a government generally do not constitute a fine or penalty.

However, amounts paid in a business context in settlement or with respect to a judgment concerning an antitrust claim are generally tax-deductible, subject to certain limitations. For example, under certain circumstances, a limitation may be imposed on the amount deductible with respect to a judgment for damages entered against a taxpayer under section 4 of the Clayton Act, or a settlement thereof.

37 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

The DoJ's respect for enforcement actions in other jurisdictions is based on the principles identified by the International Competition Policy Advisory Committee Final Report, issued in 2000. The DoJ follows the principles that competition agencies must be mindful of the impact of their actions in other jurisdictions, respect the ideas of others, build trust between the enforcement and business communities, and encourage an ongoing dialogue between enforcement agencies, businesses, consumers, practitioners and academics (Antitrust Division's International Program, 10-11, available at www.justice.gov/atr/public/international/program.pdf).

To understand how these principles are applied in practice, the DoJ's focus must be recognised. In criminal cases, the DoJ analyses the effects that the alleged cartel had in the US. As such, the focus is less oriented toward other jurisdictions. In addition, the constitutional prohibition on double jeopardy would not be applicable, as it governs being tried twice for the same offence by the same sovereign (see US Const. amend. V; *Bartkus v Illinois*, 359 U.S. 121, 128-32 (1959)). Nonetheless, a recent example of the DoJ respecting international comity can be found in the plea agreements of three current and former executives of Dunlap Oil & Marine Ltd. The executives were sentenced to serve 24, 20 and 30 months in prison respectively for participating in a conspiracy to rig bids, fix prices and allocate market shares in violation of the Sherman Act. The executives were also criminally charged with cartel offences in the UK, and subsequently sentenced to service 24, 20 and 30 months in prison. The plea agreements with the DoJ effectively provided for concurrent sentences in the US and the UK, providing that the DoJ would recommend that the US sentences could be reduced by one day for each day of imprisonment imposed in the UK. Because the sentences in the UK and US overlapped in duration, the defendants were not required to serve prison sentences in the US. See the DoJ press release 'British Marine Hose Manufacturer Agrees to Plead Guilty and Pay $4.5 Million for Participating in Worldwide Bid-Rigging Conspiracy' (1 December 2008), available at www.justice.gov/opa/pr/2008/December/08-at-1055.html; and Scott D Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, US DOJ, 'Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program' (26 March 2008), available at www.justice.gov/atr/public/speeches/232716.htm.

In private damages claims, multiple recovery is generally not permissible but it is within the discretion of the court (see question 20). Private damages awards are offset by any settlements the plaintiff has received from other parties (see question 20).

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

This depends on the case. There are many complex decisions that guide best strategy for minimising potential fines. Early cooperation can often help, but can sometimes be ill-advised. A compliance programme can reduce the level of the fine, but usually not significantly. Similarly, steps taken after the investigation has commenced showing the company is taking the violation seriously and implementing remedial measures may be taken into account during sentencing, but it is not a guarantee that the fine will be lowered. Therefore, it is often helpful to prepare a strong defence at the outset, even if the company ultimately decides to cooperate. Strategic decisions should be made with experienced antitrust counsel.

* *The author recognises the significant contribution of Michelle Lee of the firm. White & Case represents parties in the Drywall, LCD, OPEC and Minn-Chem cases discussed herein.*

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Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice.

The information in each table has been supplied by the authors of the relevant chapter.

Australia				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime in Australia is criminal and civil court-based. Jury trials are only used in criminal cases.	For corporations, a maximum fine or penalty for a criminal or civil contravention of A$10 million, or 10 per cent of the corporate group's annual turnover connected with Australia, or three times the gain from the conduct, whichever is highest. For individuals, a maximum penalty for a criminal contravention of up to 10 years' imprisonment, fine of A$340,000, or both. The maximum civil penalty for individuals is A$500,000.	The ACCC's Immunity and Cooperation Policy sets out the circumstances in which the ACCC will grant immunity to a cartel member that is 'first in' to cooperate and more limited immunity or lesser penalties to subsequent applicants.	Extraterritorial application applies, if parties either carry on business in Australia or otherwise engage in cartel conduct in relation to goods or services supplied in Australia.	Australian law prohibiting restrictive trade practices is enforced vigorously by the ACCC. Australia criminalised its cartel laws with effect on conduct occurring as from 24 July 2009. To date, the Federal Court of Australia has imposed substantial civil penalties for cartel activity. The federal director of public prosecutions will prosecute criminal cases, but there have been no cases to date.

Austria				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The Austrian cartel regime is in essence a civil regime with certain specifics. The investigative phase before the Federal Competition Agency is governed by administrative rules. The proceedings before the Cartel Court follow special civil procedural rules.	The Cartel Court may impose a fine of up to 10 per cent of the group's turnover in the previous business year. If the behaviour also qualifies as (severe) fraud, jail terms of up to 10 years may be handed down.	Austria has a leniency regime since 1 January 2006, which is being used increasingly.	Austrian competition law also applies to conduct carried out abroad as long as there is some effect on the domestic market.	Austria is one of the jurisdictions where many private enforcement cases are pending.

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Brazil				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
A cartel is administratively (companies and individuals) and criminally (for individuals) prosecuted in Brazil. Companies and individuals are also liable for civil damages.	For companies, the maximum administrative fine is 20 per cent of the gross revenue of the company, group, or conglomerate, in the fiscal year before the initiation of the administrative process, in the field of the business activity in which the violation occurred. For individuals in managerial positions (CEOs, directors, managers, etc) directly or indirectly responsible for the violation, an administrative maximum fine of 20 per cent of the fine imposed on the company. For other individuals or public or private legal entities, an administrative maximum fine of 2 billion reais. For individuals, the maximum criminal penalty is imprisonment for five years.	Yes. The leniency agreement and TCC.	Yes. If the misconduct has direct or indirect effects in Brazil, even if potentially.	None.

Bulgaria				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
Under Bulgarian law, cartels represent administrative violation and the administrative law regime applies. Cartels are regulated by the Law on Protection of Competition, envisaging procedures deviating from the provisions of the general Law on Administrative Violations and Sanctions. Civil law regime applies to the consequences of prohibited agreements that are declared by law null and void and to claims for damages.	The maximum sanction for cartel activity under Bulgarian law is up to 10 per cent of the annual turnover of the undertaking participating in a cartel.	The Bulgarian Competition Authority last adopted a leniency programme in 2011. To this date, the leniency programme has never been applied in practice.	To the extend a cartel activity could affect the competition on the Bulgarian market the CPC may investigate undertakings and impose sanctions under the LPC.	None.

Canada				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime has both criminal and civil/administrative provisions.	A price-fixing conviction carries penalties of up to 14 years in prison and fines of up to C$25 million (five years and C$10 million for pre-2010 conduct). In foreign-directed conspiracies and bid rigging, corporations are liable to a fine at the discretion of the court. The civil/administrative provisions permit a prohibition order only.	A highly successful immunity programme has been in place since 2000. It is also complemented by a formal leniency programme for subsequent cooperating parties.	International conspiracies directed at Canadian markets fall within the jurisdictional scope of the Competition Act. However, conspiracies that relate only to the export of products from Canada are expressly exempted.	Amendments that came into force in 2010 have significantly changed the former 'partial rule-of-reason' approach to criminal conspiracies. The Act now provides for a per se criminal cartel offence and a civil reviewable practice dealing with other competitor collaboration agreements.

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China				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime is civil and administrative. There are no criminal sanctions against cartel activities.	A fine amounting to 10 per cent of the sales revenue for the preceding year.	Yes. If a corporation to a monopoly agreement takes the initiative to report the agreement and supply important evidence to the relevant authorities, penalties on the said corporation can be lessened or even exempted.	Yes; as long as conduct has the effect of eliminating or restricting competition within the PRC, such conduct may be caught by the Anti-Monopoly Law (AML).	The National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC) have issued substantive and procedural rules on the application of the AML in December 2010. Despite the NDRC and SAIC having limited officials to enforce the AML, the delegation of powers to local enforcement authorities and the training of local officials will build up the local capacity for the cartel enforcement. The publication of these rules and the capacity building mark the beginning of a step-up in cartel enforcement.

Cyprus				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
Administrative.	Administrative fines, according to the gravity and duration of the infringement, not exceeding 10 per cent of the total turnover of the undertaking, or not exceeding 10 per cent of the sum of the total turnover of every undertaking which is a member of the infringing association of undertakings, where the turnover corresponds to the preceding financial year.	Yes. The Immunity and Reduction of the Administrative Fine in case of Collusions in violation of section 3 of the Competition Law and/or article 101 TFEU (Leniency Programme) Regulations of 2011 (Secondary Administrative Act 463/2011).	There must be effect within the jurisdiction of the Republic of Cyprus.	None.

Denmark				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime is criminal. Furthermore, private damage claims are possible. See questions 15–16 and 20 of the Denmark chapter.	The maximum sanction for undertakings is a fine of up to 10 per cent of the undertaking's annual worldwide turnover. For individuals, the maximum sanction is imprisonment for six years. See question 15 of the Denmark chapter.	A leniency programme exists, which is largely comparable to the leniency programme set out under EU law. See questions 22–31 of the Denmark chapter.	The Danish Competition Act does not contain any provisions on extraterritoriality. However, it is generally assumed that the Act extends to conduct which has anticompetitive effects in Denmark. See question 7 of the Denmark chapter.	

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Ecuador				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
It is an administrative regime. The law also provides a specific recourse to make damages claims in civil courts.	The maximum sanction is 12 per cent of the turnover of the previous fiscal year multiplied by the number of years that the conduct was in place. If the benefits the undertaking received from the conduct are higher than the fine previously described, the authority may impose a higher fine.	Yes, there is a leniency programme. Pursuant to the leniency programme, the first undertaking to apply may receive full immunity. Subsequent applicants may receive up to a 50 per cent reduction in the fine.	Yes, so long as the conduct produces effects in Ecuador.	To date there is no secondary legislation relating to cartel investigations and sanctions. There is no marker system in place.

European Union				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
No penalties on individuals, but substantial fines may be imposed on undertakings. Although the regime is technically civil and administrative, arguably the size of the fines makes it criminal or quasi-criminal in nature for human rights purposes.	10 per cent of worldwide group turnover.	Yes.	Yes.	Fines imposed by the Commission in cartel cases are high and the trend is towards even higher penalties. To complement the Fining Guidelines and Leniency Notice, the Commission introduced a settlement procedure in 2008.

Finland				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime is administrative.	The maximum fine can be up to 10 per cent of the undertaking's total annual turnover in the last year of its cartel participation.	Yes, there is immunity and a leniency programme largely harmonised with that of the Commission and the ECN.	Yes, if such conduct has effects within Finland.	

France				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The cartel regime is first and foremost an administrative one: most cartels are dealt with by the FCA, an independent administrative authority that can only impose administrative sanctions. Furthermore, any entity or individual may bring civil actions before national courts if they have suffered damages from a cartel. Individuals may also face criminal sanctions if they have fraudulently taken a personal and decisive action in a cartel.	The maximum amount of penalty is 10 per cent of their worldwide turnover for companies, and €3 million if the offender is not a company.	French law provides for different programmes that may allow an undertaking to avoid, or lower the level of, a fine for infringement of competition rules: (i) full and partial leniency; (ii) settlements; and (iii) commitments (not applicable to cartels).	Anticompetitive practices committed directly or indirectly through the intermediary of a subsidiary located outside the French territory are expressly included within the scope of the prohibition of article L420-1 of the FCC if they have effect on one or more markets located in France.	None.

Germany				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime is mainly administrative, but criminal for offences like bid rigging and fraud.	The maximum fine is €1 million or, in excess of that, up to 10 per cent of the worldwide turnover generated (in the year preceding the fining decision) by the economic unit to which the corporation belongs.	Yes.	The regime extends to conduct outside the jurisdiction as long as there is an appreciable effect within Germany.	A leniency programme was published by the Federal Cartel Office in 2006; new guidelines on fines came into force in 2013.

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Greece				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The proceedings within the Greek enforcement system are of an administrative nature. The participation in a cartel is both an administrative and criminal offence. However, the HCC does not have the power to impose criminal sanctions, while the latter lies within the competences of the criminal courts.	The administrative fine imposed on the members of a cartel activity may be up to 10 per cent of the total turnover of the undertaking for the financial year in which the infringement ceased or, if it continues until issuing of the decision, the year preceding the issuing of the decision. 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 also its economic benefit derived.	Yes. The leniency programme in case of collusions in violation of article 1 of the Competition Law and/or article 101 of the TFEU.	There must be effect within the jurisdiction of the Hellenic Republic.	In July 2016, the HCC adopted a new settlement procedure concerning cartel cases and the subsequent breach of competition law. According to this, companies have to plead guilty and admit the infringement in order to get a 15 per cent discount on the fine.

Hong Kong				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
Civil.	Financial penalties of up to 10 per cent of Hong Kong turnover for each year of the infringement, up to a maximum of three years, or disgorgement orders.	Yes	The Ordinance gives extraterritorial effect to the First Conduct Rule, providing that it will apply to any agreement, concerted practice or decision that has the object or effect of preventing or restricting competition in Hong Kong.	It is likely that the Commission will turn to competition authorities in other jurisdictions for guidance and precedents as it begins its enforcement role.

India				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
Proceedings under the Competition Act are civil in nature.	A penalty of up to three times the profit for each year of the duration of cartel or 10 per cent of the turnover for each year of the duration of the cartel, whichever is higher, can be imposed on each of the members involved in the cartel.	The CCI has the power to impose lesser penalties on members of a cartel if it is satisfied that such member has made full and true disclosures in respect of the alleged contraventions and such disclosures are vital. Lesser Penalty Regulations have been framed for this purpose.	The CCI has the power to inquire and pass appropriate orders in relation to anticompetitive agreements entered into outside India or where a party to such agreement is outside India, if such agreement has or is likely to have an appreciable adverse effect on competition in India.	Hefty penalties are being imposed in cases involving contraventions.

Indonesia				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The KPPU under the current ICL only has the authority to impose administrative sanctions. However, if the undertakings are obstructing the investigation, according to the current ICL, which is, further, supported by the MoU between the KPPU with the national police, the KPPU may ask the police to take up the case for criminal breach.	The maximum administrative sanction that the KPPU may impose is 25 billion rupiah. However, there is no limitation on damages should anyone be pursuing such as a result of a proven cartel allegation before the KPPU.	No, there is no immunity/ leniency programme under the current ICL. The new amendment draft, however, may accommodate the leniency programme.	Yes, the jurisdiction extension is possible for the following reasons: (i) the KPPU adopts the applicability of single economic entity, implementation and extraterritoriality doctrines; and (ii) the more intense cooperation of the KPPU with competition agencies from other jurisdictions.	Some prominent cartel cases have been initiated due to the KPPU's suspicions regarding certain associations' activities (*Cement* cartel, the *Electricity Installation* cartel, *Container* cartel, *Tyre* cartel, *Beef* cartel) and simply due to scarcity in the market of the relevant products and the parallel pricing (*Garlic* cartel and *Beef* cartel).

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Israel				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime is criminal, civil and administrative.	In the criminal venue: up to three years' imprisonment (in aggravating circumstances, up to five years); fines up to about 2.2 million shekels plus 14,000 shekels for each day such offence persists. In the case of a corporation, the fine or the additional fine, as applicable, shall be doubled. In the administrative venue: monetary sanctions of 8 per cent of the annual revenue, up to a maximum of 24 million shekels	Yes.	Yes.	The general director is stringent in the filing of criminal charges in hard-core cartel cases.

Italy				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime is administrative.	10 per cent of the company's turnover as evidenced in the last approved balance sheet.	The Italian Antitrust Authority adopted an immunity and leniency programme on 15 February 2007. Pursuant to the programme, a company that spontaneously informs the Authority of a secret cartel will be awarded full immunity from fines if it submits decisive evidence on the cartel that the Authority does not already possess. Further, companies may be awarded a reduction of up to 50 per cent if they offer qualified evidence. In any case, such companies will have to withdraw immediately from the cartel and cooperate with the Authority throughout the proceedings.	The regime covers conduct that has the object or the effect of restricting competition on the national territory, regardless of where it takes place.	After the reform of EU competition law the Antitrust Authority is applying article 101 TFEU to cartels affecting the entire national territory (rather than Italian antitrust rules), since this is considered as a relevant part of the EU territory.

Japan				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
Administrative, criminal and includes civil (private action).	Criminal: servitude of up to five years and fines of up to ¥5 million for individuals, and ¥500 million for corporations (for large enterprises). Administrative: surcharge of, in principle, 10 per cent of sales of cartel products over the cartel period up to the previous three years. Civil: amount of damage; no triple damage.	Yes, effective 4 January 2006. Amended as of 1 January 2010.	Yes, the Fair Trade Commission of Japan may challenge conduct affecting the Japanese market.	Amendment to the Antimonopoly Law regarding the reform of the administrative proceeding became effective as of 1 April 2015.

Korea				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
Administrative and criminal, with civil damages actions available.	10 per cent of affected sales in administrative fines and a criminal fine of 200 million won for corporations, as well as a criminal fine of the same amount and imprisonment for three years for individuals.	Yes; the programme is fairly effective.	Yes, if the conduct has an effect on the relevant market in Korea.	Strengthening enforcement with high administrative fines and increasingly frequent criminal prosecution.

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Macedonia				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
There is a criminal, a civil and an administrative regime.	For administrative fines, up to 10 per cent of the turnover in the previous financial year. In case of criminal liability, one to ten years of imprisonment.	Yes.	Yes.	None.

Malaysia				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
Civil and administrative.	Financial penalty of up to 10 per cent of the infringing enterprise's worldwide turnover for the duration of the infringement.	Yes.	Yes, to the extent that it affects competition in any market in Malaysia.	The Competition Act 2010 came into force on 1 January 2012, and the focus has been on cartel conduct.

Malta				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime has been found to be criminal following a judgment of the Constitutional Court.	10 per cent of the annual turnover.	There are no immunity and/or leniency programmes; however, the law does allow undertakings in a cartel investigation to achieve a settlement.	Yes, but only to the extent that the effects of the cartel are found within the jurisdiction.	In Malta, the regulation of cartels follows EU legislation, which is directly applicable.

Mexico				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime is administrative, criminal and civil. Administrative sanctions are imposed by the CFCE and the IFT. Criminal sanctions are imposed by criminal courts. Compensation for damages is awarded by federal specialised courts in competition, broadcasting and telecommunications.	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 up to 14.6 million pesos respectively. 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. Likewise, individuals that contributed, facilitated or instigated the execution of cartel conduct are liable to receive a fine of up to the equivalent of 13.14 million pesos. In case of recidivism, the CFCE may impose a fine of up to two times of the applicable fine or order the divestiture of assets. There is no limit for damages awarded as a result of anticompetitive conduct.	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.	Cartel conduct performed abroad will be sanctioned by the CFCE if it produces effects in Mexican territory. The existence of subsidiaries and affiliates in Mexico has been considered by the CFCE as indicia of the extensive effects of the practice in national territory.	In June 2013, the Constitution was amended to transform the competition commission into an autonomous constitutional entity and to increase the effectiveness of competition policy and law enforcement. On 7 July 2014, a new Competition Law and modifications to the Federal Criminal Code came into force. On November 2014, the CFCE issued new Regulations of the LFCE. On January 2015, the IFT issued new regulations of the LFCE, regarding broadcasting and telecommunications industries. On June 2015, the CFCE issued new guidelines regarding the amnesty programme and the initiation of investigations. On December 2015, the CFCE published guidelines for information exchange among competitors and regarding cartel investigation procedures. On September 2016, the IFT published the draft of its guidelines on the Immunity and Reduction of Sanctions Programme, which are currently subject to a public inquiry.

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Netherlands				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
Civil and administrative	40 per cent of annual turnover, or €900,000, whichever is higher, is the statutory maximum figure that can be imposed on a legal or natural person to whom a breach of article 6 of the Competition Act can be attributed.	Yes.	Yes, if the conduct has an effect on the whole or a part of the Dutch market.	The ACM does not hesitate to impose significant fines. High-profile investigations in the construction sector have led to over 450 leniency grants by the ACM.

Nigeria				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The proposed regime is both criminal and civil.	The maximum sanction is two years or a fine six times the profit of the transaction, or both.	Yes, in civil aviation.	Yes, as long as the conduct affects a market substantially in Nigeria.	The regime is only contemplative. There may be successful proposals to modify the final position of the regime upon enactment of the substantive Act.

Norway				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime is both criminal and administrative.	For individuals the maximum criminal sanction is three years' imprisonment (six years if there are severely aggravating circumstances). For undertakings the maximum sanction is an administrative fine of up to 10 per cent of the undertakings annual turnover during the preceding financial year.	Yes.	The Act applies to terms of business, agreements and actions that are undertaken, have effect, or are liable to have effect in Norway. Therefore, the Act will apply to conduct outside Norway if the conduct has effect in Norway.	

Portugal				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
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 general principles of civil liability.	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 (the Authority). Multiple infringements are punished with a fine, the maximum limit of which is the sum of the fines applicable to each infringement. However, the total fine cannot exceed the double of the higher limit of the fines applicable to the infringements in question.	Yes. The programme provides for full immunity or reduction of the fines that would apply to the infringement.	Yes, if such conduct produces effects within Portugal.	Law No. 19/2012 of 8 May (the Act) put in place the new Competition regime, thereby superseding Law No. 18/2003, of 11 June 2003. The Act considerably enhanced the powers of investigation granted to the Authority, notably in respect of investigations of restrictive practices.

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Russia				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The regime is administrative with a potential for criminal prosecution subject to damages and profit value thresholds and may entail civil proceedings in case of private damage claims.	The maximum administrative sanction is a fine of up to 15 per cent of the total annual turnover of the infringing entity from sales on the market on which the violation occurred, or, alternatively, the infringing entity may be required to transfer all income received from its anticompetitive behaviour to the state budget. The maximum criminal sanction is seven years' imprisonment.	Leniency is offered for both administrative and criminal liability, but only to the first applicant. Limited administrative liability leniency is offered to the second and third applicants, but not for criminal liability.	Yes, Russian antimonopoly rules, including those regulating cartels, have extraterritorial application and apply to any agreements or actions which affect competition on the territory of the Russian Federation.	Cartels are a swiftly developing area of Russian competition legislation and with the introduction of criminal liability leniency and the global tendency to battle international cartels, it is expected that there will be more cartel cases in Russia each year.

Singapore				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The competition law regime in Singapore is administrative in nature.	The Competition Commission of Singapore (CCS) 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 CCS may make directions to bring an infringement to an end, or to mitigate the adverse effect of the infringement.	Yes. The CCS operates a leniency programme, which encompasses the prospect of full immunity. The programme was revised in 2009 to include a leniency plus system and a marker system.	Yes. Such activities will be prohibited by the section 34 prohibition if they have the object or effect of preventing, restricting or distorting competition within Singapore.	The CCS has the ability to enter into cooperation agreements with foreign competition bodies. It has been publicly acknowledged by the CCS that there has been at least one occasion of such cooperation.

Spain				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The Spanish legal regime for the investigation and declaration of cartel practices is an administrative regime that is dealt with by the National Markets and Competition Commission (NMCC), the regional competition authorities, as well as the corresponding courts, such as the National High Court and the Supreme Court. In addition, the commercial courts are also entitled to declare the existence of a cartel.	The NMCC may sanction very serious infringements with a fine of up to 10 per cent of the total turnover of the infringing undertaking in the business year immediately preceding to that of the imposition of the fine. If the offender is a legal person, the NMCC may impose a fine of up to €60,000 for participating in a cartel.	The Spanish Competition Act has included in its provisions a leniency programme in order to facilitate the detection of cartels or to advance the investigation of those that have already been detected and supports the investigative work of the NMCC and its capacity to establish the investigated facts and conduct to the legally required standard of evidence.	Only conduct that may affect the Spanish market can be reviewed by the NMCC, so its regime cannot extend to conduct that takes place outside the Spanish jurisdiction.	None.

Sweden				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
Civil/administrative.	10 per cent of the turnover of the violating undertaking (the basis for calculation does not include the company group to which the undertaking may belong).	Yes, there is a leniency programme similar to that of the European Commission.	Yes, as long as there is an appreciable effect on competition in Sweden.	The current Competition Act introduced the possibility of imposing an injunction against trading against persons who have participated in serious breaches of chapter 2, section 1 or article 101 TFEU, provided such an injunction is necessitated by the public interest.

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Switzerland				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
For undertakings, the regime is civil and administrative. For individuals, there are no direct criminal sanctions for cartel activities. However, individuals acting for an undertaking (but not the undertaking itself) and violating an amicable settlement decision, any other legally enforceable decision or a court judgment in cartel matters, or intentionally failing to comply or only partly complying with the obligation to provide information, may be fined.	The maximum administrative sanction for companies is 10 per cent of the annual turnover generated in Switzerland during the last three business years (cumulative). The competition authorities may impose administrative sanctions on companies if they violate an amicable settlement, decision or judgment to their own advantage. The maximum criminal sanction for individuals is 100,000 Swiss francs.	Yes, as from 1 May 2004.	Yes, as long as the conduct has effects within Switzerland.	None.

Taiwan				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
All three.	Administrative fines: 10 per cent of the total sales income of the enterprise in the previous fiscal year. Civil compensation: actual damages and, in some situations, up to three times the value of proven damages. Criminal: in the event of failure to comply with an administrative order to cease or rectify behaviours, imprisonment for up to three years or detention; a fine of up to NT$100 million; or both.	Yes, but for administrative fines only.	Yes.	None.

Turkey				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
Administrative and civil.	10 per cent of the turnover of each of the undertakings concerned generated in the financial year preceding the date of the fining decision in Turkey (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). Employees or members of the executive bodies of the undertakings or associations of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertakings.	Yes, as of February 2008. The secondary legislation specifying the details of the leniency mechanism was put into force in February 2009 and April 2013. A cartel member may now apply for leniency until an investigation is officially served. Companies may benefit from total immunity from or reduction of a fine depending on their application order.	Yes, if the cartel activity produces effects in the Turkish jurisdiction.	None.

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United Kingdom				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
All.	Fines: up to a maximum of 10 per cent of the infringing undertaking's worldwide turnover in the previous business year; individuals can receive unlimited fines. Imprisonment: a maximum custodial sentence of five years.	Yes.	Yes, provided that the agreement is implemented (or is intended to be implemented) at least in part in the UK.	None.

United States				
Is the regime criminal, civil or administrative?	**What is the maximum sanction?**	**Are there immunity and/or leniency programmes?**	**Does the regime extend to conduct outside the jurisdiction?**	**Remarks**
The US regime has elements of all three. The most serious cases are criminal cases pursued by the DoJ and the parallel private civil actions that usually follow.	In criminal cases, US$100 million for corporations; US$1 million for individuals and 10 years' imprisonment. These maximums can be exceeded by an alternative sentencing provision allowing twice the gain or loss. In civil cases, private parties are entitled to three times actual damages.	Yes. There is a formal programme providing for full amnesty. Only companies that are first to report are eligible, and other criteria apply.	Yes, but the conduct must be import commerce or have a direct, substantial and reasonably foreseeable effect on US commerce, and such effect must have proximately caused the plaintiff's foreign injury.	The United States continues to have the most vigorous enforcement of cartel activity anywhere in the world. The DoJ measures success based on total criminal fines and imprisonment, and has made prosecution of international cartels its number one priority. Inevitable parallel civil cases greatly compound the potential exposure. Moreover, the process is expensive in terms of lawyer time and distracting to the company and its executives. Potential exposure in the US should drive worldwide strategies. Careful planning and execution are essential.

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Domains & Domain Names
Dominance
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