ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

A&L GOODBODY
ALLEN & GLEDHILL LLP
ANDERSON MŌRI & TOMOTSUNE
ASSEGAF HAMZAH & PARTNERS
BAKER & MCKENZIE LLP
BREDIN PRAT
CMS RUSSIA
CRAVATH, SWaine & MOORE LLP
ELIG GÜRkAYNAK ATTORNEYS-AT-LAW
ESTUDIO BECCAR VARELA
GLEISS LUTZ
HALDANES
HOGAN LOVELLS
J SAGAR ASSOCIATES
JONES DAY
LEE AND LI, ATTORNEYS-AT-LAW
LENZ & STAEHELIN
LIEDEKERKE WOLTERS WAELBROECK KIRKPATRICK
LINKLATERS C WISNIEWSKI I WSPÓLNICY
PINHEIRO NETO ADVOGADOS
POTAMITIS VEKRIS
RÆDER, ATTORNEYS-AT-LAW
Acknowledgements

SÉRVULO & ASSOCIADOS
SIMPSON THACHER & BARTLET LLP
SLAUGHTER AND MAY
URÍA MENÉNDEZ
YULCHON LLC
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Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 28 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part because of US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the 28 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the seventh edition of The Cartels and Leniency Review. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2019

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Globalisation remains the overarching theme of modern antitrust cartel enforcement. It takes two principal forms: a growing worldwide consensus that cartels cause serious consumer harm and should be dealt with accordingly; and a marked increase in cooperation between jurisdictions in the identification, investigation and prosecution of transnational cartels. More eyes are watching than ever before at a time when, because of the destabilising effect of leniency programmes, conspirators have less and less reason to trust each other.

The role of cartel enforcement has undergone a long evolution. From the enactment of the Canadian Competition Act in 1889 and the Sherman Act in 1890 to the mid 1940s, Canada and the United States 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 existing ones. Particularly during the Second World War, excessive concentration of economic power was used to create ‘national champions’ that were easy to control and that could outperform their foreign rivals.

In the aftermath of the Second World War, the United States put pressure on Germany and Japan to break up existing cartels and to put in place cartel enforcement regimes. At the same time, the United Kingdom 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 Community, laying the foundation for the European Commission’s cartel enforcement practice.

In the past few decades, cartel enforcement has spread 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 number continues to grow.

More countries are pursuing cartel activity and they are doing so more aggressively 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 offenders year-on-year, with enforcers such as the US Department of Justice and the European Commission regularly imposing fines totalling more than US$1 billion in a year.

This is also reflected in the expansion of the number of jurisdictions that have criminalised cartel offences. In addition to the United States, where cartel offences have long been prosecuted criminally, more than half the Member States in the European Union have now criminalised certain cartel offences, as well as Australia, Brazil, Japan, Korea, Mexico and Russia. Although the shift has not come without challenges, criminalisation of cartel enforcement is undoubtedly gaining momentum globally.

1 John Buretta is a partner at Cravath, Swaine & Moore LLP and John Terzaken is a partner at Simpson Thacher & Bartlett LLP.
Introduction

Cartel detection has also become more effective. This is primarily the result of the growing use of leniency programmes. In the 1990s, only the United States and a handful of other countries had leniency programmes. Today, there are antitrust leniency programmes in more than 50 jurisdictions. This virtually global availability of leniency programmes radically destabilises cartels because of the tremendous incentives for co-conspirators to self-report to authorities once a cartel no longer serves its purpose.

Cartel enforcers are also benefiting from increased multi-jurisdiction cooperation and an expanded jurisdictional reach. Enforcement authorities understand that failing to cooperate creates a risk that evidence will be lost or destroyed. As a result, organisations such as the International Competition Network and the Organisation for Economic Co-operation and Development were formed to drive global cooperation and convergence among enforcement authorities in the prevention, detection, investigation and punishment of cartel conduct. Today, there is close cooperation and coordination between enforcement authorities globally, as evidenced by the fact that, in nearly every recent global antitrust investigation, dawn raids were coordinated across continents.

Extraterritorial cartel enforcement has now become standard practice for the major enforcement jurisdictions. Whereas the United States was sharply criticised at first for the application of the Sherman Act to foreign conduct, other antitrust enforcement regimes now appear to have firmly embraced the principle of extraterritorial cartel enforcement. Of the world’s major antitrust regimes, Colombia and, arguably, Canada are the only countries for which the location of the conspiracy is a decisive factor in establishing jurisdiction. For other countries, it is sufficient for the conduct to affect national trade or commerce. Up-and-coming cartel regimes are routinely adopting similarly expansive policies on extraterritorial cartel enforcement.

This increasingly crowded and complex global enforcement environment complicates the strategic decision-making that faces corporations and individuals when possible wrongdoing is discovered or a government investigation commences. Counsel representing large corporate enterprises whose products are sold abroad are likely to face cartel investigations involving multiple jurisdictions, simultaneous processes, and seemingly endless demands for documents and witnesses. Individuals are likely to face similar demands, and the sobering reality that they may now be subject to criminal prosecution in multiple jurisdictions or be more readily exposed to extradition for prosecution in jurisdictions that are inclined to incarcerate them for extended periods, such as the United States. This added complexity places a premium on the need for counsel to assist clients in developing a global strategy from the outset of an international cartel investigation.

This book is intended as a primer and reference for the private practitioner or in-house lawyer on the cartel enforcement regimes of the world’s principal competition authorities. It provides guidance on the investigatory and litigation procedures of those jurisdictions, including methods of evidence gathering, policies regarding information sharing with foreign enforcement authorities and private litigants, the scope of any leniency programme, and considerations relevant to sentencing. While the book focuses primarily on government investigations, each chapter briefly discusses the risk of follow-on private lawsuits, which in some jurisdictions may be substantial. Most importantly, this book will aid lawyers representing corporations to respond swiftly and with confidence when faced with the unwelcome news that their clients may have participated in cartel activity.
I ENFORCEMENT POLICIES AND GUIDANCE

Antitrust legislation began in Argentina with the enforcement of Act No. 11,120, inspired by the provisions of the antitrust law in the United States. This Act was replaced by Act No. 12,906, which was in turn replaced by Act No. 22,262 in 1980.

The enforcement of Act No. 22,262 resulted in the establishment of the first antitrust agency of Argentina, the National Commission for the Defence of Competition (CNDC), which focuses on targeting and sanctioning anticompetitive conduct. Finally, on 25 August 1999, this Act was abrogated and replaced by Act No. 25,156 (the Competition Act), which was complemented by Decree No. 89/2011. The law and the named decree were complemented by regulations regarding the procedures established in them. Some of the sections of Act No. 25,156 were modified in September 2014 under Act No. 26,993.

On 24 May 2018, a new Antitrust Law entered into effect, namely Law No. 27,442 (the Competition Act or the new Antitrust Law), which is the current law. On the same day, the new Antitrust Law was complemented by Decree No. 480/2018. This new Law has implemented substantial changes in the antitrust system, in both the analysis of anticompetitive conduct and merger control review. With this new Law, Argentina has moved forward as regards antitrust legislation.

Further to the aforementioned specific regulation, the Argentine Constitution promotes effective competition and efficiency among markets in Argentina and intends to protect consumers’ welfare.

Currently, and with the enactment of the new Antitrust Law, the authority that will enforce the Competition Act and its complementary regulations is the National Competition Authority (ANAC). The Anticompetitive Conducts Trial Secretariat, the Economic Concentrations Secretariat and the Antitrust Tribunal will operate within this new independent agency. However, until the ANAC is created, the enforcement of the Antitrust Law will be the responsibility of the Secretariat of Domestic Trade, with the aid of the CNDC, currently led by Mr Esteban Greco.

1 Camila Corvalán is a senior associate at Estudio Beccar Varela.
2 First Antitrust Agency constituted in Argentina by Act No. 22,262, Section 6.
3 Resolution 40/2001; Resolution 26/2006; Resolution 164/2001.
The CNDC is also still the agency that investigates both anticompetitive conduct and merger and acquisition procedures as a formal requirement of the Secretariat, which has full power to investigate and decide on the existence of anticompetitive conduct either at the request of a party or *ex officio*, until the ANAC is created.

The investigation of anticompetitive conduct or the analysis of mergers and acquisitions by the CNDC results in a non-binding recommendation to the Secretariat, which will make the final decision on the case, subject to analysis (this applies to both merger and acquisition reviews and investigation procedures). The decisions of the Secretariat may be appealed by parties to the judicial courts.

With the enforcement of the new Antitrust Law, certain practices are considered *per se* illegal; this is new in the Argentine antitrust system, taking into consideration that before the enforcement of the new Antitrust Law, all anticompetitive conduct was analysed by the rule of reason criterion. These practices, which are considered *per se* illegal, must be deemed null and will not generate any kinds of effects. Practices considered *per se* illegal are listed under Section 2 of the new Antitrust Law as follows:

- to fix, directly or indirectly, the price of the purchase or sale of products or services;
- to establish the obligations (1) of manufacturing, distributing, buying or commercialising a limited amount of goods or (2) to provide a limited number, volume or frequency of services;
- to divide, distribute or horizontally impose areas, portions or segments of the markets, clients or supply sources; or
- to establish or coordinate submissions or abstentions in public tenders.

Section 1 of the Antitrust Law establishes that acts or behaviours relating to the production or trading of goods and services that limit, restrict or distort competition or constitute abuse of a dominant position in a market in a way that may result in (potential or actual) damage to the general economic interest, are prohibited and shall be sanctioned pursuant to the rules of the law.

Further, Section 3 of the Competition Act provides a detailed list of anticompetitive conduct that could be considered unlawful by the competition authorities. The types of anticompetitive conduct that will be analysed by the rule of reason criterion are:

- to fix, agree or manipulate, directly or indirectly, the price for the sale or purchase of goods and services for which they are tendered or asked in the market, as well as to exchange information for the same purpose or to the same effect;
- to establish obligations to produce, process, distribute, purchase or commercialise only a restricted or limited quantity of goods, or to render a restricted or limited number, volume or frequency of services;
- to agree upon the limitation or control of the technical development or investments bound to the production or commercialisation of goods and services;
- to prevent, render difficult or preclude third parties entering or staying in, or to exclude them, from a market;

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4 Section 20, Act No. 25,156.
5 Section 80, Act No. 27,442.
6 The general economic interest is the interest protected by the Competition Act, understood by doctrinaires as ‘the consumer’s welfare’.
to regulate goods or service markets, by agreements to limit or control research and
technological development, the production of goods or the rendering of services, or
to render difficult the investments bound to the production or distribution of goods
or services;

f to subordinate the sale of an asset to the acquisition of another or to the use of a service,
or to subordinate the rendering of a service to the use of another or the acquisition of
an asset;

g to submit a purchase or sale to the condition of not using, acquiring, selling or supplying
goods or services produced, processed, distributed or commercialised by a third party;

h to impose discriminatory conditions to the acquisition or alienation of goods or
services, with no reason grounded on commercial uses and customs;

i to refuse, without justification, to meet specific orders for the purchase or sale of goods
or services, made in the conditions standing in the market involved; or

j to suspend the supply of a dominant monopoly service in a market to a user of public
utilities or public interest service.

One of the first cartel cases investigated in Argentina was *Silos Areneros de Buenos Aires v. Arenera Argentina and others* in 1986. In the history of Argentine antitrust cartel investigations, there are two huge cases regarding the cement and liquid oxygen markets. Both resulted in fines of approximately 310 million pesos. Both cases were appealed to judicial courts and to the Supreme Court of Justice, and the sanctions imposed by the competition authority were confirmed by both.

Cartels are considered by the Argentine antitrust authorities (as well as by antitrust authorities worldwide) as serious infringements of the Competition Act because, as previously stated, they constitute one of the practices that are punished the most severely by the antitrust authorities.

It is important to state that there is no definition of a cartel or its equivalent in the Competition Act. Nonetheless, the CNDC has stated in a precedent that the following are the principal characteristics of collusive practices: price agreements, quantity agreements and market segmentation. Further, the CNDC has concluded – after several cartel investigations – that there are certain factors that facilitate collusion, namely buyer power, product homogeneity, symmetry, oligopolistic markets and multimarket contacts.

Further, it is important to highlight that the Competition Act has adopted the effects doctrine, which implies, in practice, that any act or conduct performed, or any agreement signed abroad, that has an effect in Argentine territory could be challenged by the antitrust authorities.

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7 *CNDC v. Loma Negra and others* (2005), Resolution 124/05 from the former Secretary of Technical Coordination. *CNDC v. Air Liquide and others* (2005), Resolution 119/05 from the former Secretary of Technical Coordination.

II COOPERATION WITH OTHER JURISDICTIONS

Pursuant to Section 28, subsection (j) of the Competition Act, the Antitrust Tribunal has, by law, the following functions and faculties: to ‘act with the competent agencies in the negotiation of international treaties, agreements or regulation or competition policies and free competition’.

The Antitrust Act does not contain any statement of cooperation with other jurisdictions regarding international cooperation in cartel cases. This notwithstanding, informal international cooperation could be expected on cross-border cartel cases.

Currently, Argentina has signed three documents concerning cooperation with worldwide authorities in antitrust matters:

a a cooperation agreement with Brazil, entered into in October 2003, ratified by Law No. 26,662, and entered into force in October 2010: Agreement of Cooperation between the Argentine Republic and the Federal Republic of Brazil regarding cooperation between its authorities of the Defence of Competition in the application of its laws of Competence;

b a Protocol for the Defence of Competition and an Agreement for the Defence of Competition within the Mercosur were approved in December 1996 and in December 2010.; and


Further, in November 2015, the Organisation for Economic Co-operation and Development reincorporated Argentina as an observer in its Competition Committee, which is in charge of monitoring the worldwide fight against, *inter alia*, cartel cases and transparency. One of the objectives of the current president of the CNDC is to state international policies as regards antitrust matters so as to promote transparency and efficiency in the Argentine market.

Further, in the past few years, staff at the CNDC have received exhaustive training from experts from other agencies. Among other things, the CNDC chaired UNCTAD’s 15th session of the Intergovernmental Group of Experts on Competition Law and Policy and rejoined the International Competition Network.

On 28 November 2108 in Paris, the CNDC, and the competent authorities in other countries in Central and South America, signed a declaration highlighting the benefits of clemency programmes.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

As mentioned in Section I, the Competition Act establishes (in Section 1) that acts or behaviours relating to the production or trade of goods and services that limit, restrict or distort competition or constitute an abuse of a dominant position in a market in a way that may result in a (potential or actual) damage to the general economic interest, are prohibited and shall be sanctioned pursuant to the rules of the law.

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9 The declaration was signed by Argentina, Peru, Chile, Brazil and Mexico.

10 See footnote 6.
Further, Sections 2 and 3 of the Act provide a list of anticompetitive conducts that are considered *per se* illegal and a list of behaviours that could be considered unlawful by the Argentine antitrust authorities.

Additionally, it is important to highlight that the Competition Act has adopted the effects doctrine, which implies that any act performed, or agreement signed abroad that has an effect in Argentine territory, can be challenged by the Argentine antitrust authorities. With regard to collusive practices, there does not need to be a formal and express agreement in place for the Competition Act to be applicable; only an informal understanding between the parties involved in a cartel case is necessary.

There are no exceptions expressly included in the Competition Act regarding cartel cases. However, pursuant to Section 1 of the Act, the law does not forbid conduct that involves parties that do not have sufficient market power to damage (potentially or actually) the general economic interest.

### IV LENIENCY PROGRAMMES

The new Antitrust Law has introduced a leniency programme into Argentina’s antitrust system. From the outset, the authorities have supported the application and enforcement of a leniency programme and emphasise that it will help to encourage efficiency and transparency among markets and competitors. Added to that is the fact that clemency programmes have a preventive role.

The aim of introducing a leniency programme is to facilitate the investigation of cartels. The programme that is included in the new Antitrust Law grants (1) full immunity to the first applicant as long as the applicant provides the authorities with significant evidence, (2) a reduction of between 20 per cent and 50 per cent of the fine imposed on other applicants, depending on the type of information and evidence provided for the analysis of the case, and (3) a supplementary benefit, known as leniency plus, consisting of a reduction by one-third of the fine or sanction that would otherwise have been imposed as a result of the petitioner’s participation in the first conduct.

Further, to obtain full immunity, the petitioner must comply with the following conditions:

- be the first of those involved in the conduct to apply and supply sufficient evidence;
- cease the anticompetitive behaviour, unless the authority requests that it be continued;
- fully cooperate with the ANAC;
- keep the evidence; and
- keep the petition of leniency confidential.

At the time of writing, there are no public records acknowledging any application or filing for leniency.

### V PENALTIES

Penalties for anticompetitive conduct are detailed in Section 55 of the new Antitrust Law.

Infringements of the Competition Act regarding a cartel case may result in harsh consequences for both the infringing company (or companies) and any employees that took part in the conduct.
Under current Argentine legislation, penalties for infringing the Competition Act are determined as follows: fines will increased to the higher of (1) 30 per cent of the turnover of the business associated with the infringement in the previous fiscal year, multiplied by the number of years of the infringement (the latter with a cap of 30 per cent of the total Argentine consolidated turnover of the infringing parties in the previous fiscal year), or (2) twice the amount of the economic benefit caused by the infringement. In the event that both methods can be used, the method that achieves the higher amount for the fine will be used.

Further, and if the foregoing criteria cannot be applied, fines will be imposed by the ANAC with a cap of 200 million unidades móviles.11 In case of a repeat offence, offenders’ fines may be doubled. As well as the fine, the ANAC may require the immediate ceasing of the acts or conduct and, if considered necessary by the ANAC, the removal of offenders’ effects.

To determine the sanctions, the authorities take into account, among other things:

- the loss suffered by all the individuals and companies that have been affected by the unlawful activity;
- the benefit obtained by all the individuals and companies that were involved in the activity;
- the position of the companies in the market that are involved in the investigation;
- the accounts of the companies involved in the investigation;
- the duration of the conduct subject to investigation;
- an estimation of the inflated prices generated by the conduct subject to investigation;
- the characteristics of the products involved and their contribution to the welfare of society; and
- the value of the products that are part of the investigation as well as the assets held by the individuals involved.

The CNDC has stated in a precedent12 that when sanctioning collusive conduct, penalties should be established for an amount that ‘may compensate society for the damage caused; and be superior to the benefits obtained by the companies involved in the case’.

To determine the amount of the fine, the criteria used by the authorities take the following into account:

- the loss suffered by all the individuals who have been affected by the unlawful activity;
- the benefit obtained by all the individuals who were involved in the unlawful activity;
- the responsibility of the infringing companies;
- the ‘antitrust background’ of the companies involved; and
- the value of the products that are part of the investigation as well as the assets held by the individuals involved.

The logic behind the pecuniary fine is that the imposition and the amount of the fine act as disincentives for those considering engaging in anticompetitive conduct.

In the event of a recurrence of unlawful activity, the fine could be doubled. Without prejudice to other penalties that may be related to the activity, when verified acts that constitute a cartel case, or where it is noted that a monopolistic or oligopolistic position in violation of the provisions of the Competition Act has been acquired or consolidated, the

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11 Unidad móvil is a coefficient updated annually by the Argentine inflation index. The value of one unidad móvil is fixed at 20 pesos.
12 See footnote 8.
competent authority, currently the Secretariat, may enforce conditions that have the aim of neutralising the distortional effects that the activity has had on competition, or appeal to a judge to have the offending companies dissolved, liquidated, decentralised or divided.

Further, the companies are liable for the acts of their employees (even those who are not in a managerial position) performed on their behalf, for their benefit or with their assistance.

As a consequence of the aforementioned, directors, managers, administrators, receivers or members of the surveillance commission who contribute, encourage or permit an infringement are jointly and severally liable regarding the imposition of the fine.

In addition to all the sanctions described above, the individuals or legal entities who are injured by the acts and behaviour forbidden by the Competition Act may sue for damages in a court of competent jurisdiction in accordance with the laws of Argentina.

Finally, any agreements or terms and conditions that infringe the Competition Act might be declared null and void.

VI ‘DAY ONE’ RESPONSE

The antitrust authorities have very broad investigative powers to enforce the prohibition and investigation of cartel cases.

In practice, the antitrust authorities request, in the first instance, either the parties involved, or third parties that may have knowledge or information regarding the collusion, to provide documents or information they deem necessary to pursue the investigation. Usually they request general information regarding the market and the product involved in the investigation, shares of the players involved, competitors, barriers to entry in the market, capacity, distribution channels, among other things.

The antitrust authorities, in the second instance, usually call the parties they believe are involved in the cartel case, or third parties, to hearings. The hearings are usually held in the antitrust commission offices and officiated by the lawyers and economists who are in charge of the case.

The antitrust authorities may also request a judicial order to inspect the companies that they believe are involved in the cartel case with the aim of obtaining evidence.

As part of the inspection, the authorities may review emails, diaries and documentation that they understand could have information or constitute evidence regarding the cartel case.

In addition, the antitrust authorities usually review all communications made by associated competitors.

VII PRIVATE ENFORCEMENT

With regard to private enforcement, Section 62 of the new Antitrust Law provides that ‘any person damaged by anticompetitive practices may bring an action for damages in accordance with civil law before a judge having jurisdiction over the matter’.

Two relevant cases that involved claims for damages, and had previously been sanctioned by the CNDC, were initiated as a consequence of anticompetitive conduct. One was a cartel case and the other focused on an abuse of dominant position.

The first, Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cia Industrial Argentina SA y otros s/ ordinario, was rejected by the judge for lack of legitimacy.

In the second case, Auto Gas SA v. YPF SA y otros s/ ordinario, the judge estimated that the damages amounted to 13,094,457 pesos, plus the costs of the process.
The new Antitrust Law includes new provisions regarding private enforcement; the changes focus on establishing a more efficient and faster procedure. The parties in a case should file the claim once the administrative decision imposing a sanction is final. The administrative decision will be binding on the civil judge and the case will be heard under expedited procedural rules. Further, parties who have benefited from leniency applications will be exempted from civil liability. This last rule has the following exceptions: (1) claims by defendants’ purchasers or their direct and indirect suppliers, and (2) cases in which the defendants could not obtain complete redress of their claim from parties who have not benefited from leniency applications.

VIII CURRENT DEVELOPMENTS

In February 2016, Mr Esteban Greco took office as the president of the CNDC and will continue to lead the competition authority until the ANAC is constituted. As a first step, Mr Greco carried out internal audits. He has also released the results of internal audits regarding anticompetitive conduct (including but not limited to cartel cases). Mr Greco acknowledged that the antitrust authorities, in previous years, have failed to comply with the terms established in the Competition Act as regards conduct cases. He stated that conduct cases initiated with an aim other than the protection of market competition will be dismissed and closed.

The new Antitrust Law, which was promoted – among others – by the CNDC, entered into force in May 2018.

As has already been stated, the new Competition Act will create a new, independent national competition authority. This will be comprised of (1) the Antitrust Tribunal, (2) the Anticompetitive Conducts Trial Secretariat (which will be in charge of the anticompetitive conduct analysis), and (3) the Economic Concentrations Secretariat (which will be in charge of the merger control process). As regards anticompetitive practices, the new Competition Act:

- considers cartel practices illegal per se;
- includes a leniency programme (see Section IV); and
- could consider interlocking directorates to be illegal, under a rule of reason approach.

With regard to developments in anticompetitive cases, in September 2016, the Antitrust Commission served notice to Prisma Medios de Pago SA (Prisma) and its 14 shareholder banks of an investigation by which three main anticompetitive conducts were set. This case was initiated as a consequence of an investigation held by the Antitrust Commission – in early 2016 – that was focused on credit cards and electronic payment methods. The conclusion of this investigation was that there was a lack of competition and transparency in the market.

Prisma is the operator of VISA in Argentina and is owned by – among others – 14 of Argentina’s larger banks. As part of the investigation, Prisma submitted a settlement proposal to the Antitrust Commission in March 2017, which was approved by the Ministry of Production on 7 September 2017. The settlement proposal consisted of a structural and a behavioural remedy. The structural remedy was a commitment by Prisma’s shareholders to sell their stakes in Prisma; this related to the conditions for providing its processing services. The behavioural remedy related to the conditions for providing its processing services; namely that Prisma shall sign issuer-processing contracts with the banks with which it

13 Autoridad Nacional de Competencia.
Argentina currently operates at ‘market prices’, providing guarantees of service provisions. The Antitrust Commission stated that this settlement resolves the vertical integration issue between Prisma and the 14 banks, and concerns regarding horizontal integration. The Antitrust Commission expects this settlement to result in an increase in competition within the market involved and the introduction of new electronic payment methods.

In December 2015, the antitrust authorities imposed a large fine on four important laboratories (B Braun Medical SA, Gobbi Novag SA, Fresenius Kabi SA and CSL Behring SA) and some of their representatives. The fines imposed amounted to 10 million pesos for each company and 200,000 pesos for the representatives.

This case was initiated by a claim made by a consumer that reported the existence of a cartel between the named companies in the provision of gelatin for hospitals. The antitrust authorities started the investigation by requesting information from the hospitals and subsequently asked for a judicial order to review the companies in situ and to take any information that they deemed necessary to proceed with the cartel investigation. As a second step, the CNDC called the representatives of the companies and of the hospitals to attend hearings.

In its analysis, the CNDC highlighted the following, as regards the definition and the characteristics of a cartel: ‘an agreement within competitors with the object of increasing benefits and prices of the companies involved without obtaining any objective compensatory advantage. In practice this last is made by stating prices, limiting production, spreading markets, assigning clients or territories, colluding in bidding process or combining all these practices’.14

The most valuable evidence used by the antitrust authorities to sanction the companies was email exchanges between representatives of the companies. In this case, the authorities highlighted that another factor to consider when evaluating the possibilities of collusion in an oligopolistic market is transparency, as it is an efficient tool that allows companies to reveal the actions of their competitors.

Also of note is a case in which the former Secretary of Trade, through Resolution No. 271/2014, imposed fines on eight automobile companies in December 2014, on the grounds of what was thought to be a collusive agreement between the companies on the sale of automobiles in Tierra del Fuego, Buenos Aires. Fines were imposed on Volkswagen Argentina SA, Honda Motor de Argentina SA, Toyota Argentina SA, General Motors Argentina SRL, Renault Argentina SA, Ford Argentina SCA, Fiat Auto Argentina SA and Peugeot-Citroën Argentina SA.

The sanction was appealed and finally revoked by the Court of Appeals of Comodoro Rivadavia.15 This was the first large sanction to be revoked by a court of appeals regarding cartel cases. One of the arguments that the court used to revoke the fines was that the evidence used by the antitrust authorities to sanction the companies was not sufficient to prove the existence of a cartel and specifically stated that ‘there is no evidence that proves voluntary agreements that had as a consequence homogeneous conducts’.

Further, in July 2018, the Secretariat of Trade fined the Argentine Society of Authors and Composers of Music (SADAIC) 42 million pesos for excessive prices in the copyright paid by hotels and other establishments that offer accommodation. The case was initiated by

14 See footnote 8.
15 Honda Motors Argentina S.A. y otros c/ Estado Nacional- Secretaria de comercio s/ Recurso directo ley 25156.
the request of an investigation conducted by the CNDC. The antitrust authority stated that the measure implied an improvement in the competitiveness of the tourism sector and had as a consequence the reduction of tariffs for the rights of authors and composers.

In its analysis, the CNDC used a novel method, making an international comparison of the fees paid for the reproduction of musical works. As a result of the analysis, the CNDC discovered that prices in Argentina were much higher than in other countries. After conducting the analysis, the CNDC recommended to the Secretariat of Trade the imposition of fines. The fine imposed represents 10 per cent of the turnover obtained by SADAIC between 2009 and 2014.
Chapter 3

AUSTRALIA

Prudence J Smith, Matthew Whitaker, Timothy Atkins and Lachlan Green

I ENFORCEMENT POLICIES AND GUIDANCE

i Statutory framework

Australia’s competition law is contained in the Competition and Consumer Act 2010 (Cth) (CCA) and is administered by the Australian Competition and Consumer Commission (ACCC). The ACCC has powers to investigate and bring proceedings against parties that have engaged in cartel conduct, including the power to:

a compel any person or company to provide information about a suspected breach of the CCA, including by providing documents or oral evidence;²

b obtain search warrants for company offices and the premises of company officers;³ and

c facilitate surveillance of individuals, including phone taps, through collaboration with the Australian Federal Police.

In the CCA, there are four categories of cartel conduct that are prohibited by Section 45AD. These provisions prohibit making or giving effect to a contract, arrangement or understanding between competitors that has the purpose of:

a or is likely to have had the effect of, price-fixing;

b market sharing;

c bid rigging; or

d preventing, restricting or limiting production, capacity or supply.

Cartel conduct constitutes both a civil and a criminal offence under the CCA, which does not differentiate between differing degrees of cartel behaviour. However, under the Criminal Code Act 1995 (Cth), additional requirements must be met in order to prosecute a criminal cartel offence, including the need to establish certain fault elements, prove the offence beyond reasonable doubt and, depending on the circumstances, obtain a unanimous jury verdict. While the ACCC investigates and litigates cartel conduct as a civil offence, it is the Commonwealth Director of Public Prosecutions (CDPP) who prosecutes criminal cartel offences. The ACCC and the CDPP have signed a memorandum of understanding (MOU), which provides that the ACCC will refer cartel conduct that can cause large-scale or serious economic harm to the CDPP for prosecution.

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1 Prudence J Smith is a partner, and Matthew Whitaker, Timothy Atkins and Lachlan Green are associates at Jones Day.
2 Section 155 of the Competition and Consumer Act 2010 (Cth) [CCA].
3 CCA, Section 135A.
II COOPERATION WITH OTHER JURISDICTIONS

Cooperation between antitrust enforcement agencies of different countries has become increasingly important. Cross-border trade has increased and led to greater scope for international cartel conduct. For example, two treaties allow for assistance between Australia and the United States to exchange evidence and enforce their respective competition laws: the Australia United States Mutual Antitrust Enforcement Assistance Agreement, and the Agreement between the Government of Australia and the Government of the United States relating to cooperation and antitrust matters.

The ACCC has also signed agreements and MOUs with numerous other antitrust agencies, including in Canada, China, Taiwan, the European Union, Fiji, India, Japan, New Zealand, Papua New Guinea, the Philippines, the Republic of Korea and the United Kingdom. These agreements aim to assist with cross-border investigations and assist other countries, particularly in the Asia-Pacific region, in building effective systems and appropriate frameworks for economic regulation.

Additionally, the ACCC receives and makes requests outside these formal arrangements. For example in 2017–2018, the ACCC received and responded to, or made requests to, agencies in Brazil, Canada, Chile, China, Columbia, Denmark, the European Union, France, Germany, Hong Kong, India, Israel, Italy, Japan, Kenya, Malaysia, Mongolia, the Netherlands, New Zealand, Singapore, South Africa, Spain, Sweden, Taiwan, Thailand, the United Kingdom, the United States and Vietnam.

i Information sharing

The ACCC regularly exchanges information with overseas agencies. It has exchanged information with foreign agencies and government bodies on 175 occasions, facilitated by agreements and MOUs with these agencies, and bilateral waivers obtained from the affected parties. The ACCC has a standard non-negotiable disclosure consent form to allow confidential information to be disclosed to, among other entities, these foreign agencies and government bodies.

The CCA permits the ACCC to disclose ‘protected information’ to a foreign government body when the chairman of the ACCC is satisfied that disclosure would assist the agency. Protected information is defined in Section 155AAA of the CCA to include information that was given in confidence to the ACCC, including by a foreign government body or obtained by the ACCC under compulsion. The chairman is entitled to impose conditions, in writing, in relation to the disclosure of protected information.

In relation to its treatment of confidential personal information, under the Privacy Act 1988 (Cth), the ACCC is prohibited from disclosing personal information for a purpose other than that for which it was collected, subject to the exceptions provided in the Privacy Principles.

Additionally, under the Leniency Policy, the ACCC will not share with other regulators any confidential information provided by an informant, or the identity of the informant, without the informant’s consent. However, in international matters, it will seek to obtain the informant’s consent as a matter of course and request that the informant provide written consent to disclosure for each jurisdiction in which he or she intends to seek immunity or leniency for prohibited conduct.
ii  **Extradition requests**
Extradition procedures are dictated by the Extradition Act 1988 (Cth). Australia accepts extradition requests from countries that have been declared an extradition country. Regulations also make provisions for extradition procedures with countries that have non-treaty extradition arrangements with Australia, including the United Kingdom and Japan.

For the Australian government to agree to an extradition request, the conduct in question must amount to an offence in both Australia and the foreign country. As cartel conduct constitutes a criminal offence under the CCA, there is scope for Australia to accept extradition requests for contravening conduct from foreign agencies.

iii  **Extraterritorial discovery**
Extraterritorial discovery constitutes the gathering of evidence for foreign proceedings and discovery, which is not permissible.

### III  JURISDICTION LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i  **Extraterritorial application of Australia's competition laws**
Section 5(1) of the CCA provides that Australia's competition laws extend to the engaging of conduct outside Australia. The laws extend to companies incorporated or carrying on business in Australia, Australian citizens or persons ordinarily resident in Australia. The laws also extend to suppliers of goods and services in relation to a misuse of market power and exclusive dealing.

**Joint venture exemption**
The CCA provides for exemptions from civil and criminal prohibitions for joint ventures.\(^4\) Joint ventures contained in an arrangement or understanding (not simply contracts) and for the acquisition of goods or services (not just production or supply) are exempt from civil and criminal prohibition. However, the CCA imposes some additional requirements to qualify for the joint venture exemption.

For a production, supply or joint acquisition joint venture, the exception from the application of the cartel laws will be available to the extent that the cartel provision is reasonably necessary for undertaking the joint venture, and the joint venture is not carried out for the purpose of substantially lessening competition.

While the meaning of the term ‘reasonably necessary’ is as yet unclear in the context of the joint venture exception, the term imports a consideration of the purposes of the joint venture and whether the provision in question is reasonably necessary to attain the joint venture’s purposes. If this could be achieved through less restrictive means, then the provision is unlikely to be considered reasonably necessary.

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\(^4\) CCA, Sections 45AO and 45AP.
**Immunities**

The ACCC has an Immunity and Cooperation Policy that grants full immunity from any civil enforcement action brought by the ACCC to the first individual or corporation that meets the criteria under the policy.\(^5\) Those criteria include continuing cooperation and full disclosure of information relating to the alleged cartel.

The ACCC also accepts applications for criminal immunity and makes recommendations to the CDPP that an applicant be granted immunity pursuant to the Prosecution Policy of the Commonwealth.\(^6\) Such a recommendation will be made only where the individual or corporation first satisfies the criteria for a conditional immunity application under the ACCC's Immunity and Cooperation Policy.

**Legal developments on cartel law in Australia**

In June 2018, the ACCC laid charges against four major Australian banks and several executives regarding alleged criminal cartel conduct in breach of the CCA (the Share Placement Cartel). The alleged cartel behaviour relates to the A$2.5 billion sale in Australia of 80.8 million discounted shares to institutional investors in 2015. The parties have asserted that the use of underwriting syndicates has operated successfully without prosecution for decades. Accordingly, the case will have ramifications on market practice in the area of institutional placements and capital raisings. The action is the fourth criminal action for cartel conduct since 2017, and only the second instance in which individuals have been criminally charged. Earlier in 2018, the ACCC identified cartel conduct as one of the ACCC’s priorities for 2018.

On 15 February 2018, the CDPP commenced proceedings against Country Care Group Pty Ltd (Country Care), its managing director and former business development manager. This marked the first time that individuals have been charged under Australia’s criminal cartel prohibitions. It was alleged that Country Care, a Mildura-based company, engaged in cartel conduct involving assistive technology products used in rehabilitation and care of elderly people, including beds and mattresses, wheelchairs and walking frames.

On 16 May 2018, the Full Federal Court ordered Japanese company Yazaki Corporation to pay A$46 million in penalties for cartel conduct. The Court found that Yazaki had engaged in anticompetitive cartel conduct in the supply of wire harnesses used in the manufacture of the Toyota Camry. The penalty is the highest handed down to date under the CCA.

On 14 June 2017, the High Court of Australia found that price-fixing agreements entered into by Air New Zealand Ltd, PT Garuda Indonesia Ltd and other international airlines, between 2002 and 2006, breached Australia’s competition laws. The ACCC alleged that the two aforenamed companies engaged in collusive behaviour by fixing surcharges and fees on the carriage of air cargo to Australia. In the first instance, the case was dismissed as the alleged collusive conduct was engaged in Indonesia and therefore no Australian market was involved.\(^7\)

Upon appeal by the ACCC, the majority of the Full Court of the Federal Court of Australia held that the relevant market for the air cargo services from Hong Kong to

\(^5\) Australian Competition and Consumer Commission [ACCC], ACCC Immunity and Cooperation Policy, September 2014 (under review).

\(^6\) Commonwealth Director of Public Prosecutions, Prosecution Policy of the Commonwealth, Annexure B: Immunity from Prosecution in Serious Cartel Offences, September 2014.

\(^7\) ACCC v. Air New Zealand Limited [2014] FCA 1157, [21].
Australian ports, involving airlines, freight forwarders, exporters and (at least) including some large shippers, were markets ‘in Australia’. This was essentially an adoption of a broader definition of ‘the relevant market’.

The High Court’s findings consider the approach to market definition. Rather than focusing on a traditional approach to geographical market definition, the High Court took an approach that focused on the geographical area in which the airlines competed. While affirming the decision of the Full Federal Court, the High Court placed less emphasis on the fact that some of the air cargo services were performed in Australia. The key consideration for the High Court was that the airlines engaged in rivalry in Australia, in terms of competing for the business of Australian customers.

On 14 July 2016, the ACCC commenced its first criminal charge under the former Section 44ZZRG(1) of the CCA (which provided that it was an offence to give effect to a cartel provision) against Nippon Yusen Kabushiki Kaisha (NYK), a global shipping company based in Japan. It alleged that NYK had engaged in a cartel from July 2009 to September 2012. On 18 July 2016, NYK pleaded guilty to the charges of criminal cartel conduct and, on 3 August 2017, the Federal Court convicted NYK of criminal cartel behaviour and ordered it to pay a fine of A$25 million. The fine incorporated a discount of 50 per cent for NYK’s early guilty plea, assistance and cooperation.

IV LEIENCY PROGRAMMES

i Overview

The ACCC first introduced a leniency programme in July 2003. The current policy, entitled ‘ACCC immunity and cooperation policy for cartel conduct’ (the Leniency Policy) and published in September 2014, sets out the ACCC’s approach to cooperation by cartel participants (and is currently again under review). At the time of publication of the current policy, the ACCC chairman emphasised the utility of the Leniency Policy in detecting and prosecuting cartels:

Due to the difficulty in detecting cartels and the damage that cartels cause to competitors and consumers, identifying and prosecuting cartel conduct is an enduring priority for the commission . . . This immunity policy and the threat of civil and criminal penalties are fundamental to the effective discovery and disruption of cartel conduct.10

The Leniency Policy offers two forms of leniency for cartel participants who are willing to assist the ACCC in its investigation:

a Immunity: the first cartel participant to approach the ACCC may be granted conditional immunity from civil enforcement actions, and potentially from criminal action by the CDPP if it meets the necessary criteria.

8 ACCC v. PT Garuda Indonesia Ltd [2016] FCAFC 42, [148]–[160].
Cooperation: if a cartel participant fails to meet the criteria for conditional immunity, it may still receive leniency from the ACCC, or the court if it cooperates in the ACCC’s investigation.

A corporation that is or was party to a cartel (in a primary or ancillary capacity) will be eligible for conditional civil immunity if it meets the following seven conditions.

- It admits that its conduct may contravene the CCA.
- It is the first party to apply for immunity in respect of the cartel.
- It has not coerced others to participate in the cartel.
- It has ceased its involvement in the cartel, or indicated to the ACCC that it will cease its involvement.
- Its admissions are a true corporate act, rather than isolated confessions of individual representatives.
- It has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, and undertakes to continue to do so throughout the investigation and any subsequent court proceedings.
- The ACCC has not received written legal advice that it has reasonable grounds to institute proceedings in respect of the cartel.

An individual who was a director, officer or employee of a corporation that is or was party to a cartel may also apply for conditional immunity, subject to the same criteria (save for the requirement that the admissions are a true corporate act).

When determining whether to grant conditional immunity, the ACCC will interpret the Leniency Policy in favour of the applicant in the case of any ambiguity. Further, in rare and exceptional circumstances, the ACCC may grant immunity to an applicant that fails to meet the criteria (including second or subsequent applicants) under its cooperation policy by not commencing civil proceedings against the applicant. The ACCC has not issued any guidance as to what constitutes ‘rare and exceptional circumstances’.

Under an agreement between the ACCC and the CDPP, if the ACCC considers that an applicant meets the criteria for conditional immunity, it may recommend to the CDPP that the applicant be granted immunity from criminal prosecution. The CDPP will then exercise independent discretion to assess whether the applicant meets the criteria under the Leniency Policy.

ii  ‘Amnesty plus’ regime

A cartel participant who does not qualify for conditional immunity but who cooperates with the ACCC in relation to a cartel may discover a second, unrelated cartel. In such a case, that party may apply for conditional immunity for the second cartel as well as a recommendation by the ACCC to the court for a further reduction in penalty in relation to the original cartel.

iii  Obtaining a marker

Corporations or individuals who intend to apply for immunity can request a marker from the ACCC. The marker will have the effect of preserving the applicant’s status as the first immunity applicant in respect of a cartel, giving it a limited period of time to gather the required information to satisfy the criteria for conditional immunity. To obtain a marker, the
applicant must provide a description of the cartel conduct that allows the ACCC to confirm that no other party has applied for immunity or obtained a marker in respect of that cartel. If this standard is met, the request may be made anonymously.

If the applicant wishes to proceed with the immunity application after obtaining a marker, it must make a ‘proffer’ by providing the ACCC with a detailed description of the cartel conduct. The proffer may be made orally or in writing. If the ACCC is satisfied that the applicant has met the criteria for immunity, it will grant conditional immunity.

iv Duties of cooperation required for a grant of leniency

Once conditional immunity is granted, the applicant has an obligation to provide full, frank and truthful disclosure and to cooperate fully and expeditiously with the ACCC throughout its investigation and any subsequent court proceedings. The applicant must also keep confidential its status as an immunity applicant and the details of any investigation or court proceedings, unless otherwise required by law or with the ACCC’s written consent.

If the applicant complies with these obligations, conditional immunity will become final immunity upon the resolution of any proceedings against other cartel participants.

v Reductions in liability

The first applicant to meet the criteria in the Leniency Policy is completely immune to civil action by the ACCC, and potential criminal prosecution by the CDPP, as discussed in Section IV.iii. It should be noted, however, that immunity under the Leniency Policy is not a bar to private enforcement actions. The applicant may still be liable to compensate parties that suffered damage as a result of the cartel conduct.

A further benefit of conditional immunity for a corporation is that it may also seek derivative immunity for related corporate entities or current and former directors, officers and employees. A related corporate entity will be eligible for derivative immunity if, for all or part of the period of the cartel conduct, the corporation with conditional immunity held a controlling interest in the related corporate entity, or the related corporate entity held a controlling interest in the corporation, and the related corporate entity meets the conditions set out in Section IV.i. Individual directors, officers or employees will similarly qualify for derivative immunity if they meet the conditions for individual conditional immunity.

If an applicant fails to meet these conditions, it may still receive leniency from the ACCC or the court if it cooperates in the ACCC’s investigation. There is no sliding scale for discounts awarded for cooperation but, in civil proceedings, the ACCC will identify to the court any cooperation provided by a party and take this cooperation into account when making a recommendation as to a penalty or sanction. When assessing the extent and value of the cooperation, the ACCC will consider:

a the timeliness of the cooperation;
b the significance of the evidence provided;
c whether the party provided full, frank and truthful disclosure and continued to cooperate fully and expeditiously;
d whether the party ceased its involvement in the cartel or indicated that it will cease its involvement;
e whether the party coerced any other party to participate in the cartel;
f whether the party acted in good faith in dealings with the ACCC; and
g in the case of individuals, whether the party agreed not to use the same legal representation as the corporation by which they are or were employed.
Ultimately, the penalty or sanction imposed on cartel participants will be determined by the court.

In criminal proceedings, when determining the appropriate sentence, the court will take into account the extent to which the defendant cooperated with law enforcement agencies.

**vi** Discovery of surrendered materials by private litigants

As discussed in Section IV.v, immunity under the Leniency Policy does not protect the applicant from private enforcement actions. There is a risk that information disclosed to the ACCC in support of an application for leniency may be discovered by parties to private litigation.

While the ACCC undertakes to ‘use its best endeavours to protect any confidential information provided by an immunity applicant’, this is subject to the protected cartel information provisions of the CCA. In particular, Section 157C provides that the ACCC is not required to make discovery of documents containing protected cartel information (defined as information relating to a cartel offence and given to the ACCC in confidence) to a party to actual or prospective court proceedings. However, the ACCC may disclose such information after considering such matters as the fact that the information was provided in confidence, the safety of the informant, the fact that the disclosure may discourage future informants, and the interests of the administration of justice.

**V PENALTIES**

**i** Statutory basis for and types of liability

Individuals and corporations face both civil and criminal liability under the CCA for their involvement in cartel conduct. The criminal and civil prohibitions are the same, save for an additional fault element of ‘knowledge or belief’ in relation to the criminal offence. The civil penalties for making or giving effect to a cartel provision are the same as those currently available for other contraventions of Part IV – Restrictive trade practices.

It is the CDPP that has the power to bring criminal indictments under the CCA. The ACCC will refer serious cartel matters to the CDPP.

**ii** Potential and typical remedies for cartel violations

**Individuals**

Individuals face pecuniary penalties of up to A$500,000 per breach of the cartel prohibitions contained in Part IV, Division 1 of the CCA.

In addition, individuals found to have committed a cartel offence may face criminal penalties of up to A$220,000 (per breach) or up to 10 years’ imprisonment. It is illegal for a corporation to indemnify its officers against legal costs and any financial penalty.

The CCA prohibition against indemnification makes no distinction between claims for which no liability is found and claims for which liability is found in the same proceedings – meaning it is theoretically sufficient for the director to be found liable on one claim in a proceeding to trigger the prohibition on indemnification in respect of all legal costs – even those incurred in respect of claims for which no liability was found.

11 CCA, Section 79.
12 CCA, Section 77A.
The complex and costly nature of litigation involving alleged contraventions of the cartel prohibitions serves to operate harshly or unfairly against officers involved. As a consequence, there is a risk that an officer may elect to settle with the ACCC, or give concessions, rather than fight any allegations for fear that they will personally be exposed to all costs in a civil hearing.

Finally, ‘officer’ has the meaning given to it under Section 9 of the Corporations Act 2001 (Cth), meaning employees and middle managers may not fall within the ambit of Section 77A of the CCA. Therefore, it appears that employees who do not fall within the definition of ‘officer’ can be indemnified by the company in relation to civil liabilities and legal costs.

**Penalties for corporations**

The maximum fine or pecuniary penalty for a corporation (per criminal cartel offence or civil contravention, whichever applies) will be the greater of the following amounts:

- a A$10 million;
- b three times the commercial gain derived from the anticompetitive activity; or
- c where the amount of gain cannot be fully determined, 10 per cent of the group turnover in Australia.

**Other remedies**

On application, the Federal Court may impose other penalties for cartel civil contraventions or criminal offences, including:

- a injunctions;\(^{13}\)
- b damages (to compensate persons who suffer loss and damage as a result) (six-year limitation period);\(^{14}\)
- c orders disqualifying a person from managing corporations;\(^{15}\)
- d non-punitive orders such as community service orders, probation orders, orders for disclosure of information or orders requiring the offender to publish an advertisement on the terms specified in the order;\(^{16}\) and
- e the Court may make ‘such orders as it thinks appropriate’. These orders may include voiding a contract or certain provisions of a contract, varying a contract or refusing to enforce all or any of the provisions of a contract.\(^{17}\)

**Typical penalty**

The following recent penalties imposed for cartel conduct should provide an indication of a ‘typical penalty’ for a breach:

- a in 2013, A$1.35 million on Japanese cable supplier, Viscas Corporation;
- b in 2014, A$8.3 million in agreed penalties against Renegade Gas Pty Ltd, Speed-E-Gas (NSW) Pty Ltd (a wholly owned subsidiary of Origin Energy Limited) and three current and former senior officers of the two companies;

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\(^{13}\) CCA, Section 80.
\(^{14}\) CCA, Section 82.
\(^{15}\) CCA, Section 86E.
\(^{16}\) CCA, Section 86C.
\(^{17}\) CCA, Section 87.
In 2014, A$3 million and A$2 million in agreed penalties against NSK Australia Pty Ltd and Koyo Australia Pty Ltd, respectively;

d in 2016, A$120,000 on the former director of the Australian Egg Corporation Limited and the former managing director of Farm Pride Foods Ltd for attempting to induce a cartel arrangement between competing egg producers;

e in 2016, A$18.6 million on Cement Australia Pty Ltd; however, the Court subsequently set aside A$1.5 million, thereby reducing the total penalty imposed to A$17.1 million. The ACCC had submitted that penalties over A$9 million were appropriate and appealed the level of penalty to the Full Federal Court in October 2017. The appeal was upheld and an increased penalty of A$20.6 million was ordered on all companies in the cartel;

f in 2016, A$18 million on Colgate-Palmolive. A fine of A$9 million was imposed on Woolworths in the same matter;

g in December 2016, the Federal Court ordered ANZ Bank to pay penalties of A$9 million earlier this year, and Macquarie Bank was ordered to pay penalties of A$6 million for attempted cartel conduct in 2011 in relation to the benchmark rate for the Malaysian ringgit;

h in June 2017, Prysmian was ordered to pay a penalty of A$3.5 million for engaging in cartel conduct in relation to the supply of high-voltage land cables. The ACCC sought a penalty of A$7 million;

i in August 2017, the Federal Court imposed a penalty of A$25 million on NYK after it pleaded guilty to its involvement in a criminal cartel;

j in October 2017, the Full Federal Court upheld an ACCC appeal, imposing a A$20.6 million penalty against Cement Australia and its related companies for giving effect to anti-competitive agreements; and

k in May 2018, the Full Federal Court ordered Japanese company Yazaki Corporation to pay A$46 million for cartel conduct, following an appeal by the ACCC. This is the highest penalty ever handed down under the CCA.

It is only the court that can impose penalties and determine their value. The ACCC is able to, and does, agree with parties the amount of penalties that will be sought from the court. In 2015, the Full Federal Court ruled that joint submissions on penalties was not permitted, which put into doubt the ACCC’s ability to make joint submissions in relation to pecuniary penalties. This doubt arose as a result of the High Court decision in *Barbaro*, 18 in which the court held that the prosecution should not nominate a sentence range in criminal sentence proceedings.

The question of whether the reasoning in *Barbaro* applies to civil pecuniary penalties was appealed to the High Court, 19 as was the question of whether parties could make joint submissions with regulators in relation to an agreed penalty or penalty range. The High Court unanimously held that *Barbaro* did not apply to civil pecuniary penalties and, accordingly, parties to civil proceedings are able to submit agreed penalties to the court. Whether the court accepts them is, of course, a different matter.

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18 *Barbaro v. The Queen; Zirilli v. The Queen* [2014] HCA 2 (12 February 2014).

In March 2018, the Organisation for Economic Co-operation and Development released a report comparing the penalties for competition law infringements between Australia, the United Kingdom, Germany, Korea and the United States. The report found that Australian penalties were comparatively lower, both in terms of average and maximum penalty. In response, the ACCC released an annual report in October 2018 stating the ACCC will ‘rethink its approach to assessing the penalties that it puts to the court for breaches of competition law’.20 The ACCC chair Rod Sims has also stated: ‘As I have said before, we do not want breaches of our competition law to be seen as an acceptable cost of doing business. We need penalties that will be large enough to be noticed by senior management and company boards, and also shareholders.’ This new approach is evident in the penalties sought in cases heard in 2018.

VI INVESTIGATIVE POWERS

The CCA contains several far-reaching powers that the ACCC can use for investigating and gathering evidence for investigations. The ACCC will always assess cartels as a priority.

Section 155 of the CCA is the ACCC’s most widely used mandatory information and evidence-gathering power. It gives the ACCC the power to require a person to provide information or documents, or to give evidence relating to a possible contravention, if the ACCC has reason to believe that a person is capable of doing so. Failure to comply with a notice is a criminal offence punishable by a fine or imprisonment,21 and there is no privilege against self-incrimination. Legal professional privilege in respect of documents is preserved.

The ACCC also has the option of seeking a warrant to conduct search and seizure operations (i.e., dawn raids). The ACCC does not generally comment on its use of search warrants, but they are most commonly used in cartel investigations. Further, the following factors indicate a likely increase in the occurrence of search warrants:

a the focus of ACCC enforcement activities on detecting and prosecuting cartels;
b the criminalisation of cartels in Australia; and
c the increasing use of search warrants by regulators internationally.

VII PRIVATE ENFORCEMENT

i Private right of action

The CCA permits a private enforcement action in respect of a breach of the cartel provisions contained in Part IV, Division 1 of the CCA. Section 82 provides that any person who suffers loss or damage from a breach of the cartel provisions can bring a private claim for damages in the Federal Court against a party that engaged in, or was involved in, the contravening conduct.22 Furthermore, under Section 80, a private litigant may seek an injunction restraining a party from engaging in conduct that constitutes an actual or attempted breach of the cartel provisions, or an attempt to aid, abet or induce a person to contravene the cartel provisions.23

Notwithstanding these statutory provisions, the number of private enforcement actions in Australia continues to lag behind other major jurisdictions.

21 CCA, Section 155(7).
22 CCA, Section 82(1).
23 CCA, Section 80.
Australia

ii Class actions
Australia has a well-developed class action regime that operates under Part VI of the Federal Court of Australia Act 1976 (Cth) (FCA). Under the FCA regime, four cartel class actions have been commenced, all of which have settled. The most recent action, which settled for A$38 million, was brought against a number of airlines alleging the existence of a cartel to fix the price of air cargo services.24

The FCA regime provides that a class action may be commenced only if:

a seven or more persons have claims against the same person;
b the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
c all the claims give rise to a substantial common issue of law or fact.25

In relation to the requirements for standing, under the FCA regime, a person who has a sufficient interest to commence a proceeding on his or her own behalf against another person will also have a sufficient interest to commence a class action proceeding.26

The FCA regime operates an ‘opt-out’ system, whereby all persons who satisfy the definition of the ‘class’ will be represented by the lead plaintiff in the proceedings, unless they opt out. However, in some cases the ‘class’ has been defined as those potential claimants who have arrangements with a certain litigation under or have engaged a particular law firm. In such instances, the definition of the ‘class’ becomes sufficiently narrow so that, in effect, potential claimants are required to opt in to the proceedings.

iii Calculation of damages
Damages under the CCA for a breach of the cartel provisions are compensatory in nature and, accordingly, a plaintiff may only recover actual loss or damage suffered.27 Punitive or exemplary damages are not available. Further, there is a causal requirement that the loss or damage was sustained by the other party’s contravention. Where a court determines that loss or damage has been incurred, the court will be required to quantify the loss, including, where necessary, by approximation or degree.

In Australia, as no action for damages arising from a breach of the cartel provisions has proceeded to judgment, the precise methodologies by which the courts will calculate damages remain unclear. One key issue that is yet to be addressed in the cartel context is the potential availability of a pass-on defence, namely a defence to a claim for loss or damage on the basis that the plaintiff passed through any increased costs associated with the cartel conduct to its own customers.28

iv Limitation periods
An action for damages in respect of a breach of the cartel provisions must be initiated within six years of the date on which the cause of action accrued. There is no settled position in the Australian courts as to when the cause of action will accrue in cartel cases. One argument is

24 De Brett Seafood Pty Ltd v. Qantas Airways Ltd (No. 7) [2015] FCA 979.
25 Federal Court of Australia Act 1976 (Cth) [FCA], Section 33C.
26 FCA, Section 33D.
27 CCA, Section 82(1).
that the cause of action will only accrue when the plaintiff becomes aware that it has suffered loss or damage as a result of the cartel conduct. However, on the other hand, it is argued that the cause of action accrues at the time the plaintiff suffers the loss, which is usually when the plaintiff purchases the goods or services.

v Jurisdiction and extraterritoriality
The CCA extends the operation of the cartel provisions to any conduct engaged in outside Australia by companies incorporated or carrying on business in Australia, or by Australian citizens or persons ordinarily residing in Australia. However, Section 5(3) requires that before conduct outside Australia can be relied upon in private enforcement proceedings, written consent must be obtained from the minister. The Harper Review recognised that such consent requirements pose ‘a material hurdle for private plaintiffs’ and recommended they be removed.

vi Interaction between government investigations and private enforcement
The interaction between the public and private enforcement regimes can both facilitate and frustrate private actions. A private party is not precluded from commencing a private enforcement action when the ACCC or CDPP has commenced or completed its own investigations. In fact, it is increasingly common for private enforcement actions to be triggered by high-profile ACCC proceedings.

Section 83 of the CCA provides that findings of fact made against the respondent in prior proceedings can be used as prima facie evidence of those facts in subsequent proceedings. Accordingly, rather than having to adduce its own evidence, a private litigant may rely on findings of fact made in a successful ACCC proceeding. However, the function of this provision may be undermined by the ACCC Immunity and Cooperation Policy, which encourages the ACCC and the respondent to settle proceedings by way of an agreed statement of facts and consent orders. It is unclear whether a private litigant can rely on Section 83 in relation to findings based on admissions in settled proceedings, as distinct from findings based on evidence. In addition, under Section 87B of the CCA, when a party has engaged in an alleged contravention of the CCA (including the cartel provisions), the ACCC may accept a formal undertaking by the party. However, an undertaking does not require an admission that the party contravened the CCA, and accordingly cannot be relied upon under Section 83 by a private litigant.

30 ibid.
31 CCA, Section 5(1).
32 CCA, Section 5(3). The definition of minister is derived by reference to Section 19A of the Acts Interpretation Act 1901 (Cth). The ministers ‘administering’ the CCA can be ascertained by reference to the Administrative Arrangements Order, made by the Governor-General and notified in the gazette. Ministerial appointments to administer particular portfolios are also made by the Governor-General and are notified in the gazette, but a court would not normally require such details to be proven.
34 CCA, Section 83.
Obtaining evidence is a significant challenge for private litigants. While the ACCC has wide-ranging investigative powers to gather evidence, it has adopted a highly restrictive stance on the disclosure of such information to private litigants. Under the CCA, where evidence is deemed to be ‘protected cartel information’, the ACCC has broad power to refuse to comply with a private litigant’s request for information.

**VIII CURRENT DEVELOPMENTS**

After years of civil prosecutions for cartel conduct, the CDPP has a criminal conviction for a cartel and has commenced criminal proceedings against a number of corporates and executives. In early 2018, the ACCC indicated that cartel conduct would continue to be a priority, with ‘three to four’ domestic firms to face criminal prosecution in 2018. The ACCC lived up to this statement.

Notably, the ACCC’s new focus on targeting individuals represents a significant change in policy – in 2017, the ACCC chair Rod Sims stated: ‘Unfortunately, I fear that only jail sentences for individuals in prominent companies will help send the appropriate deterrence messages that cartels seriously damage competition and the enemy as a whole.’ The ACCC will continue to focus on criminal cartel prosecutions during the next five years, and is likely to seek greater penalties than those handed down previously.

The revised joint venture exception with additional requirements is now in place. Although provided in its application, including to a collective acquisition, the term ‘reasonably necessary’ has significant uncertainty in terminology; time will tell as to how the courts will apply the term.
Cartels are prohibited by Article IV.1 of the Belgian Code of Economic Law. Book IV of this Code is entitled ‘Protection of competition’ (the Competition Act). The Competition Act entered into force on 6 September 2013, replacing the Act on the Protection of Economic Competition of 15 September 2006. Article IV.1, Section 1 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, in an appreciable way, within the Belgian market or a substantial part thereof. That prohibition may be declared inapplicable when the conditions mentioned in Article IV.1, Section 3 are satisfied. These Belgian statutory provisions are modelled on Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Although there is no legal definition of a cartel in Belgium, the notion of cartel is understood to be limited to an agreement or concerted practice between two or more competitors, which non-competitors may also be involved in, aimed at coordinating their competitive behaviour in the market or influencing the relevant parameters of competition through practices such as fixing or coordinating prices or other trading conditions, the allocation of production or sales quota, the sharing of markets and customers, restrictions of imports or exports, or anticompetitive actions against other competitors.

Belgium is a small country with much cross-border activity. As a consequence, more often than not, an agreement, decision or concerted practice within the meaning of Article IV.1, Section 1 of the Competition Act may affect trade between EU Member States within the meaning of Article 101(1) of the TFEU. In that case, the Belgian Competition Authority (BCA) and the Belgian courts also have to apply Article 101 of the TFEU to such an agreement, decision or concerted practice (Article 3 of Council Regulation (EC) No. 1/2003 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty).

The application of Article 101 of the TFEU will not lead to a different result from that by the application of Article IV.1 of the Competition Act. The latter is construed and applied by the BCA and the Belgian courts in the same way as Article 101 of the TFEU. European regulations, directives, guidelines and communications are the most important source for the construction and application of Article IV.1.

In addition, block exemptions adopted at the European level under Article 101(3) of the TFEU are applicable, even if the requirement that trade between Member States may be
affected is not met (Article IV.4, Paragraph II of the Competition Act). The government also has the power to adopt block exemptions (Article IV.5 of the Competition Act), but to date it has not used that power.

Apart from the above-mentioned prohibition on cartels addressed to undertakings and associations of undertakings, the Competition Act prohibits physical persons, acting in the name and on behalf of an undertaking or an association of undertakings, from negotiating with competitors or reaching an understanding with them concerning the fixing of prices for the sale of products or services to third parties, the limitation of the production of the sale of products and services, and the allocation of markets (Article IV.1, Section 4 of the Competition Act). This means that not only undertakings or associations of undertakings but also the physical persons acting for them, can be investigated and prosecuted by the BCA, and be held personally liable and convicted, and that a fine can be imposed on them (albeit a much lower one than the undertaking or association itself – see Sections IV and V).

The BCA is responsible for the administrative enforcement of competition law. Investigations and prosecutions are conducted by the body of competition inspectors and prosecutors under the direction of the competition prosecutor general. A competition prosecutor submits a draft decision to a competition college. Decisions as to whether a cartel exists, and which sanctions or remedies are to be imposed, are taken by a competition college, which is in each individual case composed of the president of the BCA and two other members, taken from a list of 20 part-time members of the BCA.

The BCA is an autonomous service with legal personality directed by a board, consisting of the president, the competition prosecutor general, the director of economic affairs and the director of legal affairs.

Guidance on cartels and leniency is provided by the following instruments published on the website of the BCA, which is part of the website of the Federal Ministry for the Economy:

a New leniency guidelines were adopted by the BCA and entered into force on 22 March 2016 (the 2016 Guidelines). A notice on immunity from fines and reduction of fines in cartel cases, adopted in 2007 by the then Competition Council (the predecessor of the BCA) is still applicable today, in cases where at least one leniency application had already been submitted before the entry into force of the 2016 Guidelines. In a press release dated 6 September 2013, the board of the BCA announced that this notice would also be applied, analogously, to leniency requests by physical persons.

b The BCA has adopted guidelines on the calculation of fines, which entered into force on 1 November 2014 for cases in which a draft decision had not yet been filed with the competition college, and guidelines on inspections, which were last adapted on 17 December 2013.

c A notice on informal opinions of the president of the BCA was published, on 27 January 2015. This opinion can be solicited in cases where a practice has not yet been concluded or implemented, though it is not purely hypothetical that it will be, and when that practice gives rise to a question that is new in competition law practice.

II COOPERATION WITH OTHER JURISDICTIONS

The BCA is part of the European Competition Network (ECN) of the European Commission and the national competition authorities of the Member States of the European Union. The rules of cooperation within the ECN, as laid down in Regulation (EC) No. 1/2003, apply. In addition, there are particularly close contacts at the level of an investigation between the BCA and the competition authorities of neighbouring Member States.

The BCA participates in an informal organisation called the European Competition Authorities, which is a forum in which the heads of the competition authorities of the European Economic Area meet annually to exchange experiences and to discuss policy issues. Belgium is also a member of the International Competition Network, a forum of competition authorities from all over the world that meets annually to discuss policy issues and is devoted to preparing best practices in competition law enforcement. Finally, it should be mentioned that Belgium is a member of the Paris-based Organisation for Economic Co-operation and Development (OECD), which has a competition committee uniting government representatives and competition authorities. The OECD also issues recommendations in the field of competition policy.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Affirmative defences and exemptions are discussed in Section I.

The BCA is unlikely to open an investigation in a case unless at least one, or preferably a significant number, of the cartel members has a turnover on, or exported from, Belgian territory. The reasons are two-fold. First, it will not be able to apply Article IV, Section 1 of the Competition Act in the absence of a restriction of competition on the Belgian market or a substantial part thereof. Second, the maximum amount of the fine it can impose is defined with reference to the turnover of the undertaking concerned on, and exported from, Belgian territory, which is likely to be understood as the expression of the intention of the legislator for the BCA to focus on undertakings that are active in Belgium. However, this may change once the Belgian law has been adapted to provide for a maximum fine of 10 per cent of worldwide turnover in execution of the future EU Directive designed to make national competition authorities even more effective enforcers.

IV LENIENCY PROGRAMMES

The present leniency guidelines entered into force on 22 March 2016. Both undertakings (this term applies hereafter to undertakings and to associations of undertakings) and physical persons can benefit from a leniency programme. However, a leniency application by an association of undertakings does not benefit the members of that association.

i Leniency for undertakings

Immunity (of Type 1A) is granted to an undertaking if it is the first to submit information and evidence that will enable the BCA to carry out targeted inspections in connection with the cartel and, at the time of the application, the BCA did not have sufficient evidence to justify an inspection in connection with the cartel.

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Immunity (of Type 1B) is available if the undertaking is the first to submit information and evidence that enables the BCA to establish an infringement and, at the time of the submission of the leniency application, the BCA did not have sufficient evidence to find an infringement in connection with the cartel.

Immunity cannot be obtained by applicants who have taken steps to coerce another undertaking to participate in the cartel.

An undertaking may obtain a reduction of fines (Type 2) of between 30 and 50 per cent if it is the first to submit evidence with significant added value, between 20 and 40 per cent if it is the second to do so, and between 10 and 30 per cent if it is the third or subsequent undertaking to do so. Under the 2007 Notice on Leniency, there were only two categories: a reduction of fines of 30 to 50 per cent for the first applicant and of 10 to 30 per cent for subsequent applicants. The concept of ‘significant added value’ refers to the extent to which the evidence provided strengthens the BCA’s ability to prove the cartel.

The general conditions for leniency are:

a. preceding the application, not to destroy, falsify or conceal any evidence in relation to the cartel, and to keep secret the intention to submit a leniency application and its content, except to other competition authorities;

b. to end its involvement in the cartel immediately following the application, unless the competition prosecutor finds its continued involvement to be reasonably necessary to preserve the integrity of its inspections; and

c. to cooperate fully, genuinely, promptly and continuously with the BCA. This means, for instance, that the BCA will have to be provided with all relevant information and evidence the applicant has access to, and that the applicant:
   • must not dispute any factual elements he or she has provided in connection with the investigation and on which the leniency declaration is based, or dispute the materiality of the facts he or she has mentioned or the infringement itself;
   • may be called upon to reply to any request that may contribute to the establishment of relevant facts;
   • has to make current and, if possible, former directors and employees appear before the BCA;
   • does not destroy, falsify or conceal information or evidence; and
   • does not disclose the leniency application or its content until the draft decision of the competition prosecutor is submitted to the competition college, unless agreed otherwise with the competition prosecutor.

Undertakings wishing to obtain immunity or a reduction of fines have to submit a full leniency application comprising a written leniency statement and evidence. The written statement must contain the following information:

a. the name and address of the legal person filing the application;

b. the names and functions of the physical persons involved in the cartel with the applicant;

c. the names and addresses of undertakings that were involved in the cartel and the names and addresses of other physical persons involved in the cartel;

d. a detailed description of the cartel, including the purpose, activities, products and services concerned, the territories concerned, its duration and the estimated market volume;

e. information about where, when and with whom the cartel meetings were held and what was discussed at those meetings;

f. the nature of the alleged cartel behaviour;
all relevant information accompanying the evidence; and
information about the leniency applications filed or possibly to be filed with other
competition authorities in and outside the European Union in connection with the cartel.

Before filing a formal request for leniency, the would-be applicant can contact the competition
prosecutor general, either himself or herself or through an intermediary (such as an attorney),
even anonymously, to obtain information in connection with leniency. The competition
prosecutor general will provide the requested information as soon as possible.

Only the would-be applicant’s attorney (not the applicant) can contact the competition
prosecutor general by telephone to find out whether the possibility of obtaining full
immunity is still available. If that is the case, the attorney is required to file the leniency
application immediately. This implies that his or her client has given him or her a mandate
to file for leniency before he or she makes the phone call. Before answering that question,
the competition prosecutor general will ask the attorney to confirm by email that he or she
has received the instruction of his or her client to file a request for immunity or a marker, in
case the answer to the question of whether it is possible to obtain full immunity is positive.

Before filing a leniency request, the applicant or his or her representative has to make
an appointment with the competition prosecutor general, by telephone or by email. When
the applicant requests an appointment by telephone, the prosecutor general will take note
of the day and time of the request. To obtain the appointment, he or she has to provide
the following information: name and address, the products and territories concerned, the
identities of cartel participants, and the nature and estimated duration of the cartel.

If the appointment is requested during an inspection, it will take place after the
inspection has been closed.

The application will be considered to have been filed when the appointment with
the competition prosecutor general takes place. In the case of multiple requests for an
appointment, the competition prosecutor general will schedule the appointments in the same
chronological order as he or she received the requests.

To remedy information asymmetries, the college of competition prosecutors will issue
a press release after the inspections, without mentioning names of undertakings and without
violating the presumption of innocence, and after an investigation has been discontinued.
This will enable other undertakings or physical persons to decide whether or not to apply
for leniency.

The leniency statement may be drafted in one of the official languages of Belgium
(Dutch, French or German) or in English. In the latter case, a translation in one of the
official languages of Belgium must be submitted within two working days, unless otherwise
agreed with the competition prosecutor general. If the evidence is not submitted in one of the
official languages of Belgium, the competition prosecutor general may request a translation.

The leniency statement can be made orally, in which case a transcription is made by
the registry of the BCA. Oral leniency statements will always be accepted in cases where the
European Commission is extremely well placed to handle the case within the meaning of
the ECN Notice on cooperation between authorities, and the undertaking files a summary
leniency application with the BCA.
The content of the summary application must be identical to the leniency application that is filed with the European Commission, and include:

- the name and address of the applicant;
- the other participants in the cartel;
- the relevant products and territories concerned;
- the estimated duration of the cartel;
- the nature of the cartel;
- the Member States where the evidence is likely to be found; and
- all other leniency applications that have been or will be filed with competition authorities inside or outside the European Union.

A summary application will lead to a marker. When an applicant discloses information and evidence to the European Commission afterwards that implies that the cartel is of a different scale from what was mentioned in the summary application, he or she must inform the competition prosecutor general. By doing so, the protection will remain identical at the level of the European Commission and of the BCA.

The 2016 Guidelines provide for a marker system. A potential applicant may initially request, by email or telephone, a marker to protect his or her place in the queue for a period of time, for instance to allow for the gathering of the necessary information and evidence to meet the threshold for immunity or reduction of fines.

To secure the marker, the applicant must, from the outset, provide a justification for applying for the marker only, as well as:

- his or her name and address;
- the parties to the alleged cartel;
- the affected product or products and territory or territories;
- the estimated duration of the alleged cartel; and
- the nature of the alleged cartel conduct.

The competition prosecutor general or, in his or her absence, a competition prosecutor designated by him or her to that effect, decides whether the marker is granted or not, taking into consideration the credibility and the seriousness of the justification provided by the applicant. The marker has to be perfected within the period determined by the competition prosecutor by submitting the information required to be eligible for immunity from fines. Failing to do so will result in the marker being lost, and a full or summary leniency application must be submitted in order to be eligible for any immunity from or reduction of fines.

On the basis of the investigation of the leniency application, the competition prosecutor general requests the competition college to adopt a leniency declaration. The college will do so if it recognises that the conditions to obtain leniency are met, and that immunity or reduction of fines will be granted, if the applicant continues to comply with all conditions for leniency throughout the procedure.

If the competition college decides that the applicant does not meet the conditions for full immunity, the applicant will automatically be considered for a reduction of fines. If the college also decides that the applicant does not meet the conditions for a reduction of fines, the leniency application is dismissed. If that is the case, the BCA will not use the information it has obtained by means of the leniency application submitted in good faith against the applicant. Nevertheless, the competition prosecutor can still request or obtain the same information by making use of its ordinary investigative powers.
If the applicant does not continue to comply with all the conditions for leniency throughout the procedure, he or she will lose the immunity or reduction of fines. If that is the case, the BCA is entitled to use all the information received from the applicant as proof and impose a fine as if the leniency application had not been submitted.

Immunity from or reduction of fines is eventually granted in the decision by the competition college on the cartel as such, or in the settlement decision made by the college of competition prosecutors. Access to leniency statements is restricted to the recipients of the statement of objections in the cartel procedure. They must sign a written statement that they will not copy the leniency statements or transcripts thereof and that they will solely use the information for the purposes of the procedure concerned.

ii  Immunity from prosecution for physical persons

Even though the Competition Act itself is not explicit on this point, the BCA has announced in the 2016 Guidelines that a physical person will only be subject to investigation and conviction for the infringements mentioned in Article IV.1, Section 4 of the Competition Act if the undertaking on behalf of which the physical person was acting is itself investigated and convicted.

Immunity can be granted to physical persons who have committed the infringements mentioned in Article IV.1, Section 4 of the Competition Act while acting on behalf of an undertaking.

To obtain immunity, a physical person must have been involved in one or several of the infringements mentioned in Article IV.1, Section 4 of the Competition Act and have contributed to prove the existence of these illegal practices by either providing information to the BCA that it did not already have or by recognising an illegal practice mentioned under Article IV.1, Section 4.

All immunity applicants who are physical persons can obtain full immunity, regardless of the rank of their application. The fact that the physical person has already provided the information that would entitle the undertaking to immunity or a reduction of fines does not preclude the undertaking itself from obtaining immunity or a reduction of fines, and this is regardless of whether the physical person applying for immunity is or was connected to the undertaking applying for immunity.

Physical persons can apply for immunity by participating in the leniency application of the undertaking, or independently of the undertaking. In the former case, his or her immunity application can either be inserted in the undertaking’s leniency application, or filed separately but simultaneously. In the latter case, he or she must provide the following information:

\[a\]  his or her name and address;
\[b\]  the products and territories concerned;
\[c\]  the identity of the participants to the cartel;
\[d\]  the nature and the estimated duration of the cartel; and
\[e\]  his or her role in the cartel.

Immunity can be obtained even when the undertaking does not file for leniency.
V PENALTIES

i Undertakings
The BCA may impose fines on undertakings for infringement of the cartel prohibition in Article IV.1, Section 1 of the Competition Act or Article 101(1) of the TFEU not exceeding 10 per cent of their turnover. In addition, the BCA may, by the same decision, impose periodic penalty payments for non-compliance with a BCA decision of up to 5 per cent of the average daily turnover, per day of non-compliance, with effect from the date fixed in its decision. The turnover is the amount realised during the previous financial year on, and exported from, Belgian territory.

The Fining Guidelines of the BCA are modelled on those of the European Commission (published in the Official Journal of the European Union 2006/C 210/2) with the following diverging rules. The value of sales that is taken into account to calculate the basic amount of the fine (which in turn is a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement) is the value of the undertaking’s sales of goods or services in Belgium to which the infringement directly or indirectly relates.

If the undertaking has a turnover in Belgium, but no sales of goods or services in Belgium to which the infringement directly or indirectly relates, the following value of sales to which the infringement directly or indirectly relates is taken into account to calculate the basic amount of the fine:

a in cases where the infringement consists of a division of the markets, whereby one or more undertakings have agreed not to sell in Belgium: the value of the sales in the geographical markets where they did offer their products and services; and

b in all other cases: the average value of the sales in Belgium by the other participants in the infringement who did offer products and services in Belgium.

At any time during the investigation, but before the competition prosecutor submits the draft decision to the competition college, the college of competition prosecutors can reach a settlement with an undertaking willing to accept that the infringement has been committed in return for a 10 per cent reduction of the fine calculated according to the 2016 Guidelines.

ii Personal fines
The fines imposed on physical persons can range between €100 and €10,000. No fining guidelines exist, nor do any decisions by the BCA. However, footnote 1 of the above-mentioned Fining Guidelines for undertakings mentions that the degree of gravity of the infringement, the implication of the physical person in the infringement and other circumstances of the case will be taken into consideration when setting a fine.

VI ‘DAY ONE’ RESPONSE

i Dawn raids
Competition prosecutors and inspectors for the BCA have the power to search for infringements and to collect all information to that effect. They are entitled to carry out inspections (dawn raids) between 8.00am and 6.00pm if they are instructed to do so by an order signed by a competition prosecutor that mentions the object and the purpose of the inspection, and with the prior authorisation of a judge of the court of first instance of the
Belgium

judiciary that has ordinary jurisdiction to the effect of authorising dawn raids in criminal matters. The inspectors can be accompanied by experts. The inspection can be conducted on the premises, means of transport and other places owned or used by the undertakings, as well as at the homes of heads of undertakings, directors, managers and other members of staff, and at the home addresses or business premises of natural or legal persons (in-house or external) entrusted with commercial, accounting, administrative, fiscal or financial management responsibilities, subject to the condition that the inspectors have reason to believe that they will find information at these locations that they will need to accomplish their mission as defined in the order of the competition prosecutor. During the dawn raid, the undertaking can be assisted by one or more attorneys or other counsel. It is advisable to have one attorney present per inspector so that the whereabouts and investigations of inspectors can be monitored closely. Inspectors are not required to await the arrival of the attorney.

The inspectors are authorised to make copies of documents and to seize them by affixing seals to ensure that they will not be removed for the duration of the inspection. The seizure cannot be maintained for more than 72 hours in premises other than those of the undertakings.

Correspondence with external counsel and with in-house counsel who are members of the Belgian Institute of In-house Counsel benefits from legal professional privilege (LPP) under Belgian law.

The BCA’s guidelines for inspections outline certain rules for searches conducted in both a paper-based and a digital environment. Paper documents are selected manually and copied. Digital documents may be searched using built-in (keyword) search tools or the BCA’s own dedicated software or hardware (forensic IT tools), and data copied on separate storage media. If needs be, the data so selected are divided into three categories, and kept or stored accordingly in documents:

a. that the undertaking does not contest are within the scope of the inspection as defined in the order of the competition prosecutor, and for which it does not claim LPP;

b. for which the undertaking claims LPP, but the inspectors do not agree; and

c. that are outside the scope of the inspection as defined by the order of the competition prosecutor according to the undertaking, but within that scope according to the inspector.

The documents described in point (a), above, are immediately available for further investigation. For the documents described in points (b) and (c), the undertaking has to justify the LPP or the out-of-scope character within 10 working days, at most, from a date as determined by the competition prosecutor. Another competition prosecutor will decide whether LPP protection is available. If so, the document is removed from the file of the investigation. The competition prosecutor in charge of the case will decide whether the documents are actually within or outwith the scope of the investigation. In the latter case, they are removed from the file of the investigation.

Any decision by a competition prosecutor concerning the use of data in an investigation obtained by an inspection can be appealed before the Brussels Court of Appeal after the communication of the statement of objections and to the extent that these data have been used as a basis for these objections.
ii Requests for information
During an investigation procedure, the competition prosecutors may send information requests to undertakings with a set time limit for providing a response. If an undertaking does not provide the information within the time limit set by the competition prosecutors, or if the information supplied is incomplete, inaccurate or misrepresented, the competition prosecutors may request the information by reasoned decision. This decision will specify the information required and set a deadline for providing the said information.

iii Sanctions
The competition college may impose on those persons, undertakings or associations of undertakings involved fines of up to 1 per cent of their turnover in Belgium in the previous financial year if they prevent or impede the investigations, or if the information requested by a reasoned decision is incomplete, inaccurate or misleading or is not provided within the deadline.

VII PRIVATE ENFORCEMENT

i Voiding of agreements and decisions
Agreements by undertakings and decisions made by associations of undertakings that are prohibited pursuant to Article IV.1 of the Competition Act are automatically void, as are agreements and decisions prohibited pursuant to Article 101 of the TFEU.

ii Actions for damages: substantive law
Actions for damages to compensate harm suffered as a result of an infringement of competition law are governed by Belgian law on civil liability.

Directive 2014/104/EU on actions for damages for infringement of competition law was implemented by the Law of 6 June 2017. Most of the rules the Directive imposes were already on the Belgian law books. The most important modification is the rebuttable presumption that cartels cause harm. The former rule that the claimant has to demonstrate that the infringement has caused harm had proved to be an obstacle for damages claims to be effective in some of the cases of private enforcement that have already been brought before the Belgian courts.

iii Actions for damages: procedural law
Several individual legal actions brought by different plaintiffs arising from the same or similar events or contracts can be brought jointly before the court, in which case they will be examined in the same proceedings and decided upon in the same judgment. However, they remain separate actions.

An action for collective redress has been introduced into Belgian law for acts causing harm that have occurred after 1 September 2014. However, it is open only to non-profit organisations or public bodies representing consumers or representing small and medium-sized enterprises.
VIII CURRENT DEVELOPMENTS

Cartels are increasingly likely to become a priority for the BCA. Merger control will remain very time-consuming and human resources at the BCA are extremely limited. The new BCA has already established its reputation in fining cartels. On 22 June 2015, the college of competition prosecutors rendered its very first settlement decision. A substantial number of large retailers of healthcare and beauty products and some of their suppliers, the latter having been instrumental in enabling the former to raise prices simultaneously, were fined a total of €174 million, the largest fine to date imposed in a single case. Subsequently, more settlement decisions have been rendered or are under way. Worth highlighting is the decision of 3 May 2017 to fine a cartel of undertakings participating in a public procurement, which was a first in Belgium. During the past year, the BCA had to focus on merger control investigations.

The board of directors of the BCA, consisting of the president, the competition prosecutor general, the general counsel and the chief economist, is due for renewal on 1 September 2019. The new board is unlikely to bring about substantial changes in the enforcement policy.
Chapter 5

BRAZIL

José Alexandre Buaiz Neto

I ENFORCEMENT POLICIES AND GUIDANCE

The Brazilian Competition Act (Law No. 12,529 of 30 November 2011) is the primary statute that deals with competition matters (both repression to violations to the economic order and merger control) in Brazil. The agency responsible for enforcing the competition laws is the Administrative Council for Economic Defence (CADE), considered the Americas’ agency of the year by Global Competition Review in 2018.

There have been no significant changes to the composition of CADE during 2018. However, Paula Farani de Azevedo Silveira was appointed to CADE’s Tribunal in February and Alexandre Cordeiro, CADE’s General Superintendent since 2017, added to the technical team responsible for CADE’s General Superintendence (SG) by nominating Alden Caribé de Souza as Chief of Staff of the SG.

Besides these few modifications to its composition, CADE has focused its efforts on cooperation with other public authorities, both national and international, regarding the development of the fight against cartels in Brazil, and the academic development of the Competition Authority. In this regards, CADE settled an agreement with the Centre for Studies in Economic and Social Law to promote the development of research projects. CADE has also signed technical cooperation agreements with the Public Prosecutor’s Offices in the States of Paraíba, Sergipe, São Paulo, Maranhão, Mato Grosso, Piauí, Alagoas and Tocantins to develop the fight against cartels and other antitrust practices in Brazil.

CADE’s prosecution efforts resulted in the continuation of important investigations relating to *Operation Car Wash*. The coordinator of the task force regarding this operation explained, in January 2017, the relevance of the cooperation between CADE and the Public Prosecutor’s Office (MPF) to develop investigations. An example of the continuation of the investigations was that the companies Carioca Christiani-Nielsen Engenharia, Norberto Odebrecht, OAS and Andrade Gutierrez entered into settlement agreements with CADE to acknowledge their participation in alleged cartels in tenders relating to alleged frauds in Petrobras’ tenders, as Angra 3, the aforementioned companies and some of their employees disbursed a total of approximately 897.9 million reais within the scope of those settlement

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2 A list regarding the national agreements entered into in 2018 by CADE may be found online at www.cade.gov.br/acesso-a-informacao/convenios-e-transferencias/acordos-nacionais.

agreements.⁴ CADE has continued to take important steps to clarify its internal procedures and decision-making processes. One of these was the opening of a public hearing for third parties to submit proposals to modify CADE’s Internal Rules. CADE also published its Guidelines for Remedies⁵ and Resolution No. 21/2018,⁶ which establishes rules regarding the access of documents relating to leniency and settlement agreements. The aim of these provisions is to provide companies, executives and lawyers with more transparency in relation to CADE’s internal rules and practices.

II COOPERATION WITH OTHER JURISDICTIONS

Notwithstanding the importance of CADE’s enforcement of international cartel activities, CADE’s current investigations are mostly domestic, not international. As a result of this, the cooperation between CADE and other competition authorities was not prominent in 2018, with the exception of the notification of individuals located abroad.

However, CADE is in constant contact with various antitrust authorities from different jurisdictions to exchange practices and proceedings relating to investigations, whether at seminars led by the BRICS countries and the Organisation for Economic Co-operation and Development or by direct exchanges of information. A significant change with regard to its participation on the international scene was that, on 18 January 2018, CADE joined COMPAL⁷, a programme under the United Nations Conference on Trade and Development.

In October 2018, CADE signed memoranda of understanding with the Paraguay National Antitrust Commission⁸ and with the Costa Rica Ministry of Economy, Industry and Trade⁹ during the eighth annual Meeting of the Working Group on Trade and Competition in Latin America and the Caribbean. The aim of these forms of cooperation is to share experiences and reinforce the implementation of the competition rules of each agency.

III JURISDICTIONAL LIMITATIONS AND EXEMPTIONS

i Jurisdictional limitations

CADE has expressly affirmed its jurisdiction to investigate foreign cartel practices even in situations where the alleged perpetrators have no physical presence in Brazil. In these cases, CADE argues that it is sufficient that the illegal agreement has potential effects in Brazil. This approach has ignited several investigations in which CADE specifically indicated that there was no evidence that the practice took place in Brazil. These investigations were based purely

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⁶ Available at www.cade.gov.br/assuntos/normas-e-legislacao/resolucao/resolucao-no-21-de-12-de-setembro-de-2018.pdf/view.
⁷ Competencia y Proteccion al Consumidor en America Latina.

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on the potential impact of foreign conduct on Brazilian markets. CADE’s approach to the matter has been a subject of discussion over a long period. During 2016, for example, CADE discussed the effects of alleged international cartels in Brazil in at least three important cases.

In Administrative Proceeding No. 08012.000773/2011-20, which was initiated to investigate an alleged international cartel in the thermoplastic elastomers market, CADE decided to close the investigation because it concluded, in summary, that (1) there was no evidence of causal relationship between the alleged practice that happened outside Brazil and imports of the products to Brazil, (2) the evidence contained in the case records related only to alleged acts that happened in China and Hong Kong, and (3) no penalties were imposed on the defendants in other jurisdictions. The Reporting Commissioner also stated that the practice could result in indirect effects in Brazil through the entry of imported products made using the materials that were the subject of the alleged cartel. However, CADE concluded that there was no evidence of indirect effects in Brazil.

In Administrative Proceeding No. 08700.001020/2014-26, also regarding the market for plastics, Reporting Commissioner Alexandre Cordeiro Macedo decided to close the case mainly in consideration of various factors: (1) that the alleged illegal contacts among competitors would have been restricted to Hong Kong and China, with no discussion regarding other regions of the world and, therefore, the practice could not be considered an international conduct; (2) there would be no agreement to fix the prices of products sold to Brazil; and (3) there was no evidence that could demonstrate that the products that were the subject of the alleged agreements were exported to Brazil.

Finally, CADE discussed the ‘effect doctrine’ in an investigation into an alleged international cartel in the market for dynamic random access memory (DRAM) (Administrative Proceeding No. 08012.005255/2010-11). Reporting Commissioner Márcio de Oliveira Júnior rendered a decision highlighting that not only practices with direct effects on Brazil could be punished by CADE, but also those that resulted in indirect effects. CADE’s Commissioner affirmed that ‘the existence of sales in Brazil conducted by the participants of a cartel is the most clear effect that the agreement affected the Brazilian economy’. However, an international cartel, according to CADE, could also cause harmful effects in Brazil in the absence of direct sales, mainly if the cartel involved intermediate goods or components. In that regard, CADE decided that the practice under investigation would have affected the Brazilian market, at least, through (1) the direct import of DRAM to Brazil and (2) the import of products that use DRAM components, where DRAM represented a relevant part of the final product, which would not be fit for purpose without the DRAM.

Also in 2018, we highlight two cases judged by CADE that involved discussions on the effects of an alleged international cartel within two markets in Brazil: gas-insulated switchgear (Administrative Proceeding No. 08012.001376/2006-16) and colour picture tubes (Administrative Proceeding No. 08012.002414/2009-92). In the first proceeding, Reporting Commissioner Polyanna Vilanova reinforced CADE’s understanding that an international cartel may be punished in Brazil even if there is only the potential for it to cause effects in the country. In the second proceeding, Reporting Commissioner Paulo Burnier da Silveira issued an important decision regarding the standard of evidence of the potential effects of an international cartel in Brazil. According to the Commissioner, this potentiality may be identified if the evidence contained in the case record (1) emphatically mentions Brazil as part of an agreements between competitors, (2) emphatically mentions Latin America as part of an agreement between competitors, or even (3) indicates the existence of a global cartel, without indicating clearly that Brazil is not part of the agreement between competitors.
Exemptions

There are no express industry exemptions under the Competition Act. Despite this, a discussion is pending with respect to antitrust violations in the financial sector.

The issue relates to provisions of the Banking Act\textsuperscript{10} that may be interpreted to mean that the Brazilian Central Bank has sole jurisdiction in investigations of financial institutions and in the analysis of transactions involving such institutions. The matter has been, and continues to be, widely debated within the government and in Congress, and has already been submitted to the analysis of the General Counsel for the Executive Branch, which defended the notion that the Central Bank would have sole jurisdiction in such cases. CADE does not agree with this approach and has thus initiated certain investigations into financial institutions,\textsuperscript{11} even though it may be argued that financial institutions are exempted from CADE's jurisdiction; it is therefore likely that the matter will only be definitely resolved after its analysis by the Brazilian courts, or upon a new and clear law being enacted by Congress.

IV LENIENCY PROGRAMMES

A leniency programme was introduced in Brazil in 2000\textsuperscript{12} and affirmed by CADE in May 2012. The relevance of leniency programmes has been on the increase. It is now fairly easy to make a request for a marker to CADE. The request may be made in writing or orally and, if available, a marker will be issued by the SG within five business days after the request is made. Markers may be obtained prior to presenting evidence of the violation to ensure that a certain applicant is the first to qualify for leniency. Once the marker is issued, the leniency proposal shall be presented within a term defined by CADE, which may be extended.

To obtain a marker, an immunity application, which may be made by companies or individuals, must only provide information about the applicant itself, the other known participants of the violation, the products or services affected by the violation, the geographical scope of the violation and, if possible, the duration of the violation. Typically, applications are made jointly by companies and individuals, and at least in theory their legal representation may be provided by the same counsel. Under the current rules, leniency agreements may be extended to individuals and companies that were not included in the original agreement.\textsuperscript{13}

The request for a marker is, of course, treated as strictly confidential by CADE. If a leniency application is not available, the applicant shall not be jeopardised for trying to obtain the marker. It will still have its right to full defence if an investigation is actually initiated in the case and the investigation may not be initiated solely based on such a marker. It should be mentioned that CADE has been increasingly cautious before entering into a leniency agreement; it has requested more evidence of the illegal practice and, for international practices, it has been requesting strong evidence of the effects on the Brazilian market.

In any case, the leniency programme may be considered attractive given that the offender (either an individual or a company) will have total immunity from, or at least a significant

\textsuperscript{10} Law No. 4,595 of 31 December 1964, as amended.
\textsuperscript{11} For example, see Administrative Proceeding No. 08700.003070/2010-14, involving Banco do Brasil SA.
\textsuperscript{12} Brazil’s leniency programme was initially dealt with in Provisional Measure No. 2,055 of 11 August 2000, which was later altered and converted into Law No. 10,149 of 21 December 2000. With the enactment of the new Competition Act in 2011, most of the provisions regarding leniency applications were incorporated into the Act.
\textsuperscript{13} Article 238, Paragraphs 1 and 2 of CADE’s internal rules.
reduction (between one-third and two-thirds)\textsuperscript{14} of, any fines and other penalties that may be imposed by CADE.\textsuperscript{15} Notwithstanding the immunity from or reduction of the administrative fine, the leniency programme also provides for criminal immunity for applicants. However, it does not provide for immunity against private damage claims or against civil claims that may be initiated by the Public Prosecutor’s Office (see Section VII). The leniency programme also does not provide for immunity in relation to certain different, but related, violations, such as acts of corruption. Even though these acts may be subject to separate leniency programmes, it is still unclear how CADE and the anti-corruption enforcement entities will cooperate and work together to avoid inconsistencies that may weaken both programmes.

Applicants under the leniency programme are required to cooperate with CADE in investigations. In addition, applicants are required to identify the other participants in the antitrust offence\textsuperscript{16} and to provide evidence that is sufficient to support the investigation into the reported violation.\textsuperscript{17} Another \textit{sine qua non} condition of leniency applications relates to the fact that applicants must be the first to qualify in order to be entitled to sign a leniency agreement.\textsuperscript{18}

The level of cooperation required by CADE is typically higher than that expected under US or European investigations. This is mainly because of the fact that other defendants still tend to challenge investigations initiated by CADE. With the increase in the number of cases based on leniency applications and the confirmation of the leniency programme in Brazilian courts, this may change in the future.

In addition to continuous cooperation, the Competition Act also requires that:
\begin{itemize}
  \item[a] applicants cease all involvement in the violation notified or under investigation as of the date on which the agreement is proposed;\textsuperscript{19}
  \item[b] CADE does not have sufficient evidence to ensure the conviction of the applicants at the time of the proposal;\textsuperscript{20} and
  \item[c] applicants confessing their participation in the unlawful practice must cooperate fully and continuously with the investigations and the administrative procedures, and take part, at their own expense whenever requested, in all procedural acts until they have been completed.\textsuperscript{21}
\end{itemize}

In 2018, five leniency agreements were signed by CADE.\textsuperscript{22} Of these, three involved facts relating to the scope of Operation Car Wash.

It is important to mention that, since the new Competition Act entered into force, there are no restrictions preventing a cartel instigator or leader from applying for immunity before CADE.

\textsuperscript{14} In cases involving practices that were previously unknown to CADE, the leniency programme will ensure total immunity. In situations in which investigations were initiated by CADE prior to the application, reductions of one-third or two-thirds of the potential fines will be determined by CADE’s Board. See Article 86, Paragraph 4 of the Competition Act.
\textsuperscript{15} Article 86 of the Competition Act.
\textsuperscript{16} Article 86, Item I of the Competition Act.
\textsuperscript{17} Article 86, Item II of the Competition Act.
\textsuperscript{18} Article 86, Paragraph 1, Item I of the Competition Act.
\textsuperscript{19} Article 86, Paragraph 1, Item II of the Competition Act.
\textsuperscript{20} Article 86, Paragraph 1, Item III of the Competition Act.
\textsuperscript{21} Article 86, Paragraph 1, Item IV of the Competition Act.
\textsuperscript{22} Information available at www.cade.gov.br/assuntos/programa-de-leniencia.
V PENALTIES

After conducting an investigation relating to a cartel practice, CADE may either shelve the process if it does not find sufficient evidence of the illegality of the investigated practice, or rule that the practice is illegal under the terms of the Competition Act and impose administrative penalties on the companies and individuals under investigation.

If CADE decides that a company's conduct is illegal, it may impose a fine ranging from 0.1 to 20 per cent of its gross revenue in the sector of activities in which the practice took place in the year before the investigation started.23 In addition, CADE may impose on the senior managers who are directly or indirectly liable for their company's violation a fine of between 1 and 20 per cent of the fine imposed on the company; these fines should be personally and exclusively borne by the individuals. Further, CADE may impose a fine on (non-corporate) third parties, which can range from 50,000 to 2 billion reais.24

In previous years, CADE has clarified its understanding relating to the applicability of the new Competition Act to practices that took place when the former Act was in force. In line with the previously adopted approach, CADE decided to apply the former Competition Act in the analysis of the Marine Hoses cartel case25 in February 2015, as it was more beneficial than the current Act in terms of the fines that could be imposed on the companies involved in the illegal practices. In fact, the former Act may prove to be more beneficial, especially for companies that are active in only one sector, because it sets forth that taxes should be excluded from the calculation of the fine. There is no such provision in the new Act.

Besides the above-mentioned monetary fines provided for in the Competition Act, CADE may also impose other penalties, such as a half-page publication of the summary of decisions in newspapers,26 and ineligibility from participation in official financing or in government bidding procedures.27

Penalties for antitrust violations shall be calculated based on the following mitigating and aggravating factors:28

- the severity of the offence;
- the offender’s good faith;
- the advantages obtained or envisaged by the offender;
- the actual or threatened occurrence of the offence;
- the extent of the damage or threatened damage to open competition, the Brazilian economy, consumers or third parties;
- the negative economic effects on the market;
- the offender’s economic status; and
- recidivism.

Until November 2018, CADE’s fines in cartel cases for the year totalled approximately 284.7 million reais. The largest penalty ever imposed by CADE relates to the Cement cartel, judged by CADE’s Administrative Tribunal in 2014. The case is relevant not only because of the scale of fines (3.1 billion reais) but also because of the other remedies imposed by the

23 Article 37, Item I of the Competition Act.
24 Article 37, Item II of the Competition Act.
26 Article 38, Item I of the Competition Act.
27 Article 38, Item II of the Competition Act.
28 Article 225 of CADE’s internal rules.
Tribunal, such as the divestment of plants and a prohibition of operations in the cement and concrete sectors until 2019. CADE’s rationale was that the cartel had been widespread across the entire country for many years, thereby changing the structure of the market. In line with this, CADE ordered the sale of assets in the markets for cement and concrete by four companies; therefore, Votorantim and InterCement would have to sell, respectively, 35 per cent and 25 per cent of their production capacity, whereas Itabita and Holcim would be obliged to sell 22 per cent of their production capacity.

Further, new entrants to the cement sector would also have a ‘transparency commitment’, allowing CADE to request documents and information at all times and without previous authorisation, to ensure that new entrants would not join the cartelised structure of the market. CADE also ordered Votorantim to sell its minority shares in competitors active in the market for cement. The Cement case is currently being reviewed by the Brazilian courts, as some of the companies and individuals challenged CADE’s decision, requesting that it be annulled.

Further, a review of decisions handed down by CADE in the Brazilian courts, with the aim that they be annulled, has become more common in Brazil. For instance, in 2015, White Martins, which was allegedly involved in a cartel relating to the industrial and medical gas market, was relieved by the Judiciary Branch from the payment of one the largest fines ever imposed by CADE. The case is still being discussed at the Superior Court of Justice.

In addition to the penalties that may be imposed by CADE, other procedures may be used by third parties or by the MPF in relation to cartel practices. Criminal actions initiated by the Public Prosecutor’s Office may lead to imprisonment of the executives involved for between one and five years.29 Separate settlements are usually negotiated with the MPF. These tend not to lead to imprisonment, but only to fines and to the obligation to perform community service. Usually, the amounts involved in settlements with the MPF are substantially lower than those in settlements with CADE.

In the civil sphere, the MPF may initiate public civil actions before the Brazilian courts claiming indemnification for moral and property damages caused to consumers or to society. Penalties in such cases are of a monetary nature, and amounts may vary according to several conditions, such as the extent of the damage that society allegedly suffered.

According to CADE’s rules, settlements in cartel investigations require that the company or individual admits its participation in the practice under investigation.30 Because of this requirement, several defendants are unable to enter into settlement agreements with CADE. This is generally owing to:

\[
\begin{align*}
  a & \quad \text{potential criminal investigations that may be influenced by such acknowledgment;} \\
  b & \quad \text{potential civil claims that may be filed in Brazil or other jurisdictions;} \\
  c & \quad \text{ongoing investigations in other jurisdictions;} \\
  d & \quad \text{reputational and corporate governance issues; and} \\
  e & \quad \text{questions as to whether the conduct actually took place or had effects within the Brazilian territory.}
\end{align*}
\]

Further, CADE’s rules establish that the defendant must collaborate with the authority. Requiring collaboration may also be a problem for companies, especially when it is impossible

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29 These penalties are provided for in the White Collar Act, Law No. 8,137/1990.
30 The requirement of admitting participation in the practice under investigation was already included in the previous rule in cases where a leniency agreement had been entered into.
for a defendant to provide additional evidence to CADE. For example, investigations are sometimes initiated a long time after the conduct has taken place, and the defendant may therefore no longer have information or documents about it. Moreover, a company that would be willing to enter into a settlement agreement could lack information and documents because the business concerned has been sold. In such cases, companies would not be able to settle a case and end an investigation, or would end up with a low discount, which would mean that the settlement was not financially viable. Needless to say, neither defendants nor CADE would benefit from having to litigate cases until the end of the process – and possibly before the Judiciary Branch.

Finally, CADE’s rules contain additional parameters for establishing the monetary contribution that would have to be paid to CADE for settling cartel cases. The rules set forth that the first defendant to propose a settlement would obtain a discount of between 30 and 50 per cent of the fine that would be paid by the end of the process. The second defendant would obtain a 25 to 40 per cent discount. Other defendants would obtain a discount of up to 25 per cent. If settlement is requested after the end of the discovery phase, the maximum potential reduction would be 15 per cent. Discounts are defined based on the level of collaboration provided by the defendants.

However, there may well be several discussions regarding the amount of the fine that would be applicable to the parties. In fact, the rules do not account for the culpability of the defendants. For obvious reasons, this is a policy that could be questioned. CADE has been trying to mitigate eventual discrepancies during the negotiations to create some proportionality, but this has been on a case-by-case basis so far.

Since the new rules for settlements were established by CADE in March 2013, it has experienced an increase in the number of applications for settlements.

VI ‘DAY ONE’ RESPONSE

Generally, dawn raids in Brazil are regulated by the Civil Procedure Code and only a judge may grant an order for a dawn raid to occur. Specifically for antitrust investigations, dawn raid orders may be obtained through two different proceedings: the SG, acting through CADE’s Attorney General, requests the General Counsel for the Executive Branch to seek an order in a federal court to perform a dawn raid; or the MPF, based on the criminal provisions applicable to cartel behaviour, may independently seek a court order directly to obtain evidence in a certain cartel investigation. In both cases, CADE and the MPF (and the federal police in some cases) tend to cooperate and coordinate actions to carry out the dawn raid.

Judges may grant dawn raid orders if it is shown that there are good arguments on the merits (fumus boni iuris) and that there is the risk of imminent and irreparable harm (periculum in mora) if the order is not granted. Judges may freely evaluate whether the evidence indicated

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31 Articles 839 to 843 of Law No. 5,869 of 11 January 1973, as amended.
32 Under the Competition Act, the SG-CADE is responsible for carrying out the investigation of antitrust cases.
33 Article 13, Item VI(d) of the Competition Act.
in each case is sufficient to fulfil the first requirement.\textsuperscript{34} The second requirement is usually fulfilled by CADE based on the argument that the dawn raid would avoid the destruction of documents and additional evidence.

In addition to companies’ premises, CADE may request access to the homes of individuals under investigation. Courts are usually hesitant to grant orders for dawn raids on private addresses unless CADE is able to provide specific evidence to support such a request.

Dawn raid orders must be enforced by court officials and at least two witnesses. One of the court officials carrying out the dawn raid is required to read the court order and request access to the premises of the company under investigation.\textsuperscript{35} If access is denied, court officials may use force to enter the premises. Court officials are also required to draft a report of the dawn raid, which must be signed by both the officials and the witnesses.\textsuperscript{36}

The Civil Procedure Code\textsuperscript{37} establishes that obstructing court orders may result in a fine that will be duly measured by the judge but that is limited to 20 per cent of the value of the claim.\textsuperscript{38} Further, obstructing a dawn raid may also be considered a crime under Brazilian law. The Criminal Code\textsuperscript{39} sets forth that disobeying a legal order from a public official may result in imprisonment\textsuperscript{40} and a fine.

During a dawn raid, the court officials, members of CADE, the federal police and the MPF may seek and seize objects, papers of any kind, commercial books, computers and digital files. However, these documents or materials must relate to a current investigation, as fishing expeditions are not allowed under Brazilian law. The evidence seized in a dawn raid must be sealed by court officials to guarantee its authenticity.\textsuperscript{41}

As soon as a company learns about the dawn raid, it may question its legality before the courts. The company will be entitled to the right of full defence and may question whether the requirements for the dawn raid have been complied with by CADE and duly assessed by the court that granted the dawn raid order. If the dawn raid is considered illegal, the materials seen, copied or seized will also be considered illegally obtained and will be unsuitable for use in the investigation to be carried out by CADE.

Employees of the company or of its external counsel should always escort the officials responsible for the dawn raid. Employees must be instructed to treat the officials with courtesy, but to contact the legal department if they have doubts as to whether a particular document may be copied or a particular room may be searched. Privileged documents and

\textsuperscript{34} It is obviously easier for CADE to have a dawn raid order granted if there is a leniency agreement or material evidence of the illegal practice. For example, in cases involving anonymous tips, orders are usually denied (see Special Appeal No. 29,447/MG).

\textsuperscript{35} Article 842 of the Civil Procedure Code.

\textsuperscript{36} Article 843 of the Civil Procedure Code.

\textsuperscript{37} Article 14, Item V, Sole Paragraph of the Civil Procedure Code.

\textsuperscript{38} In Brazil, all claims must be quantified as monetary sums. The monetary sum may be the damages, when specific damages are sought, or may be established as an estimate by the plaintiff. In a request for a dawn raid, generally the value of the claim is close to 10,000 reais.

\textsuperscript{39} Article 330 of the Criminal Code.

\textsuperscript{40} If the obstruction is by means of threat or violence, the penalty is a period of detention of between two months and two years. However, if as a result of the threat or violence the act is not executed, the agent may be subject to imprisonment for a term of one to three years. Obviously, the agent of the threat or the violence may also face charges in relation to such a threat or violence.

\textsuperscript{41} CADE may request that the entire procedure be kept confidential. However, there have been cases in which leaks have occurred, and companies need to be extremely cautious with confidentiality in these cases.
documents that fall outside the scope of the investigation should not be copied or seized. A copy and a complete list of all documents analysed or seized by the authorities must be kept by the company.

Except in specific circumstances, employees should refrain from answering on-the-spot questions. Under Brazilian law, there is no obligation to answer such questions, and employees should be instructed to always indicate that they will not answer any questions unless authorised to do so by their employer’s legal department.

During 2018, CADE made use of such proceedings to enforce its policies against cartel practices. For example, in July, CADE conducted dawn raids at companies that were allegedly involved in cartel practices in tenders involving medical equipment within the scope of the Resonance Operation and at companies that were allegedly involved in the cartel practices involving asphalt pavements within the scope of the Nexus Operation.

VII PRIVATE ENFORCEMENT

In addition to administrative, criminal and civil investigations by CADE and the MPF, cartel perpetrators may also be subject to private lawsuits for claims for damages. Third parties may initiate lawsuits before Brazilian courts in an attempt to recover losses and damages that they may have suffered. Damages lawsuits are starting to become more commonplace, and the expectation is that this trend will continue, as well as CADE analysing more cartel cases and the lower state courts ruling on such cases. In fact, when examining the Liquefied Gas case, CADE expressly mentioned that customers should claim damages against the defendants in the investigation. CADE also started, in 2017, to forward the case records with alleged cartel practices to the State Public Prosecutor in order to file a lawsuit for damages, if necessary. This was the case in the Ceramic-rollers cartel, in which CADE had also included the name of companies that were allegedly damaged by the practice.

Adjunct Superintendent Diogo Thomson de Andrade held a conference in March 2018 entitled ‘Interplay between public and private enforcement’. This demonstrates an internal interest in gaining a better understanding of the subject of private enforcement.

Under Brazilian law, most of the information gathered in an investigation may be made available to third parties at least until the end of the investigation. Thus, in CADE decisions, third parties may have access to a substantial level of evidence to be used in potential damage claims, but only after an investigation is over. In fact, in the alleged Subway cartel in São Paulo, CADE restated its position that the information and documents gathered in an investigation or obtained under a leniency agreement will only be available to third parties as a result of a judicial authorisation or at the end of the process.

Regarding disclosures ruled by the Judiciary Branch, a decision handed down by Minas Gerais State Lower Court determined that Gerdau must disclose its sales documents. The

43 Available at www.cade.gov.br/noticias/cade-realiza-busca-e-apreensao-em-investigacao-de-cartel-emlicitacoes.
44 Administrative Proceeding No. 08012.009888/2003-70.
45 Administrative Proceeding No. 08700.004627/2015-49.
46 In the Hydrogen Peroxide case, for example, CADE has made available in its decision relevant evidence obtained in its investigation.
company was convicted in 2005 by CADE for colluding with two competitors in the steel beams market. Two companies that acted as distributors have filed a lawsuit to seek damages regarding their supposed losses during the cartel’s active period. As those companies are gathering evidence to estimate the value of the damage allegedly suffered, the judge in the case ruled that, despite the provision of Brazilian tax law, Gerdau ought to provide documentation dating prior to 2000.

CADE opened a public hearing in 2017 regarding access to cartel evidence in order to draft a regulation to enhance private enforcement in Brazil. The fact that evidence may be made available by CADE to third parties at the end of an investigation may be considered a drawback to the leniency programme and to potential settlement agreements. This may be a relevant issue in cases involving alleged international cartels, considering that evidence made available to CADE in Brazil may end up in the hands of customers, and may therefore be used to form the basis of damages claims in Brazil or abroad. The result of the aforementioned public hearing was Resolution No. 21/2018, which provides in its Article 12 that compensation in the scope of a claim for damages may be considered as a mitigating circumstance for a defendant in the calculation of penalties provided for in the Brazilian Competition Act or in the calculation of the pecuniary contribution in the case of a settlement agreement. Further, CADE’s General Attorney Walter de Agra Júnior publicly stated his interest in filing claims for damages caused by alleged cartel practices. However, as at November 2018, there is no formal rule on the matter.

The value of the damages granted in similar lawsuits in Brazil is dependent on several factors, such as the extent of the damage caused to the eventual plaintiff and the amount of evidence available in each case. The amounts awarded will also depend on how strongly plaintiffs are able to demonstrate that damages may be quantified. In fact, the calculation of potential damages will certainly be a central issue in the lawsuits, as this may lead to a lengthy process in Brazilian courts. In order to mitigate the obstacles regarding the calculation of damages, the Secretariat for the Promotion of Productivity and Competition Advocacy (known as Seprac) has published its guidelines on calculating cartel damages.

**VIII CURRENT DEVELOPMENTS**

Competition policy has been implemented more efficiently in Brazil during 2018. This was evidenced through the update or creation of some guidelines and the promotion of CADE itself before both national and international authorities.

The main developments regarding CADE have been its efforts to reinforce the effectiveness of the provisions set forth in the Competition Act, but also to initiate an active participation in the enhancement of private enforcement in Brazil.

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47 For example, please refer to https://www.jota.info/tributos-e-empresas/concorrencia/procade-reparacao-danos-agra-10102018.

48 Available at www.fazenda.gov.br/centrais-de-conteudos/publicacoes/guias-e-manuais/calculo-de-danos-em-cartelis.
Chapter 6

CANADA

Arlan Gates and Yana Ermak

I  ENFORCEMENT POLICIES AND GUIDANCE

All aspects of competition law in Canada are governed by a single federal statute – the Competition Act (the Act). Canadian provinces and territories do not have their own competition legislation. The Act is administered by the Commissioner of Competition, an independent public official who heads the Competition Bureau (the Bureau), a federal investigative and enforcement agency consisting of various operating branches. The Bureau, and specifically the Cartels Directorate of the Cartels and Deceptive Marketing Practices Branch, investigates criminal matters, including cartels but refers cases it considers worthy of prosecution to the Attorney General, who makes the final determination whether to prosecute.

Canada has a dual-track approach (criminal and civil) to agreements between competitors. Agreements or arrangements that are akin to hard-core cartels (conspiracy, bid rigging) are per se illegal. Other forms of competitor collaboration (joint ventures, strategic alliances) are subject to a civil review that incorporates a competitive effects test.

1 Arlan Gates is a partner and Yana Ermak is a senior associate at Baker & McKenzie LLP.
2 RSC 1985, c C-34, as amended.
3 The current Interim Commissioner of Competition is Matthew Boswell, who was appointed in May 2018 for up to one year to replace outgoing Commissioner John Pecman. The Commissioner is appointed for a five-year term.
4 Unlike some other enforcement agencies (e.g., the US Federal Trade Commission), the Bureau does not have carriage of criminal prosecutions. This is the responsibility of the Public Prosecution Service of Canada (PPSC), a federal organisation that fulfils the responsibilities of the Attorney General in prosecuting criminal offences under federal jurisdiction. Following the completion of its investigation, the Bureau will refer a criminal matter to the PPSC, with a recommendation as to whether it should prosecute. The PPSC alone has the authority to decide whether it is in the public interest to proceed, although as a practical matter, the PPSC is unlikely not to follow the Bureau’s recommendation, and the Bureau remains closely involved in the prosecution.
5 This means that prosecution does not need to prove that the conduct in question had any effect on the market. Prior to March 2010, in a conspiracy case, prosecution had to prove that the conduct at issue resulted in an ‘undue’ lessening of competition, which meant that parties to an alleged agreement had to possess some degree of market power. Conduct carried out prior to March 2010 continues to be assessed pursuant to the former criminal provisions, using the ‘undueness’ standard. Conduct carried out after March 2010 will be assessed under the new per se standard.
6 The civil provision is found in Section 90.1 of the Act. It prohibits agreements between actual or potential competitors that have the effect of substantially preventing or lessening competition. It is meant to provide more flexibility to the Bureau to address other forms of competitor collaborations that have or are likely to have a negative effect on competition but do not amount to hard-core cartels warranting criminal
In 2009, the Bureau published Competitor Collaboration Guidelines (the Guidelines), which reflect its stated position regarding the enforcement of the horizontal conspiracy provisions and are intended to assist in assessing the likelihood of interactions with competitors raising concerns under the criminal or civil provisions of the Act. The Guidelines discuss, among other things, who is considered a competitor, the types of agreements that fall within the criminal as opposed to civil provisions, and the defences available. Parties may seek an advisory opinion from the Commissioner to determine whether a particular agreement or arrangement violates the Act.

The main anti-cartel prohibitions are found in Sections 45 and 47.

### Section 45 – Conspiracy
Section 45 prohibits agreements between actual or potential competitors to fix prices, allocate sales, territories, customers or markets or restrict output.

### Section 47 – Bid rigging
Section 47 prohibits agreements or arrangements between one or more unaffiliated entities either not to submit a bid or tender, to withdraw an already made bid or tender, or to submit a separate but coordinated bid or tender, where the agreement or arrangement is not disclosed to the person calling for the bid or tender at or before the time of submitting or withdrawing the bid or tender.

### Other cartel-related offences
The Act also contains a number of other anti-cartel prohibitions, the most important of which is the prohibition against foreign-directed conspiracies found in Section 46. Section 46 makes it an offence for a corporation carrying on business in Canada to implement a directive

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8 The Guidelines do not have the force of law; they simply reflect the Bureau’s enforcement approach and are not binding on the Bureau.
9 Section 45(8) of the Act defines a competitor broadly to include ‘a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement’.
10 Competition Act, Section 45(1)(a).
11 Competition Act, Section 45(1)(b).
12 Competition Act, Section 45(1)(c).
13 In May 2018, the definition of ‘affiliate’ under the Act was amended to replace prior references to ‘corporation’ and ‘partnership’ with the concept of ‘entity’, which broadens the scope of entities that could be considered affiliated.
14 Competition Act, Section 47(1). It should be noted that even if the coordinated conduct is not subject to Section 47(1) by virtue of having been made known to the person calling for bids or tenders, it may still constitute conspiracy under Section 45.
15 Other anti-cartel provisions prohibit conspiracies in professional sports (Section 48) and certain agreements or arrangements between federal financial institutions (Section 49).
or other communications from a person outside Canada for the purpose of giving effect to a foreign conspiracy that would have contravened Section 45. The offence can occur even if directors or officers in Canada were unaware of the foreign conspiracy.16

II COOPERATION WITH OTHER JURISDICTIONS

The Bureau cooperates closely with enforcement agencies in other jurisdictions through both formal and informal arrangements.

At the state level, Canada has entered into a number of mutual legal assistance treaties, which enable signatory countries to request that the other authority take measures under its existing laws to provide assistance, including exchanging information, providing documents and records, locating or identifying persons, serving documents, taking evidence under oath and executing searches and seizures. Assistance can be provided regardless of whether the conduct under investigation constitutes an offence in the jurisdiction in which the request is made.

Informally, the Bureau will routinely coordinate its investigative efforts with other agencies in cross-border cartel cases, with the most recent example being its cooperation with the Antitrust Division of the United States Department of Justice in the *Nishikawa Rubber Co Ltd* investigation.17 The Bureau also routinely requests and expects immunity and leniency applicants to provide confidentiality waivers to enable it to communicate informally with other agencies in cartel investigations.

State level cooperation may also result in extradition, both to and from Canada. The Extradition Act18 provides Canada with the legal basis on which to extradite persons located in Canada who are sought for extradition by one of Canada’s ‘extradition partners’.19 Extradition is possible only in cases of ‘dual criminality’, that is where conduct for which extradition is sought is considered criminal in both the requesting country and Canada.20 To date, no one has been extradited (nor has the Bureau requested the extradition of any individual) in an international cartel case, although some individuals have been extradited to the United States in respect of other criminal offences under the Act.21

16 The Bureau has relied on this section fairly infrequently and there have been no recent prosecutions.
17 This investigation was part of a larger, ongoing international investigation into a series of conspiracies and bid-rigging arrangements among various suppliers of motor vehicle components, which is being coordinated with competition agencies in the United States, Japan, the European Union and Australia. In July 2016, Nishikawa, a Japanese manufacturer of body sealing products, was charged in the United States and agreed to plead guilty and pay a fine of US$130 million for its participation in bid rigging affecting both the United States and Canada. After discussions, it was agreed that the Antitrust Division would take the lead on the prosecution, as the conduct primarily targeted US consumers. Competition Bureau, News Release, ‘Unprecedented cooperation with US antitrust enforcement authority leads to major cartel crackdown’ (20 July 2016) at https://www.canada.ca/en/competition-bureau/news/2016/07/unprecedented-cooperation-with-us-antitrust-enforcement-authority-leads-to-major-cartel-crackdown.html.
18 SC 1999, c 18.
19 Extradition partners are countries with which Canada has an extradition agreement (bilateral treaty or multilateral convention) or a case-specific agreement, or countries or international courts whose names appear in the schedule to the Extradition Act.
20 Extradition will only be granted for offences punishable by imprisonment of at least two years in both countries or as otherwise specified in the relevant extradition treaty.
21 For example, in 2007, three Canadians who ran a telemarketing ‘boiler room’ in Toronto that purported to offer credit cards to American consumers with poor credit histories for a fee but never delivered the
III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Canada has traditionally held a strong presumption against the extraterritorial application of criminal laws. In common law and under the Criminal Code, criminal jurisdiction is based on territoriality – a court has authority to try an offence only if it is committed in Canada.22 To prosecute in Canada a cartel offence committed outside Canada, a Canadian court must have jurisdiction over both the offence because of its extraterritorial aspects (subject-matter jurisdiction) and over a defendant who is outside Canada’s territorial jurisdiction (personal jurisdiction).

Although no Canadian court, in a contested criminal cartel case, has yet held that subject-matter jurisdiction may be established based on the effects of the criminal conduct in Canada, based on civil cases that have considered the scope of extraterritorial jurisdiction, subject-matter jurisdiction is most likely to be found if there is a ‘real and substantial link’ to Canada.23

However, the existence of subject-matter jurisdiction does not automatically translate into personal jurisdiction, and the general principle governing personal jurisdiction is that it must be specifically created by the language used in the offence-creating statute. Given that the language of neither Section 45 nor Section 47 appears to specifically warrant application to persons outside Canada, significant doubts exist as to whether a Canadian court could assert personal jurisdiction over a foreign defendant with no presence in Canada. In practice, the issue remains untested since, in all the guilty pleas entered to date, the defendants voluntarily attorned to the jurisdiction of Canadian courts as part of a negotiated settlement.

The Act establishes a number of defences to the charge of conspiracy. However, these defences are very limited and parties should use caution when considering relying on them.

i Ancillary restraint defence

Parties to an agreement that contravenes Section 45 will not be convicted of an offence if the agreement is ‘ancillary’ to an otherwise lawful broader or separate agreement, provided it

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22 Section 6(2) of the Criminal Code provides that ‘no person shall be convicted . . . of an offence committed outside Canada’.

23 The ‘real and substantial link’ test, established by the Supreme Court of Canada in Libman v. The Queen, [1985] 2 S.C.R. 178, provides that all that is necessary to make an offence subject to the jurisdiction of Canadian courts is that a significant portion of the activities constituting the offence took place in Canada and that there be a ‘real and substantial link’ between an offence and Canada. In the competition law context, this approach was confirmed in VitaPharm Canada Ltd v. F Hoffman-La Roche Ltd (2002) 20 C.P.C. (5th) 351 (Ont. S.C.J.), in which five foreign defendants brought a motion to challenge a Canadian class action in relation to the bulk vitamins conspiracy on the basis that the court lacked jurisdiction because the agreements in question were made outside Canada and the defendants did not operate in Canada (although some had Canadian subsidiaries). The court concluded that where defendants conducted business in Canada, made sales in Canada and conspired (elsewhere) to fix prices on products sold in Canada, a real and substantial connection existed between the alleged damage in Canada and each defendant’s conduct elsewhere. The VitaPharm decision was affirmed by the Supreme Court of Canada in Sun-Rype Products Ltd v. Archer Daniels Midland Company [2013] S.C.J. No. 58.
is ‘directly related to’ and ‘reasonably necessary’ for implementing that lawful agreement.\textsuperscript{24} The most common example of an ancillary restraint defence (ARD) is a non-competition agreement between parties to a merger or a joint venture. The Bureau has provided some guidance on the scope of ARD\textsuperscript{25} but, given the relative lack of Canadian jurisprudence on the issue, it should be approached with caution.

ii Other defences and exemptions

The Act recognises the common law defence of ‘regulated conduct’\textsuperscript{26} Actions that are authorised or carried out pursuant to federal or provincial legislation are exempt from prosecution under the conspiracy provisions.

Agreements or arrangements that relate only to the export of products from Canada are exempt from prosecution under the conspiracy provisions, provided they meet certain conditions.\textsuperscript{27} Other exemptions include certain types of agreements or arrangements between federal financial institutions\textsuperscript{28} and agreements or arrangements between affiliates.\textsuperscript{29}

IV LENIENCY PROGRAMMES

i Immunity and leniency programmes

The Bureau administers robust immunity and leniency programmes, both of which were recently updated, which allow corporate and individual applicants party to a criminal offence to seek either immunity from prosecution or leniency in return for their cooperation.\textsuperscript{30} Immunity and leniency are available for all cartel offences, as well as for aiding, abetting or counselling an offence.

To obtain full immunity, an applicant must be either first to disclose an offence of which the Bureau is unaware or first to come forward before there is sufficient evidence to warrant a referral to the Attorney General.\textsuperscript{31} The applicant must have ended its involvement in the illegal conduct and not have coerced others to participate in the conduct. In addition, to qualify for and maintain immunity, the applicant must cooperate fully and in a timely manner with the Bureau’s investigation and subsequent PPSC prosecution, which essentially means full disclosure of all relevant non-privileged information and records. Failure to abide by all the requirements may vitiate immunity.

Under the previous immunity programme, when a company qualified for immunity, all current directors, officers and employees also automatically received immunity, provided they

\textsuperscript{24} Competition Act, Section 45(4).
\textsuperscript{25} Competitor Collaboration Guidelines – see footnote 7 – at 13 and 14.
\textsuperscript{26} Competition Act, Section 45(7).
\textsuperscript{27} Competition Act, Section 45(5).
\textsuperscript{28} Competition Act, Section 45(6)(a).
\textsuperscript{29} Competition Act, Section 45(6)(b). The Bureau’s position is that the exemption does not apply to partnerships, trusts or other non-corporate entities or individuals, although the Bureau has indicated that it will consider the nature of any common control or relationship between the parties when determining whether criminal prosecution is appropriate. Competitor Collaboration Guidelines – see footnote 7 – at 15.
\textsuperscript{30} Although requests for immunity or leniency are made to the Bureau, only PPSC can grant immunity or leniency, on the Bureau’s recommendation. As a practical matter, although the decision is technically at the PPSC’s discretion, the PPSC is unlikely to go against the Bureau’s immunity or leniency recommendation.
\textsuperscript{31} An applicant must be the first to disclose in Canada. Being the ‘first-in’ in another jurisdiction does not automatically translate into immunity in Canada.
admitted their involvement in the cartel as part of the corporate admission, and cooperated with the Bureau and the PPSC. Under the revised programme, this automatic coverage will no longer be provided and those individuals seeking immunity will be required to proactively admit their involvement as a party to the offence and demonstrate a willingness to cooperate with the Bureau’s investigation. The approach remains the same with respect to immunity for agents and former directors, officers and employees in that it is granted on a case-by-case basis. Generally speaking, provided these individuals fully cooperate with the investigation and are not employed by another member of the cartel that is being investigated, they are likely to be granted immunity.

The new immunity programme also now includes an ‘interim’ immunity stage. A grant of interim immunity will be provided where documentary and testimonial evidence is submitted by an applicant. Final immunity will not be provided until the Director of Public Prosecutions accepts a recommendation from the Bureau that the applicant has satisfied its obligations and the applicant’s assistance is no longer required. The new immunity programme has also introduced a new mandatory protocol for claims of privilege, including identifying, reviewing and adjudicating privilege claims by immunity applicants.

Even if a party does not qualify for immunity, it may still qualify for some form of leniency resulting in significant discounts to the otherwise applicable fine. Previously, the amount of leniency available to applicants was largely contingent on the order in which they made their application. The first applicant was eligible for a fine reduction of 50 per cent, the second, 30 per cent and, for all subsequent applicants, a reduction of 30 per cent or lower. The updated programme extends eligibility of a 50 per cent reduction to all applicants, though this is now discretionary and subject to the value of the applicant’s cooperation. This value is measured by several factors, including:

- the timeliness of the leniency application;
- the timing of the applicant’s cooperation;
- the availability, credibility and reliability of witnesses;
- the relevance and materiality of the applicant’s records; and
- any other factor relevant to the development of the Bureau’s investigation.

The Bureau has also indicated that having an effective compliance programme would be viewed as one of the mitigating factors in granting leniency. Leniency applicants must meet the requirements of the leniency programme, which are similar to those of the immunity programme.

Canada also has an Immunity Plus Program, similar to the Amnesty Plus Program in the United States, whereby reporting any other unrelated cartels during the leniency negotiations may result in immunity for that offence and additional discounts in the fines for the initial offence, typically between 5 and 10 per cent. The previously published information bulletins on the immunity and leniency programmes, as well as a comprehensive set of frequently asked questions that outlined the Bureau’s approach, have been replaced by the newly published bulletin.32

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Immunity and leniency process

The first step in obtaining immunity or leniency is to request an immunity or leniency marker by contacting the Senior Deputy Commissioner, Cartels and Deceptive Marketing Practices Branch. Marker requests are generally made through an applicant’s counsel and may be done on the basis of minimal hypothetical disclosure that would allow the Bureau to identify the offence committed and the relevant product. The Bureau will often inform the applicant immediately of its eligibility for a marker, although the process may take up to a few days.

Once a marker is granted, typically applicants will have 30 calendar days to provide sufficient detail about the nature of any records in their possession, testimony their witnesses are able to give and how probative the evidence is likely to be, to allow the Bureau to determine whether the applicant may in fact qualify for immunity or leniency. This stage, called a ‘proffer’, may also be completed in hypothetical terms (although the Bureau may request that the applicant’s identity be disclosed) and is also completed by counsel. The Bureau may, at its discretion, grant an extension to the 30-day period, but the reasons for seeking an extension must be compelling. Generally speaking, delays that are solely caused by an applicant negotiating immunity or leniency in other jurisdictions will not be enough to obtain an extension. If the applicant has not perfected the marker or obtained an extension within the 30-day period, the marker will automatically lapse without further notice from the Bureau.

Information at both the marker and proffer stages is usually provided orally, although in some cases the Bureau may request production of documents during the proffer stage and, under the new immunity programme, witness interviews may be conducted using audio or video recordings and may be taken under oath. Once the Bureau feels it has received all the relevant information, it will consider whether to recommend interim immunity or leniency to the PPSC. It is important to note that immunity from criminal prosecution does not insulate a party from civil liability and parties who obtain immunity may still be subject to civil damages claims.

The Bureau keeps the identity of the immunity or leniency applicants, and any information obtained from them, confidential, subject to very limited statutory exceptions where disclosure is:

a. required by law;
b. necessary to obtain or maintain the validity of a judicial authorisation for the exercise of investigative powers or to secure the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
c. consented to by the applicant;
d. already public;
e. necessary to prevent the commission of a serious criminal offence; or
f. necessary for the administration or enforcement of the Act.33

The identity of applicants will be publicly disclosed once charges are laid against other cartel participants and the Bureau may be required to disclose information received from an applicant to other cartel participants if the information is necessary for their defence. Private

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plaintiffs seeking to bring damages claims may also seek access to information disclosed to the Bureau during the immunity or leniency application process. The Bureau’s policy is not to provide information to private litigants other than in response to a court order.

As individual employees may also be charged with an offence, counsel may face a conflict of interests if it represents both the company and the employees targeted by the investigation. There may also be situations in which a corporation does not qualify for immunity (for example, because it was deemed to be a ringleader), but employees who came forward with the corporation nonetheless may. In cases where the interests of corporate and individual defendants may not be aligned, counsel should caution individual defendants that he or she represents the corporation only and invite them to consider whether separate representation is appropriate.

V PENALTIES

Violations of the anti-cartel provisions of the Act are prosecuted as indictable criminal offences and can attract significant penalties. Violations of Section 45 may result in a fine of up to C$25 million per count, and for individuals, a fine or imprisonment for up to 14 years, or both. Since parties can be charged with multiple counts under Section 45, the resulting fines may significantly exceed the statutory maximum.34 Individuals convicted of bid rigging may also face up to 14 years in prison and there is no maximum statutory fine for either individuals or corporations.35 In addition to statutory penalties, parties that are convicted of, or plead guilty to, cartel offences, may be subject to sanctions under other regulatory regimes.36

There are no cartel-specific sentencing guidelines; sentencing for cartel violations is guided by the general sentencing principles set out in the Criminal Code (which apply to all criminal offences, not just offences under the Act), as well as a number of principles developed in competition law jurisprudence.37

When recommending a fine, the main factor the Bureau considers is the overall economic harm caused by the conduct at issue. Since the degree of harm is generally difficult

34 In 1999, F Hoffmann-La Roche paid C$50.9 million for multiple conspiracies involving bulk vitamins.
36 For example, under the federal Integrity Framework, parties may be debarred from federal procurement for up to 10 years. See https://www.tpsgc-pwgsc.gc.ca/ci-if/ci-if-eng.html. It should also be noted that the leniency programme does not contain an express debarment exemption for leniency applicants who may, therefore, face debarment from federal public procurement after pleading guilty as part of the leniency process.
37 These include deterrence, ensuring the sentence is sufficiently large so as not to amount to a mere licence fee, proportionality to the gravity of the offence and the degree of the defendant’s responsibility, the duration of the offence, the defendant’s market share and the potential harm to consumers.
to quantify, the Bureau generally starts with a proxy of the volume of commerce in Canada affected by the cartel multiplied by an overcharge factor, which is generally 20 per cent (10 per cent representing the notional overcharge and 10 per cent for deterrence). However, the Bureau may use a different approach (or multiplier) where, in its judgement, the 20 per cent multiplier calculation does not reflect the economic harm caused by the cartel.38

The Bureau also takes into account aggravating and mitigating factors in recommending a fine. Examples of aggravating factors include recidivism, coercion or instigation, obstruction and involvement of senior officers in the conduct. Cooperation with the authorities, acceptance of responsibility, early termination of conduct, restitution to victims and inability to pay are examples of mitigating factors.

Although the maximum prison sentences available under Sections 45 and 47 is 14 years, to date no custodial jail sentence has been imposed in Canada for a cartel offence, although the Bureau has shown greater willingness to recommend tougher sanctions against individuals involved in domestic cartels.39

VI ‘DAY ONE’ RESPONSE

The Bureau has a number of powerful investigative tools at its disposal, the main one being search and seizure, whereby the Bureau can obtain and execute judicially authorised search warrants to enter premises and seize documentary and electronic records.40 Warrantless searches are also possible in 'exigent circumstances' where the delay to obtain a warrant would result in loss or destruction of evidence. Subject to legal privilege, the Bureau can require production of any relevant document or information, including information held on a computer,41 and can interview individual employees. Documents must be relevant to the matters being investigated but, in exigent circumstances, officers can seize documents immediately without the search warrant and without explaining in advance how the search will unfold.

Other investigative tools include documentary production orders (including against foreign affiliates of Canadian companies),42 orders to compel testimony under oath43 and orders to intercept electronic communications (wiretaps).44

38 For example, where the party agreed to refrain from doing business in Canada and thus had no Canadian volume of commerce or where a party deliberately lost out on a bid and thus earned no revenues.
39 Canadian courts have imposed conditional sentences involving home confinement, community service or both. As a result of the enactment of the Safe Streets and Communities Act in November 2012, Canadian judges technically no longer have the discretion to impose a conditional sentence on individuals convicted of an offence that carries a maximum penalty of 14 years’ imprisonment or more. See Competition Bureau, News Release, ‘Ontario individual sentenced after pleading guilty to bid rigging’ (21 May 2015), www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03936.html. In December 2018, the Quebec Court of Appeal reversed a trial judge’s decision to impose conditional sentences on three individuals accused of bid rigging, substituting them with prison sentences. The Court even increased one accused’s sentence from two years less a day to be served in the community, to three years in prison.
40 Competition Act, Section 15.
41 Subject to legal privilege, access to computerised data, whether stored on computers or other devices, means that Bureau officers must be provided with necessary passwords, encryption codes, decryption codes, software, hardware or other means to allow access.
42 Competition Act, Sections 11(1)(b) and 11(2).
43 Competition Act, Section 11(1)(a).
44 Criminal Code, Section 183.
Where a search warrant has been issued, it is an offence to refuse to allow the Bureau officers named in the warrant to enter and search the premises. As the Bureau may conduct a search and seizure at any time it thinks expedient, and usually in the early morning (hence the term ‘dawn raid’), a company’s ability to respond quickly and efficiently is crucial to its defence, particularly given that officers have no formal obligation to wait for legal counsel to arrive before entering the premises or commencing the investigation. Companies should be mindful of the following key practical points.

a. Companies must ensure the investigative actions are within the scope of the warrant. It is advisable to carefully check the warrant and note the alleged offence, the affected individuals, if any, the description of the premises subject to search and what may be seized. A search warrant should be photocopied and immediately sent to the company’s legal counsel.

b. Companies should devise an internal communication plan to both senior executives and all employees addressing conduct during the investigation, including communicating and cooperating with the Bureau, disclosing information and signing documents, and should put in place IT protocols to maintain the integrity of electronic devices. It should be made clear that employees may not obstruct the investigation by, for example, deleting emails or destroying or removing records from the premises.

c. Bureau officers cannot examine privileged documents. Where there is a concern about legal privilege, officers cannot examine or seize documents or items until a procedure for dealing with them has been agreed upon or until a judge has ruled on the matter. In the event of a dispute over legal privilege, the documents in question must be placed in a package, sealed, identified and placed in the custody of a permitted third person for subsequent discussion with the lead officer or for resolution after the raid. For electronic records, owing to their volume and the technical requirements for accessing and maintaining the integrity of the records, the review of privilege may take place following the seizure, further to a mutually agreed process.

d. To the extent possible, detailed records of all requested documents and copies of all seized documents or data should be made and memoranda setting out everything taking place during the Bureau investigation should be prepared.

VII PRIVATE ENFORCEMENT

Section 36 of the Act allows private parties to bring a civil claim in respect of damages resulting from the breaches of criminal provisions of the Act. Most commonly, claims under Section 36 are brought by way of class actions, by both direct and indirect purchasers.

The plaintiffs in a civil action must prove the same elements required to be proven under the relevant criminal provisions, as well as having to prove that the conduct has caused their loss or damage. In other words, it is not enough for the plaintiffs to prove that alleged prohibited conduct has occurred; they must prove that they have sustained quantifiable harm as a result of the conduct. Successful plaintiffs may recover an amount equal to the loss or damage proven to have been suffered (treble damages are not available in Canada), as well as any additional amount the court may allow to cover the costs of any investigations in connection with the matter, up to the full cost of the investigation. Section 36 does not allow plaintiffs to recover punitive or exemplary damages.

45 In practice, they will often allow for a brief period of time for counsel to be contacted.
A finding of guilt in the criminal case is not required for a plaintiff to commence a civil action. However, typically, claims under Section 36 are brought following criminal convictions or guilty pleas, and the Act facilitates the proof by plaintiffs where there has been a prior conviction. The record of proceedings in the criminal case (including a criminal conviction, as well as an agreed statement of facts in a guilty plea) creates a rebuttable presumption that the defendant engaged in the prohibited conduct.

In addition to the statutory cause of action under Section 36, common law economic torts (e.g., unlawful interference with economic interests, civil conspiracy and inducing breach of contract) are available and are often asserted in conjunction with Section 36 proceedings. Equitable or restitutionary claims are also becoming increasingly common in Canada.

The limitation period for commencing an action under Section 36 is two years after the offending conduct or the final disposition of any criminal proceedings, whichever is the later. The ambiguous wording of the provision creates a possibility that the two-year limitation period may be extended if criminal proceedings are brought more than two years after the date of the offending conduct.

VIII CURRENT DEVELOPMENTS

Significant changes to the immunity and leniency programmes, intended to improve Canada’s detection, investigation and prosecution of criminal violations of the Act, came into effect on 27 September 2018, following two rounds of public consultations. During the consultation process, the proposed changes, particularly to the immunity programme, were met with significant criticism from both the Canadian and international competition law bars, and although some concerns were addressed, the changes have created significant uncertainties for immunity applicants.

For example, the fact that the revised programme now includes an additional stage, the interim grant of immunity (IGI), or effectively a conditional grant of immunity designed to facilitate early disclosure of records and interviewing of witnesses, with full immunity contingent on an applicant’s cooperation, means that full immunity will only be granted once the prosecution is satisfied that no further assistance from the applicant is required. Given that cartel prosecutions may take years (e.g., the Canadian prosecution of an alleged chocolate cartel stemmed from a 2007 tip-off from one of the participants and did not end until 2015) and an immunity applicant’s assistance may conceivably be required throughout, this creates considerable uncertainty as to when (or even if) an applicant may eventually receive full immunity. Also, as the revised immunity programme no longer contemplates granting automatic blanket immunity to individual directors, officers and employees as part of the corporate immunity application, this may lead to conflicts, as interests may not be aligned. Applicants will also now be required to justify their claims of privilege and, within 30 days of the IGI being issued, would have to advise the Bureau of the specific legal privilege being claimed and the nature of the record to which privilege is attached. In cases of a dispute regarding a privilege claim, the PPSC and the applicant may agree to appoint an independent counsel to resolve the privilege claim. Otherwise, the PPSC may ask the court for a privilege ruling.

The revised leniency programme does now allow all leniency applicants to benefit from a fine reduction of up to 50 per cent, but this will be based on the timing of the application and the value of cooperation, and it will no longer be possible to predict with certainty the financial value of seeking leniency.

These changes are still recent, and it remains to be seen how they affect the way in which immunity and leniency are sought and granted and with it the incentives created for cartel participants.

In terms of developments other than the immunity and leniency programme, Bill C-49, An Act to amend the Canada Transportation Act and other Acts respecting transportation and to make related and consequential amendments to other Acts, received Royal Assent on 23 May 2018. With respect to the Act, the Bill created, among other things, an exemption to Section 45 of the Act for certain arrangements among public airlines that have been authorised by the Minister of Transport.

In November 2017, the Bureau issued a bulletin on its approach to requests for disclosure of confidential information in its possession from private litigants, likely in response to increasing requests for access from class action plaintiffs. The Bureau confirmed its previously stated position that it will not voluntarily disclose confidential information to persons contemplating, or who are parties to, a proceeding under Section 36 of the Act, and provides guidance on how it will approach disclosure in the circumstances where it is ordered to do so by a court.

Finally, on 7 June 2018, the Supreme Court of Canada granted defendants in a class action alleging a price-fixing cartel in the market for optical disc drives leave to appeal the decision of the British Columbia Court of Appeal affirming a lower court decision certifying the claims of umbrella purchasers. Currently, the law on umbrella purchasers is split between courts in Ontario and British Columbia, with the Ontario lower court having rejected umbrella purchaser claims on the basis that they would expose defendants to indeterminate liability. The result of this appeal will have important implications for both plaintiffs and cartel defendants because it will affect who can bring a claim and the scope of the cartel defendants’ liability.


48 Courts in various jurisdictions in Canada have reached different conclusions regarding the production of information in the Bureau’s possession. See, for example: Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2016 BCSC 97; Imperial Oil v. Jacques, 2014 SCC 66; Canada (Attorney General) v. Thouin, 2015 QCCA 2159 affirming, Thouin v. Ultramar Ltée, 2015 QCCS 1432.

49 Umbrella purchasers are those who purchased the allegedly cartelised product from non-conspirator manufacturers. The main argument advanced in umbrella claims is that cartel members dominated the relevant market to such an extent that they were able to increase prices across the entire market, resulting in non-conspiring manufacturers being able to – and having – charged their customers higher prices than they would have in a non-cartelised market.

50 The lower court’s decision on the umbrella purchaser issue was appealed to the Ontario Court of Appeal and the decision is currently under reserve.
Chapter 7

EUROPEAN UNION

Philippe Chappatte and Paul Walter

I ENFORCEMENT POLICIES AND GUIDANCE

Both EU and national competition laws apply to cartels in the European Union. The relevant EU competition law provision is Article 101 of the Treaty on the Functioning of the European Union (TFEU). The relevant national competition law provisions in respect of a number of the Member States are covered in other chapters of this book.

Article 101(1) of the TFEU provides that ‘all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between Member States and that have as their object or effect the prevention, restriction or distortion of competition within the internal market’ are prohibited. As a matter of practice, any agreement between competitors or potential competitors that fixes prices, limits output or shares markets, customers or sources of supply will generally be regarded as an agreement restricting competition within the meaning of Article 101(1).

The principal enforcement agency in the European Union is the European Commission, with the Competition Directorate General (the DG Competition) primarily responsible for the enforcement of the competition rules. However, in accordance with Regulation (EC) No. 1/2003, the national competition authorities (NCAs) throughout the European Union are also fully competent to enforce Article 101 of the TFEU, as well as their domestic competition rules, on cartels. National courts must also apply Article 101 to such conduct in addition to national antitrust rules.

The Commission has extensive powers of investigation and inspection, including the power to demand the production of information, take statements from individuals, search

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1 Philippe Chappatte is a partner and Paul Walter is a special adviser at Slaughter and May. The authors would like to thank Robert Walmsley, a trainee solicitor at Slaughter and May, for his help in preparing this chapter.

2 Article 101 of the Treaty on the Functioning of the European Union (TFEU) applies to ‘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).


4 Article 3(1) of Regulation (EC) No. 1/2003 provides that, if a national competition authority within the European Union uses domestic competition law to investigate a cartel that may affect trade between Member States, it must also apply Article 101 TFEU. Moreover, national competition rules should not be used to prohibit agreements that are compatible with the EU competition rules or to authorise agreements that are prohibited under the EU competition rules.
private premises and seal premises or business records. The Commission also has wide discretion to impose substantial fines for cartel behaviour in breach of Article 101 of the TFEU and for breaches of the procedural rules, for example for failure to provide information.

The incumbent EU Commissioner for Competition, Margrethe Vestager, has commented that ‘fighting cartels is a very high priority for the European Commission’ owing to the ‘serious harm cartels cause to consumers and businesses [and to] the economy as a whole in terms of removing incentives to compete on prices or to innovate’. However, the Commission is prepared to offer lenient treatment to businesses that come forward with information about a cartel in which they are involved. The Commission also launched an anonymous whistle-blowing tool in 2017 to assist individuals seeking to pass on information on cartels.

The framework principles for the Commission’s leniency policy are set out in the Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (the Leniency Notice) and are discussed in further detail in Section IV. The Commission has also published various notices providing guidance for the application of Article 101 of the TFEU, including notices on, *inter alia*, fines and handling complaints.

### II COOPERATION WITH OTHER JURISDICTIONS

#### i Cooperation within the European Union

There is close cooperation in the application of the EU competition rules between the Commission and European NCAs within the framework of the European Competition Network (ECN). For example, authorities may ask each other for assistance in collecting information in their respective territories. Members of the ECN can also exchange information, including confidential information, for the purpose of applying Article 101 of the TFEU or for parallel proceedings under national competition law.

ECN members also cooperate with a view to ensuring the efficient allocation of cases. When an authority is assigned a case, it may decide to reallocate that case to another authority if it is better placed to deal with it. The Commission is usually best placed to handle an investigation if the cartel affects competition in more than three Member States, whereas an NCA will normally be best placed if it mainly affects competition within its own territory. When the Commission initiates proceedings in relation to a case, this will end the NCA’s competence to apply Article 101 of the TFEU to the same conduct. However, parallel action by the Commission and the NCA is possible when they focus on cases that are not the same in terms of product or geographical markets.

The ECN Model Leniency Programme is intended to simplify the burden for applicants and authorities in cases of multiple leniency applications. The programme envisages undertakings making summary applications to NCAs when the Commission is particularly

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5. The key provisions regarding the Commission’s cartel enforcement procedures are set out in Regulation (EC) No. 1/2003. Further relevant provisions are set out in Regulation No. 773/2004, which governs the initiation of proceedings, conduct of investigations, handling of complaints and hearing of parties.


7. See Paragraphs 40 and 41 of the Commission Notice on cooperation within the Network of Competition Authorities (Cooperation Notice).

8. See Paragraph 5 et seq. of the Cooperation Notice.

9. See Paragraph 51 of the Cooperation Notice.
well placed to deal with a case. These applications are intended to help the applicant protect its position by securing its place in the queue before the NCA. While the Model Leniency Programme is a helpful tool, the Court of Justice of the European Union (CJEU) has held that there is no legal link between an application for immunity submitted to the Commission and a summary application submitted to an NCA in respect of the same cartel. Accordingly, NCAs are not required to assess a summary application in light of an application for immunity nor are they required to contact the Commission in order to obtain information about the purpose and results of the leniency procedure carried out at the European level.10 The Commission has introduced draft legislation designed in part to ensure mutual recognition of leniency applications at the European and national levels (see Section VIII).

ii Cooperation with non-EU countries

The European Union also has cooperation agreements with several non-EU countries, notably the United States, China, Canada, Australia, Japan, Switzerland, Brazil, South Africa, India and South Korea. These agreements can help the Commission to obtain information and evidence located outside the European Union. Most of these are ‘first generation’ agreements that provide for cooperation in the area of competition policy but do not allow the Commission to disclose confidential information received in the course of its investigations. Owing to this restriction, it is common for the Commission to request the investigated parties to provide waivers in order to allow it to discuss cases with other competition authorities. However, the European Union has entered into a ‘second generation’ cooperation agreement with Switzerland that allows their respective competition authorities to exchange information they have obtained during their investigations into the same case, subject to strict conditions regarding confidentiality, personal data and other requirements.11

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Extraterritoriality

Article 101 of the TFEU can apply to agreements between undertakings located outside the European Union if they affect competition within the European Union. The CJEU has recognised that it is not necessary that companies implicated in the alleged cartel activity be based inside the European Union; nor is it necessary for the restrictive agreement to be entered into inside the European Union, or the alleged acts to be committed or business conducted within the European Union. In Wood Pulp I, the CJEU found that the decisive factor in determining whether the EU competition rules apply is where the agreement, decision or concerted practice is implemented.12 Overall, according to the effects doctrine, the

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10 Case C-428/14, DHL Express (Italy) Srl and DHL Global Forwarding (Italy) Srl v. Autorità Garante della Concorrenza e del Mercato, judgment of 20 January 2016.
11 Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (2014). The European Union is also negotiating a revised cooperation agreement with Canada that will include enhanced information-sharing provisions, comparable to the European Union-Switzerland agreement. Negotiations also began in 2017 on a ‘second generation’ agreement with Japan, again including enhanced information-sharing provisions.
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 European Union.

ii Parent company liability

The conduct of a subsidiary may be imputed to the parent company when, having regard to the economic, organisational and legal links between those two entities, the subsidiary does not decide independently upon its own conduct in the market but, in all material respects, carries out the instructions given to it by the parent company. In such a situation, the parent and the subsidiary form a single undertaking for the purposes of EU competition law. The Commission is therefore able to impose fines on a parent company without first having to establish its involvement in the infringement. If a parent company has a 100 per cent shareholding in a subsidiary, there is a rebuttable presumption that the parent company exercises a decisive influence over its subsidiary, and therefore the two entities form a single undertaking. Shareholdings below 100 per cent may also give rise to a position of a single undertaking depending on the level of the shareholding and the nature of the links between the companies. Parent companies may also be held liable for infringements of the European competition rules committed by their full-function joint ventures.

iii Affirmative defences and exemptions

Article 101(3) of the TFEU exempts those agreements that, although they restrict competition, have pro-competitive effects outweighing the competition concerns. However, it is highly unlikely that a hard-core cartel agreement could qualify for such an exemption.

There are no industry-specific defences. However, there are special rules governing the application of Article 101 of the TFEU to the agricultural and transport sectors.

IV LENIENCY PROGRAMMES

i Overview of the leniency programme

The Leniency Notice is essentially based on two principles: first, that the earlier undertakings contact the Commission, the higher the reward; and second, that the value of the reward will depend on the usefulness of the materials supplied.

ii Immunity

Full immunity from fines that might otherwise be imposed by the Commission will be granted under the Leniency Notice to either the first undertaking to provide the Commission with information and evidence that enables it to carry out a targeted inspection in connection with the alleged cartel, or the first undertaking to submit information and evidence enabling the Commission to find an infringement of Article 101 of the TFEU.

These options are mutually exclusive, so only one undertaking can qualify for full immunity.

13 See, for example, Case C-97/08 P, Akzo Nobel NV and others v. Commission, judgment of 10 September 2009.

The undertaking seeking immunity must provide the Commission with a corporate statement and other evidence relating to the alleged cartel, and in particular any evidence contemporaneous with the infringement. Corporate statements may take the form of written documents signed by or on behalf of the undertaking or may be made orally. They should include:

a. a detailed description of the cartel arrangement;
b. contact details of the applicant and the other members of the cartel;
c. the names, positions and addresses of all individuals involved in the cartel; and
d. information about which other competition authorities have been (or are intended to be) approached in relation to the cartel.

To obtain full immunity, an undertaking must also fulfil the following conditions:

a. It must cooperate fully and expeditiously on a continuing basis with the Commission (see Section IV.v).
b. It must put an end to its involvement in the cartel immediately following its application (except where, in the Commission’s view, it would be reasonably necessary to preserve the integrity of the inspections).
c. It cannot have destroyed, falsified or concealed evidence of the cartel or disclosed the leniency application (except to other competition authorities).
d. It cannot have taken steps to coerce other undertakings to participate in the cartel.

Assuming all the relevant conditions are satisfied at the time of application, the Commission should grant conditional immunity to the undertaking. If it then continues to comply with its obligations, the conditional immunity should be confirmed in the final decision.

iii Reducing fine

If an undertaking does not qualify for immunity, favourable treatment is also available under the Leniency Notice if it provides evidence representing significant added value to that already in the Commission’s possession and terminates its involvement in the cartel activity. Provided these conditions are met, the cooperating undertaking may receive a reduction of up to 50 per cent 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 undertaking to provide significant added value; 20 to 30 per cent for the second undertaking to provide significant added value; and zero to 20 per cent for any subsequent undertakings that provide significant added value.

The amount received within these bands depends upon the time at which the undertaking started to cooperate, the quality of evidence provided and the extent to which it represents added value. If a leniency applicant supplies information previously unknown to the Commission showing that the cartel had lasted longer or was in some way more serious than the Commission had been aware, the Commission will not take account of those elements (regarding duration or gravity) when setting the level of that applicant’s fine.

Undertakings wishing to benefit from a reduction in their fine should provide the Commission with their evidence of the cartel activity at issue. Following the necessary verification process by the Commission, they will be informed whether the evidence

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15 The Commission notice entitled ‘Delivering oral statements at DG Competition’, of 8 October 2013, provides practical guidance on the content and delivery of oral corporate statements in cartel cases.
submitted at the time of their application has passed the significant added value threshold (as well as 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 reduction to be granted should be confirmed in the final decision.

iv Markers
To take advantage of the Commission’s leniency programme, an undertaking (or its legal advisers) must contact DG Competition. If immunity is still available for the particular cartel in question, the undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines.

The Commission may grant a marker protecting an immunity applicant’s place in the queue to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning:

a) its name and address;

b) the parties to the alleged cartel;

c) the affected products and territories;

d) the estimated duration of the alleged cartel;

e) the nature of the alleged cartel conduct;

f) details of any other past or possible future leniency applications to other authorities in relation to the alleged cartel; and

g) its justification for requesting a marker.

If the Commission grants a marker, it will specify the length of time within which the applicant must perfect the marker by submitting information and evidence required to meet the relevant threshold for immunity.

v Duties of cooperation
A leniency applicant must maintain complete and continuous cooperation throughout the Commission’s investigation. The Leniency Notice explains that this includes:

a) promptly providing the Commission with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;

b) remaining at the Commission’s disposal to promptly answer any request that may contribute to the establishment of the facts;

c) making current (and, if possible, former) employees and directors available for interview by the Commission;

d) not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and

e) not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed.

vi Access of private litigants to leniency materials
Information and documents communicated to the Commission under the Leniency Notice are treated as confidential. Any subsequent disclosure to the parties under investigation, as may be required by the proceedings, will be made in accordance with the rules relating to
access to the file. In practice, the Commission does not publicly reveal the identity of a leniency applicant as long as the investigations continue. Eventually, however, details of the cartel investigation and the applicant’s involvement may be made publicly available in the final Commission decision and the associated press release issued by the Commission.

In December 2014, a Directive on rules governing actions for damages under national law for breach of the EU antitrust rules and those of Member States (the Damages Directive) came into force, giving Member States two years to implement it (see Section VIII). The provisions of the Damages Directive include a number of safeguards in relation to leniency programmes. These ensure that leniency corporate statements and settlement submissions (except those that have been withdrawn) have absolute protection from disclosure or use as evidence, and that documents specifically prepared in the context of the public enforcement proceedings by the parties (e.g., replies to authorities’ requests for information) or the competition authorities (e.g., a statement of objections) have temporary protection, for the duration of the relevant competition authority’s proceedings. In addition, Member States must ensure that national courts limit the disclosure of evidence to that which is proportionate considering the legitimate interest of the parties and third parties concerned.

Potential leniency applicants and litigants should also have regard to the transparency rules contained in Regulation (EC) No. 1049/2001, which gives EU citizens and companies a right of access to documents drawn up by, or in the possession of, EU institutions. The CJEU has held that the Commission is entitled to presume, without carrying out an individual examination of each of the documents in the file, that disclosure is likely to undermine the protection of the commercial interests of the relevant undertakings as well as the general interest that such proceedings seek to protect. It is up to the party seeking disclosure to rebut this presumption or to show that there is an overriding public interest in disclosure; the mere fact that the documents are requested to bring a private action for damages will not be sufficient for these purposes.

vii  Potential issues arising from simultaneous representation by counsel of the corporate entity and its employees

It may be possible for external counsel to represent a corporate entity while also advising the employees who have participated in the cartel (provided that this is compatible with the law firm’s own professional conduct obligations). However, such an arrangement could give rise to issues in respect of criminal proceedings against individuals under national legislation where conflicts of interest between the corporate entity and the employees may arise. Conflicts of interest may also arise in respect of disciplinary measures imposed upon employees pursuant to their contracts of employment. A decision on the appropriateness of such arrangements will therefore need to be made in each case.

16 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No. 139/2004.
V PENALTIES

i Overview

The principal sanction available to the Commission is the imposition of fines on the undertakings that have engaged in cartel activities. The Commission does not have any powers to impose criminal sanctions on individuals involved (in contrast to the position at the national level in some countries).

Regulation (EC) No. 1/2003 provides that fines can be imposed for a breach of Article 101 of the TFEU up to a maximum of 10 per cent of worldwide turnover of the undertaking in the financial year preceding the decision. The CJEU has confirmed that the Commission has wide discretion in setting the level of fines on companies within these limits. 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. The highest fines imposed by the Commission in respect of cartel cases include:

a in July 2016, record total fines of €2.93 billion upon four undertakings for participation in a cartel relating to medium and heavy trucks. Daimler received the highest individual fine (€1.01 billion). A further undertaking was fined €880 million for its participation in September 2017, bringing the total to €3.81 billion;

b in December 2013, total fines of €1.71 billion on eight undertakings in two cartel decisions relating to euro interest rate derivatives (EIRD) and yen interest rate derivatives (YIRD). The Commission fined a ninth undertaking €14.96 million in relation to the YIRD case in April 2015 and three other undertakings €485 million in relation to the EIRD case in December 2016, bringing the total to €2.21 billion;

c in December 2012, total fines of €1.47 billion on seven undertakings for participation in two cartels relating to cathode ray tubes; and

d in November 2008, total fines of €1.38 billion upon four undertakings in respect of a cartel for car glass. The highest individual fine was that imposed upon Saint-Gobain (€896 million).

In 2018, the Commission imposed total fines of €801 million (as at 17 December), representing a decrease in total fines compared to recent years (with the exception of 2015, in which the total was only €365 million).

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19 Case AT.39824, Trucks, Commission decision of 19 July 2016.
20 Case AT.39824, Trucks, Commission decision of 27 September 2017.
21 Reduced to €1.99 billion by decision of 6 April 2016 – the Commission amended the fine for Société Générale based on corrected sales data provided by Société Générale in February 2016.
23 Reduced to €1.19 billion on appeal to the General Court. See joined Cases T-56/09 and T-73/09, Saint-Gobain Glass France SA and others v. Commission, judgment of 27 March 2014.
24 Reduced to €715 million on appeal to the General Court, id.
Factors taken into account when setting a penalty

A financial penalty imposed by the Commission in respect of a cartel will be calculated following the methodology set out in its Fining Guidelines. This methodology may be summarised as follows:

a. Value of sales: The Commission starts by applying a percentage of the undertaking’s value of sales in the market affected by the infringement. The percentage applied in each case will be based on the gravity of the infringement and, as a general rule, will be set at a level of up to 30 per cent of sales. In determining the proportion of the value of sales, account is taken of the nature of the infringement, its actual impact on the market and the size of the relevant geographical market.

b. Duration: The amount determined based on the value of sales will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year, and periods of longer than six months but shorter than one year will be counted as a full year.

c. Entry fee: An additional sum of between 15 and 25 per cent of the value of sales is included to deter undertakings from participating in cartels even for only a short period.

d. Aggravating or attenuating circumstances and other adjustments: The sum achieved from the value of sales multiplied by the duration, plus the entry fee, is adjusted to reflect a variety of possible aggravating or attenuating circumstances. The Fining Guidelines place an emphasis on recidivism as an aggravating factor: the Commission may increase a fine by up to 100 per cent for each similar infringement found by the Commission or by an NCA. Additional adjustments are possible on the basis of other objective factors, such as the specific economic context, any economic or financial benefit derived by the offenders, the specific characteristics of the companies in question and their real ability to pay in a specific social and economic context.

e. Adjustment for leniency or settlement discounts.

Given the substantial discretion the Commission has in setting fines, it can in practice be difficult to assess with certainty the ultimate penalty that will be imposed in cartel cases. This is largely justified on public policy grounds, as increased transparency could prompt companies to engage in offsetting calculations between the likely level of fines and the likely benefit arising from their anticompetitive cartel conduct. Nonetheless, the Commission generally follows the Fining Guidelines and must exercise its discretion in a coherent and non-discriminatory way.

Early resolutions and settlement procedures

The Commission’s procedure for settling cartel cases is intended to complement the Leniency Notice and the Fining Guidelines. The aim of the settlement procedure is to simplify and speed up the administrative procedure for investigations (and to reduce CJEU litigation in cartel cases), thereby freeing up the Commission’s resources and enabling it to pursue more cases.

Pursuant to the settlement procedure, 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.

26 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003.
In return for cooperating, the parties are rewarded with a 10 per cent reduction in fines (cumulative with any leniency reduction) and a cap on the multiplier that may be applied to the fine for specific deterrence (to a multiple of two).

The Commission has a broad margin of discretion to determine which cases may be suitable for settlement. An undertaking does not have the right to enter into settlement discussions, but nor is it obliged to do so if invited by the Commission. The procedure is available in cases in which the Commission has initiated proceedings with a view to adopting an infringement decision and imposing fines but has not yet issued a formal statement of objections. However, settlements may be explored at an earlier stage if requested by the undertakings under investigation.

The Commission is using the settlement procedure with increasing frequency. It had used the procedure in respect of 28 cartel decisions at the time of writing, three of which were issued in 2018 (in three separate decisions, the Commission fined four maritime car carriers €395 million, two suppliers of spark plugs €76 million and two suppliers of braking systems €75 million for taking part in cartels). The Commission has also shown an increasing willingness to compromise with ‘hybrid’ cases, in which one or more parties elect not to settle. In September 2017, for instance, it announced that it had fined Scania €880 million for its part in the Trucks cartel, the other parties to which settled with the Commission in July 2016 (see Section VI.i). On the other hand, the General Court has criticised the use of ‘hybrid’ settlements in cases in which an early settlement with some parties to an investigation raises a risk of infringing the presumption of innocence applying to non-settling parties.27 It is expected that the Commission will most likely address this concern by issuing settlement and infringement decisions simultaneously rather than altering its approach to settlement fundamentally.

VI ‘DAY ONE’ RESPONSE

Officials from the Commission may carry out unannounced inspections anywhere in the European Union to investigate possible cartel activities. The team conducting a dawn raid usually consists of between five and 10 officials. The Commission officials are normally accompanied by two or three officials from the relevant NCAs that are assisting the Commission in its investigation. The Commission officials will often be willing to wait for a short period for an undertaking to consult its legal advisers before commencing the inspection. However, any such delay must be kept to a minimum. In 2012, the General Court upheld a Commission decision to increase a fine on an undertaking under investigation partly on the basis that officials were refused access to the premises pending the arrival of external lawyers.28

When carrying out a surprise inspection visit, the officials may:

a enter the premises, land and means of transport of undertakings or an association of undertakings;

b examine the books and other business records of the company under investigation (irrespective of how they are stored);

c take copies of books and records;

A Commission explanatory note provides details of the extent to which officials will use information technology (IT) procedures to carry out an inspection.\(^{29}\) In particular, the note explains that officials can search an undertaking’s IT environment and storage media using both built-in search tools and their own forensic IT tools. The Commission may also remove copies of data for searching at a later date. Undertakings must cooperate with the inspection and may be required to provide assistance, not only for explanations about the organisation and its IT environment, but also for specific tasks such as the temporary blocking of individual email accounts, temporarily disconnecting running computers from the network, removing and reinstalling hard drives from computers, and providing ‘administrator access rights’ support. When such actions are taken, the undertaking under inspection must ensure that employees do not interfere in any way with these measures. In 2014, the General Court upheld a Commission fine of €2.5 million on an undertaking that failed to comply with a request to block email accounts of key individuals during an inspection.\(^{30}\)

The Commission may also – subject to obtaining a court warrant – inspect private premises, land and means of transport, 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.

The Commission can impose penalties of up to 1 per cent of total turnover upon any undertaking that obstructs an inspection. For example, in 2008 the Commission imposed a fine of €38 million on E.ON Energie for a breach of a Commission seal in E.ON’s premises during an inspection.

It is therefore essential to develop a coordinated strategy for dealing with an inspection. Important issues to consider include:

\(a\) arranging for each official to be assisted or shadowed by a member of staff or lawyer, and for the provision of appropriate IT support to allow the officials to conduct their inspection;

\(b\) briefing relevant employees that they should not obstruct the investigation (e.g., by destroying or deleting records or by interfering with IT measures) while also noting that anything they say to the officials may be recorded as evidence;

\(c\) establishing a process for identifying documents that may be covered by legal privilege before officials are allowed to see or copy them;

\(d\) maintaining a record of what officials ask for and inspect, and keeping copies of documents copied by the officials; and

\(e\) ensuring that the fact that the inspection is taking place is not leaked outside the company.


In addition to carrying out unannounced inspections, the Commission may issue information requests under Article 18 of Regulation (EC) No. 1/2003 as a means of obtaining information from undertakings based in the European Union. The Commission can impose fines upon EU undertakings of up to 1 per cent of their total turnover for supplying incorrect or misleading information in response to an information request. With respect to non-EU undertakings, the Commission is often able to exercise its jurisdiction by sending the information request within the European Union to a subsidiary company that belongs to the non-EU parent group. However, if a firm has no physical presence in the European Union, this will not be possible. In such cases, the Commission usually sends out informal information requests; it is normal for addressees to cooperate in the provision of information in response to such requests.

In light of the significant penalties that may be imposed for a breach of Article 101 of the TFEU, a tailored strategy should be developed to deal with the fallout from an unannounced inspection or receipt of information covering alleged cartel activities. Active consideration should be given to whether it is appropriate to be making applications for leniency. The strategy should be developed with senior management and the legal department in view of the surrounding facts and the different issues and risks raised in all potentially relevant jurisdictions. Delay in the implementation of a strategy could have serious consequences (e.g., in terms of the priority of leniency applications), as could the implementation of a policy that does not take due account of identifiable risks (in terms of potential civil actions, follow-on investigations in other jurisdictions, inter alia).

VII PRIVATE ENFORCEMENT

Third parties who have suffered loss as a result of cartel behaviour in breach of Article 101 of the TFEU can sue for damages before the national courts. The precise rules of standing, procedure and quantification of damages vary between different EU Member States.

The European Union has sought to address impediments to pursuing damages claims in Europe through the Damages Directive, which has now been transposed into national law by all Member States. The Directive seeks to ensure the effective enforcement of EU competition rules by optimising the interaction between the public and private enforcement of these rules, and improving the conditions under which compensation can be obtained for harm caused by infringements of the rules. The Damages Directive therefore contains a number of measures aimed at facilitating damages actions, most notably:

- allowing national courts to order parties to the proceedings and third parties to disclose evidence when victims claim compensation;
- ensuring national courts cannot take decisions that run counter to final infringement decisions by national competition authorities;
- introducing limitation periods that provide victims with a reasonable opportunity to bring a damages action;
- recognising the possibility for defendants to invoke the passing-on defence;
- facilitating consensual settlements to allow a faster and less costly resolution of compensation disputes; and
- providing a rebuttable presumption that a cartel infringement has caused harm.

The Directive also sets out a number of safeguards against diminishing the incentives for companies to cooperate with competition authorities, including absolute protection from
disclosure or use as evidence for leniency corporate statements and settlement submissions, and temporary protection for documents specifically prepared in the context of the public enforcement proceedings by the parties or the competition authorities.

VIII CURRENT DEVELOPMENTS

In January 2018, the Commission published a report assessing the progress made with its 2013 recommendation that Member States should put in place national collective redress mechanisms. The report found that the availability of collective redress mechanisms, as well as the implementation of safeguards against the potential abuse of such mechanisms, were still not consistent across the European Union. In response, the Commission proposed new measures in April 2018 to strengthen collective redress mechanisms as part of a New Deal for Consumers. These measures aim to make collective redress available to consumers and make cross-border actions more efficient, while introducing safeguards to avoid US-style class actions. The Commission’s proposals are currently subject to discussion by the European Parliament.

Further legislative changes will empower NCAs to be more effective enforcers of the EU competition rules. In March 2017, the Commission published its proposal for a new ECN+ Directive, which is designed to ensure that NCAs will:

a. act independently when enforcing EU antitrust rules;
b. have the necessary financial and human resources to function;
c. have appropriate evidence-gathering powers, including the right to conduct electronic searches;
d. have adequate powers to sanction parties that are infringing antitrust rules, including interim measures and commitments, and rules covering parental liability and succession; and
e. have coordinated leniency programmes encouraging parties to come forward with evidence of cartels, including provision for leniency markers and for the acceptance of ‘summary applications’ if the parties have applied for leniency with the Commission.

I ENFORCEMENT POLICIES AND GUIDANCE

Cartels and leniency rules in France have been subject to several significant modifications in recent years. In line with the development of the economy and of competition rules at European level, a new set of rules was implemented in 2002, introducing the French leniency programme.

Following the enactment of Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition, laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), French antitrust laws were amended in 2004 to implement a de minimis regime and a commitment procedure, and to strengthen the investigative and sanctioning powers of the French Competition Council.

The Law on the Modernisation of the Economy No. 2008-776 of 4 August 2008 created the French Competition Authority (the Authority), which replaced the Competition Council in March 2009. Since then, various reforms have been adopted to bolster the Authority’s investigative and sanctioning powers, and the Authority has adopted guidelines relating to various procedural aspects. In particular, on 16 May 2011, it adopted the Notice on the Method Relating to the Setting of Financial Penalties.

A few amendments to French law have also been implemented to facilitate private enforcement. First, Law No. 2014-344 (the Hamon Law) was adopted on 17 March 2014 to introduce, inter alia, a class action mechanism to France as of 1 October 2014. Second, in early 2017, various texts were adopted to transpose into French law Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the EU Member States and of the European Union.

i Statutory framework

Prohibited cartels and concerted practices are regulated by Articles L420-1 to L420-7 of the French Commercial Code (FCC).

In the same language as Article 101 of the TFEU, Article L420-1 of the FCC prohibits any agreement, written or oral, between two or more undertakings, express or tacit, whose object or effect is to prevent, restrict or distort competition, and in particular if it:

a limits the market access of, or free competition between, other undertakings;
b prevents free pricing on the market, artificially encouraging price increases or limiting price reductions;

1 Hugues Calvet and Olivier Billard are partners and Guillaume Fabre is an associate at Bredin Prat. The authors would like to thank Chloé Delay for her contribution to the preparation of this chapter.
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c limits or controls production, opportunities, investment or technical progress; or

d shares markets or sources of supply.

In general, the Authority follows the practice of the European Commission (the Commission) concerning agreements and concerted practices. In particular, an infringement cannot be established solely through parallel behaviour, so the Authority must find additional evidence showing that the parallel behaviour results from anticompetitive conduct, such as exchanges of information.

Article L464-6-1 of the FCC foresees a *de minimis* threshold in France: the Authority may decide not to pursue a case should the parties be competitors with a combined market share of less than 10 per cent, or should they be neither current nor potential competitors, with a combined market share of less than 15 per cent.

This exemption is not automatic and does not apply in the most serious cartel cases containing a hard-core anticompetitive restriction, such as price-fixing.

**ii The French Competition Authority**

The Authority is an independent administrative public body that has full powers to enforce competition law. Its investigative services carry out the investigation, under the supervision of the *rapporteur-general*. They act independently from its college, which, after hearing the parties and the investigative services, adopts decisions in antitrust cases.

Administrative and some judicial (commercial, civil and criminal) courts can also enforce national and European antitrust rules in cases falling under their jurisdiction (referring questions to the Authority where necessary).

**iii Starting the investigation**

The Authority can initiate proceedings *ex officio*, or cases can be referred by the Minister of Economy, or complaints can be submitted by companies or collective organisations (e.g., professional bodies, trade or consumer associations), or by individuals carrying out an economic activity.

**iv Powers of investigation**

There are two types of investigations under French law: ordinary investigations and investigations under judicial control.

*Ordinary investigations*

According to Article L450-3 of the FCC, the investigators (agents of the Authority or of the Minister of Economy) may:

a have access to all business premises, land or means of transport for professional use or the provision of a service as well as to premises that serve both as a dwelling and as a place of business (in this specific case, with prior judicial authorisation);

b request copies of books, invoices and all other professional documents;

c have access to software and computerised data and request that such data be put in a legible format;
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\[ d \] request explanations or information from any employee or company representative; and
\[ e \] request an expert opinion.\(^2\)

**Investigation under judicial control**

Pursuant to Article L450-4 of the FCC, searches and seizures (i.e., dawn raids) in all locations can only be carried out on the basis of a judicial order, delivered upon request from the Minister of Economy or from the *rapporteur-general*, or concerning investigations started by the Commission.

Investigations (searches and seizures) are carried out under court supervision and in the presence of the company’s representative (or two independent witnesses) and of police officers who assist the Authority’s investigative services and who can report, when necessary, to the supervising court. The Supreme Court has specified that a company’s representatives (e.g., external counsel) cannot directly contact the supervising court in relation to the investigations and first has to refer to the police officers, who can then confer with the supervising court.\(^3\)

A company must be informed that it can be assisted by its external legal counsel, although inspectors do not have to wait for counsel to arrive to start and carry out the investigation. The Authority’s investigative services can interrogate the company’s representative and other employees to obtain any information useful to their investigation. Article L450-3-2 of the FCC stipulates that the agents may use an assumed identity concerning certain issues, such as internet sales or concerted practices granting exclusive rights to import in the French overseas departments.

Investigators are required to draft minutes describing the dawn raid and to establish a list of all documents seized, a copy of which should be given to the company’s representative.

Under Article L450-4 of the FCC, a company can appeal the judicial order authorising the investigation. Such an appeal must be filed within 10 calendar days of notification of the judicial order. The decision of the Court of Appeal can be further challenged before the Supreme Court within five calendar days. Similarly, the company subject to investigation is able to challenge the conditions under which the investigation was carried out before the Court of Appeal, within 10 calendar days of receipt of minutes of the investigation. A further appeal to the Supreme Court is also possible.

When a company fails to answer a request from the investigative services, the Authority may issue an injunction, sanctioned by a daily periodic payment (see Section V.ii).

For both types of investigations, obstruction to an investigation (i.e., providing false or misleading information) can be sanctioned by a fine of up to 1 per cent of the total turnover of a company. In principle, legal privilege may be denied to the investigators. To determine which documents are thus protected, the company’s external counsel will send to

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\(^2\) The French Constitutional Court found that this provision was constitutional in Case No. 2016-552 QPC, 8 July 2016 (Société Brenntag). In substance, the Court considered that although no appeal allows a challenge of investigation acts undertaken on the basis of this provision, such acts (1) rely on the good will of the concerned undertaking (i.e., they cannot be implemented against its will – although the Authority may in a second step adopt a formal binding decision for the undertaking to provide the relevant information under the threat of an injunction and a daily periodic penalty payment or a fine, or both) and (2) may be challenged in the context of the appeal against the Authority’s decision on the merit of the case.

\(^3\) Cass. Crim. 9 March 2016, Pourvoi No. 14-84566.
the investigators a list of documents considered as protected within a short period following a
dawn raid, as determined by the Authority. The investigators will then review this list, jointly
with the company’s external counsel, and destroy any documents they consider to be covered
by legal privilege.

Business secrets cannot be withheld from the investigators but their protection in
relation to other parties to the procedure may be requested at a later stage. When such a
request is accepted, other parties will have access to a non-confidential version of these
documents and a summary of the documents. Confidential information that is useful to a
party’s rights of defence can be declassified during the course of the proceedings.

Ending the investigation: final decision

The Authority can adopt a decision to close the proceedings (i.e., without imposing a
sanction) at any stage of the procedure.

If the investigative services propose closing the proceedings, the parties and a
representative of the Minister of the Economy can access the file and submit their
observations within two months. The Authority can then either close the case or request
further investigations.

Alternatively, the rapporteur-general can notify a statement of objections to the
incriminated parties to the proceedings, and to the representative of the Minister of the
Economy (or initiate discussions under the commitments avenue – see Section V.i). The
recipients have, in principle, two months to access the case file and reply. The rapporteur-general
then notifies all parties with a ‘report’ that answers the parties’ arguments and describes the
investigative services’ view on the various criteria used to determine the amount of the fine
(no specific amount is set out). The parties have, in principle, two months to submit their
observations in response.

When the case does not raise significant concerns, the rapporteur-general may submit
the case to a simplified procedure, without the report stage. This simplified procedure is
also applicable in cases where leniency applications have been accepted (a report should be
established for companies that did not apply for leniency).

Finally, an oral hearing is organised before the college of the Authority. Hearings
are not public and only the concerned parties and a representative of the Minister of the
Economy can attend. In general, the rapporteur-general (represented by the case handlers),
the representative of the Minister of the Economy and the parties present oral observations.
The hearing officer may also attend the hearing to present a report. After this, the Authority
issues its final decision.

In 2017, the average time for the Authority to handle a cartel case from its referral until
the final decision was approximately 21 months.4

Appeal process

Decisions made by the Authority can be appealed within a month of their notification to
the parties concerned. That appeal is not suspensive, but a suspension of the implementation
can be requested to the first president of the appeal court. Such a request is granted only in
very exceptional circumstances. The decisions of the Court of Appeal can be further appealed
to the French Supreme Court within one month of their notification. The President of the

Authority can also appeal to the Supreme Court any decision of the Court of Appeal that rescinds or reverses a decision of the Authority. The appeal to the Supreme Court is limited to points of law and is not suspensive.

II COOPERATION WITH OTHER JURISDICTIONS

i Cooperation within the European Union

Under Regulation (EC) No. 1/2003, national competition authorities (NCAs) and courts are fully empowered to enforce Article 101 of the TFEU, and to grant individual exemptions by virtue of Article 101(3) of the TFEU.

The implementation of Regulation 1/2003 necessarily implies full cooperation between the Commission and NCAs to ensure a consistent application of EU rules.

In this respect, several measures have been implemented, three of which are:

a the creation of the European Competition Network (ECN), through which NCAs can exchange information;

b the Authority’s duty to inform the Commission as soon as it starts an investigation under Article 101 of the TFEU. It may also inform other NCAs. Conversely, the Commission must share with the NCAs the most important documents collected, and any other documents useful for the analysis of the case at a national level, at their request; and

c the Authority must inform the Commission before adopting a final decision, and the Authority may, in such circumstances, provide the Commission with a short summary of the case and of the proposed decision.

Information exchanged between the Commission and the NCAs will only be used to apply Articles 101 and 102 of the TFEU. However, it can also be used for the application of national law when it is applied in the same case, in parallel to EU law, and does not lead to a different outcome. In addition:

a NCAs and national courts may ask the Commission to share its opinion on questions concerning the application of EU competition rules; and

b under Article L450-1 of the FCC, the agents of the Authority may have to assist investigations initiated by the Commission or other NCAs if requested, and vice versa.

Information containing business secrets can be communicated between NCAs as long as, in substance, they are not publicly disclosed.

As an example of a successful cooperation with other competition authorities in the European Union, the French, Swedish and Italian competition authorities have worked together, in close coordination with the European Commission, to obtain commitments from the company Booking.com in these three countries regarding vertical restraints.

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5 Article L464-8 of the FCC.
6 Decision No. 15-D-06 of 21 April 2015 concerning practices implemented in the online hotel booking sector.
ii  **Interplay between jurisdictions**

The interplay between jurisdictions may affect the legal procedure in two situations: when the Authority applies both Article L420-1 of the FCC and Article 101 of the TFEU, and when several competition authorities apply Article 101 of the TFEU in parallel.

*The Authority applies both Article L420-1 of the FCC and Article 101 of the TFEU*

To avoid any risk of conflict when applying national law and EU law, Article 3 of Regulation (EC) No. 1/2003 provides that the application of EU law prevails. Accordingly, national law cannot lead to the prohibition of agreements or concerted practices that affect trade between Member States but do not restrict competition or may be exempted (falling under the conditions of Article 101(3) or a block exemption regulation).

*Several competition authorities apply Article 101 of the TFEU in parallel*

In certain situations, a case may be investigated either by the Commission or by one or several NCAs acting in parallel. To avoid multiple procedures and to ensure that a case is dealt with by the best-placed authority, Article 11-6 of Regulation (EC) No. 1/2003 provides that, if the proceeding is initiated by the Commission, the NCAs are relieved of applying Article 101 of the TFEU. If an NCA is already acting on a case, the Commission may only initiate proceedings after consulting with that NCA.

According to the Commission notice on cooperation within the NCAs, the initiating national authority should remain in charge of the case. Reallocation of a case would only be considered when the initiating authority considers that it is not well placed to act, or when other authorities consider themselves equally well placed to act.

In a 2007 case, the former regulating authority (the French Competition Council) decided that any previous infringement committed by an undertaking that was ruled upon by the Commission or by another NCA would be taken into account when determining the fine to be imposed on that undertaking.7

iii  **Leniency cooperation within the European Union**

In 2006, the ECN adopted the Model Leniency Programme (MLP) to make it easier for companies to apply for leniency if it is not clear which NCA is best placed to take the case. By endorsing the revised MLP, NCAs have agreed to use their best efforts to align their current and future leniency programmes and practices on the MLP.

In November 2012, the ECN adopted a revised version of the MLP that, in particular, clarifies and simplifies the information that must be provided by companies applying for leniency to several authorities:

- a standard template for summary applications, which companies will be able to use before all NCAs, is now included (the ECN has published a list of national authorities that accept summary applications); and

- all leniency applicants applying to the Commission in cases concerning more than three Member States will be able to submit a summary application to NCAs.

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7 Decision No. 07-D-08 of 12 March 2007 concerning practices implemented in the supply and distribution of cement industry in Corsica.
Other changes include clarifications on conditions that applicants must meet to qualify for leniency – in particular on the duty to cooperate – and the scope of leniency programmes under the MLP. The revised text also indicates that the ECN competition authorities should offer the same level of protection against disclosure for written and oral leniency statements.

On 3 April 2015, the Authority adopted a Revised Leniency Notice to reflect the changes made to the MLP.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Territorial scope of application

Article L420-1 of the FCC expressly covers practices committed ‘even through the direct or indirect intermediation of a company in the group established outside France’. Traditionally, the Authority considers that it may apply French provisions relating to cartels when they have an effect, either direct or indirect, on the French territory.8

ii Material scope of application

The legal antitrust framework applies to all economic activities. There are no industry-specific offences.

iii Affirmative defences and exemptions

According to Article L420-4 of the FCC, practices falling under Article L420-1 of the FCC may be exempted under specific circumstances and conditions:

a in the event that the practice at hand results from the application of a legislative act or a regulation implementing that act, it can be exempted should it be the direct and unavoidable consequence of the legislative text, and that practice should be no more restrictive than the legislative provision;

b in the same way as Article 101(3) of the TFEU, Article L420-4(2) of the FCC exempts agreement or practices:

• whose effect is to improve economic progress, including by creating or maintaining jobs;
• that allow users a fair share of the resulting profit;
• that do not give the undertakings involved the opportunity to eliminate competition for a substantial part of the products in question; and
• that do not impose restrictions that are not indispensable to the achievement of this objective; and

c by a decree adopted following a favourable opinion from the Authority, certain categories of agreement or certain agreements, in particular when they are intended to improve the management of small or medium-sized undertakings, may be considered as fulfilling the conditions hereupon. Such decrees have similar effects to European block exemptions but are very rarely issued.

8 Decision No. 89-D-22 of 13 June 1989 following a request from Phinelec.
IV  LENIENCY PROGRAMMES

As detailed in Section II.iii, the Authority adopted the Revised Leniency Notice to conform its leniency programme to the European Model Leniency Programme.

Generally speaking, leniency is available only for participants to a cartel (i.e., a hard-core infringement that amounts to competitors fixing prices, limiting quantities, sharing markets, among other things). The Revised Leniency Notice has added hub-and-spoke infringements to the list, thus covering infringements carried out between competitors with the support of actors in a vertical relationship with the cartel participants.

Up to and including 2017, the Authority had received 77 leniency applications and had made 12 decisions on this basis. Decisions adopted in proceedings where leniency was applied concerned, in particular, the steel industry where, for the first time, no full immunity was granted, or the home and personal care products sector where the Authority imposed its highest fine to date.

i  Procedural steps

Companies can have anonymous and informal contacts with the leniency adviser, to obtain general information relating to the leniency procedure.

Companies should apply for leniency to the rapporteur-general either by registered mail or orally (in which case, the rapporteur-general confirms in writing the date and time of the application). To apply orally, a company must request an appointment with the rapporteur-general by calling a dedicated phone line. If several requests for appointments are made, applications are treated on a first come, first served basis.

An applicant must provide information about the infringement, as detailed below. The rapporteur-general may grant the applicant a set period of time to submit all the relevant elements of proof to support its application (these elements will be considered as having been received on the day of the application when the deadline is respected).

Based on the information and evidence provided to the Authority, the case handler appointed to investigate the leniency application drafts a report to determine whether the conditions for leniency have been met. If so, he or she sets out a proposal for immunity or fine reduction.

That report is sent to the undertaking concerned and to the representative of the Minister of the Economy, who are summoned to a hearing before the Authority (in principle, at least three weeks later).

Following the hearing, the Authority adopts an opinion indicating whether it will grant total or partial immunity and specifying the conditions attached thereto. If the Authority considers that no immunity or reduction of fine may be granted, the undertaking can request the return of all elements of proof that it communicated.

When adopting the final decision on the merits of the case, if the undertaking has properly fulfilled the conditions set by the Authority in its opinion, it will be granted the

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11 Decision No. 14-D-19 of 18 December 2014 concerning the home and personal care products sector.
12 Article R464-5 of the FCC.
immunity or reduction of fine indicated in the leniency opinion. If the conditions attached to the leniency opinion have not been respected, the Authority may either not award any fine immunity or reduction, or it may lower the level of fine reduction awarded.

ii  Required conditions to benefit from leniency

Any applicant for leniency must:

- end its participation in the alleged anticompetitive activities immediately, and in any case, no later than the date of notification of the leniency opinion by the Authority (which may decide to postpone this date to preserve the confidentiality and efficiency of its investigation);\(^{13}\)

- cooperate fully and in good faith with the Authority as from the time of its application and throughout the investigation. In particular, the applicant must:
  - provide all evidence in, or that may come into, its possession relating to the suspected infringement;
  - not call into question at any time, and until the end of the proceedings, the factual elements that it revealed in the context of the leniency proceedings and underlying the leniency opinion, the materiality of the facts revealed, as well as the very existence of the practices;\(^{14}\)
  - promptly answer any request for information relating to the alleged cartel;
  - make available for questioning all current and, if possible, former employees and legal representatives;
  - abstain from destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and
  - abstain from disclosing the existence or the content of its leniency application (except to other competition authorities) before the Authority has issued its statements of objections, unless otherwise agreed; and

- not have taken any measures to coerce other undertakings into participating in the infringements.

In practice, the Authority accepted that a leniency applicant reveals anticompetitive conduct in which it was not directly involved, but was aware of, as long as material links existed between these and the practices in which the applicant directly took part.\(^{15}\)

Also, since the Revised Leniency Notice was brought into effect, a leniency applicant must provide all details about the entities its application intends to cover as only entities belonging to ‘a single economic unit’ at the time of the leniency application may be covered, excluding former parent companies.\(^{16}\)

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\(^{13}\) In a recent case, the Authority did grant total immunity to a company even though one of its representatives took part in a meeting after the leniency application at which illegal exchanges of information took place and in the absence of evidence that the representative left the meeting. This was because this behaviour did not prevent, delay nor made it more difficult to prove the existence of the infringement (Decision No. 15-D-19 of 15 December 2015 relating to practices implemented in the standard and express delivery industry).

\(^{14}\) Point 23(ii) of the Revised Leniency Notice 2015.

\(^{15}\) Decision No. 13-D-12 of 29 May 2013 concerning practices implemented in the distribution of commodity chemicals sector.

\(^{16}\) Point 16 of the Revised Leniency Notice 2015.
iii First in

The first eligible applicant receives total immunity, provided that it submits information and evidence that the Authority did not previously hold and that allows the Authority to carry out an investigation under judicial control.17 This requires the applicant to provide, at the very least, contact details of the other participants in the alleged infringement, a detailed description of the markets concerned and the infringing practices, all evidence in its possession, and information concerning any previous or planned leniency applications to other competition authorities in relation to the same practices.

If the Authority already has information on the practice revealed, the undertaking may qualify for total immunity if:

a it is the first to provide evidence that, from the Authority's point of view, is sufficient to enable it to establish an infringement of antitrust law;

b at the time of the application, the Authority did not have sufficient evidence to establish an infringement; and

c no undertaking has obtained a conditional opinion granting total immunity from fines for the alleged infringement.

iv Following applicants

Other undertakings can benefit from a reduction of fines by providing the Authority with evidence that has 'significant added value' (i.e., evidence that strengthens the ability of the Authority to prove the alleged infringement). In this respect, the Authority considers that elements of proof that are contemporaneous to the infringement add value as compared to ex post evidence, that evidence that directly establishes the infringement adds value as compared to evidence that establishes it indirectly and that evidence that is indisputable adds value as compared to evidence that is disputable.

To determine the level of fine reduction, the Authority will take into account the ranking, the time of the application and the extent to which the elements submitted bring significant added value to the case.

Further, if the applicant submits compelling evidence that establishes additional elements of fact with direct consequences on the quantum of the fine imposed to all cartel participants, this additional contribution will be taken into account in the setting of that applicant's fine (amounting to a partial immunity).

According to the Revised Leniency Notice, the second leniency applicant to provide significant added value shall expect, depending on the circumstances, a fine reduction ranging from 25 to 50 per cent. The third leniency applicant to come forward shall expect a fine reduction ranging from 15 to 40 per cent and any subsequent leniency applicant shall expect a maximum fine reduction of 25 per cent.18

17 Article L450-4 of the FCC; see Section II.
18 Point 21 of the Revised Leniency Notice 2015.
v Timing
The Revised Leniency Programme specifies that the Authority will publish a press release after it carries out a dawn raid, to give any company not targeted by the raid the opportunity to apply for leniency. (The press release will not name the companies subject to investigation.) The Authority will also publish a press release if it decides to close a case.\(^\text{19}\)

Timing for leniency application has been crucial in various recent cases, where the Authority dismissed applications for leniency on the grounds that it already had sufficient information from previous applications.\(^\text{20}\)

vi Confidentiality
The Authority asserts that it will keep the identity of the leniency applicant confidential for the duration of proceedings until the statement of objections is sent to the parties concerned.

This confidentiality shall be maintained within the limits of the national and EU obligations of the Authority. In particular, the Authority may communicate the information received by leniency applicants to the Commission or to other NCAs within the ECN. However, all NCAs have undertaken not to use information exchanged through the ECN to call into question a national leniency application. The Authority specified in its Revised Leniency Notice that oral statements made under the leniency programme will only be transmitted to other competition authorities, pursuant to Article 12 of Regulation (EC) No. 1/2003, provided that the conditions set out in the notice relating to cooperation are met, and the confidentiality guaranteed by the receiving authority is equivalent to that guaranteed by the Authority.

To ensure the efficiency of the leniency programme, Law No. 2012-1270 of 20 November 2012 provides that the Authority shall not communicate any documents produced or collected in the context of leniency proceedings to any judicial court requesting documents or consulting the Authority.

vii Effect of leniency on employees
When the Authority considers that the facts of the case should qualify for a criminal sanction pursuant to Article L420-6 of the FCC, it may refer the case to the state prosecutor’s office.

However, the Authority has undertaken not to refer a case where employees of the undertaking applying for leniency would be liable to be subject to such proceedings.

V PENALTIES
i Statutory framework
On 16 May 2011, the Authority adopted a Notice on the Method Relating to the Setting of Financial Penalties, the objective of which is to enhance the transparency of the method followed by the Authority in setting financial penalties and to provide up-front guidance to the parties.

\(^{19}\) As an example, the Authority published a press release after dawn raids on 6 April 2018 in the road freight transport sector. See www.autoritedelaconcurrence.fr/user/standard.php?id_rub=684&cid_article=3153&lang=en.

\(^{20}\) Decision No. 14-D-19 of 18 December 2014 concerning the home and personal care products sector.
This Notice explains in detail how the Authority sets financial penalties in each case, pursuant to the four criteria provided by Article L464-2 of the FCC:

\[ a \] the seriousness of the infringement;
\[ b \] the significance of the harm done to the economy;
\[ c \] the individual situation of the undertaking or of the group to which the undertaking belongs; and
\[ d \] reiteration.

Based on these criteria, the Authority uses the following method:

\[ a \] It sets a basic amount that represents a proportion of the value of the sales, made by each undertaking or entity at stake, of the products or services to which the infringement relates. The proportion of the value of the sales used to determine the basic amount depends on the seriousness of the infringement and of the importance of the harm done to the economy.

\[ b \] It adjusts the basic amount to take into account factors relating to the specific behaviour and the individual situation of each undertaking or entity at stake: mitigating and aggravating circumstances (such as ‘single-product’ undertaking), financial difficulties or to the contrary, economic power, *inter alia*.

\[ c \] It increases the amount in the case of reiteration.

\[ d \] It checks that the amount does not exceed the legal maximum (10 per cent of a company’s consolidated worldwide pre-tax turnover or €3 million for an individual), and it reduces the amount to be taken into account for leniency applications or transaction proceedings, and adjusted in view of the undertaking’s or entity’s ability to pay the fine, to the extent that such an adjustment is requested and warranted.\(^{21}\)

The Authority’s guidance takes into account, within the framework of the FCC, the ‘principles for convergence’ agreed upon by all the NCAs of the European Union to ensure the effective and consistent implementation of European competition rules.

In the settlement and leniency procedures, companies cannot challenge the existence of the infringement or their participation in the infringement, but retain the right to be heard on the amount of the fine. In practice, it may give rise to significant and lengthy debates.

Pursuant to Article 7 of Ordinance No. 2017-303 of 9 March 2017, the Authority may also reduce the financial penalty imposed on an undertaking that decided, during the proceedings before the Authority, to compensate the victims of the practices.

### ii Civil and administrative sanctions

A wide range of sanctions for an infringement of Article L420-1 of the FCC can, where justified, be applied by the Authority, such as injunctions, publication and fines.

#### Injunctions

The Authority may issue orders obliging the parties to terminate the anticompetitive practices within a determined period. This order may be sanctioned by a periodic penalty payment.

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The Authority may also issue injunctions through interim measures at the request of the parties initiating an investigation, provided that a strong presumption exists that the alleged practice will seriously and immediately affect the general economy, the economy of the concerned sector, or the interests of consumers or of the complainant.\footnote{Article L464-1 of the FCC.}

Article L464-9 of the FCC confers upon the Minister of Economy the power to issue orders obliging companies to terminate anticompetitive practices in cases where the affected market is local and the company’s turnover is below a given threshold (which are known as micro-practices). Under the same conditions and following proceedings detailed in the FCC, the Minister of Economy may also propose a settlement.

**Publication**

Pursuant to Article L464-2-I, Paragraph 5 of the FCC, the Authority may order publication of the decision at the undertaking’s expense, in particular in sectoral or generalist newspapers or in the annual report of the company.

**Fines**

The Authority can impose periodic penalty payments of up to 5 per cent of the average daily turnover of a company when a company fails to comply with its decision or a binding commitment.

As regards cases dealt with through the simplified procedure, the maximum fine that can be imposed on each party concerned is €750,000.\footnote{Article L464-5 of the FCC.}

Companies that obstruct an investigation risk a fine of up to 1 per cent of their consolidated worldwide pre-tax turnover.\footnote{Article L464-2 of the FCC.}

Litigation regarding the setting of the financial penalties and the application of the Authority Notice is increasing. As an example, almost all the companies appealed the Authority decision relating to the personal and home-care products sector on 18 December 2014 and the appeals were focused on the determination of the financial penalties.

### iii Mitigation of fines

With the implementation of Ordinance No. 2004-1173 of 4 November 2004, two procedures have been created to alleviate the Authority’s workload by offering a reduction of the potential fines: the commitment procedure and the settlement procedure.

**The commitment procedure**

The Authority can close a case without imposing any fine when the parties offer commitments that are sufficient to bring an end to the practices that the Authority suspects of being anticompetitive. On 2 March 2009, the Authority published a procedural notice on the commitments procedure that details the proceedings leading to the adoption of a decision. The commitment procedure does not apply to hard-core cartels or to any infringement that has already caused significant harm to the economy. Rather, its objective is to prevent such harm to the economy by allowing swift intervention (e.g., in markets undergoing liberalisation or characterised by fast innovation).
The commitment procedure does not entail an admission of guilt and it can only be entered into before the Authority issues a statement of objections. If the commitment procedure fails, the Authority will withdraw from the case any document obtained during the procedure.

Commitment decisions are published on the Authority’s website. They do not offer conclusions regarding the existence of an infringement, but merely summarise the Authority’s suspicions and explain why it considers that the commitments remedy such suspicions. Legally, it is always possible for a third party to bring an action for damages.

**The settlement procedure**

The settlement procedure was created in 2001. It was significantly amended, with effect from 6 August 2015.

Under the revised procedure, the rapporteur-general can submit a settlement offer to an undertaking that has decided not to challenge the statement of objections. The focus of the discussion between that undertaking and the rapporteur-general relates to the maximum amount of the fine that could be imposed (in the former procedure, the discussions related to the amount of the fine reduction, at a moment where the undertaking did not have an indication of the potential total amount of the fine). The aim of this new procedure is therefore to increase the predictability of the amount of a fine.

In the context of a settlement procedure, companies can also offer to make commitments to further mitigate the amount of a fine. Such commitments used to be almost exclusively related to the implementation of compliance programmes. The Authority now considers that compliance programmes should be part of the normal course of business of undertakings. Consequently, these programmes will not generally justify a mitigation of the fine any more, and especially concerning serious breaches, such as information exchanges about future prices.

Under the old settlement proceedings and following the Authority’s decision in the Detergent cartel case, companies could – if the general case handler deems it appropriate – combine the benefits of leniency with the settlement procedure. This may apply, in particular, if the objections notified to the undertaking in question differ on one or more significant aspects from the content of its leniency application. Such a situation arose in a decision in which the Authority granted a company (Univar) a reduction of 20 per cent of its fine on the basis of its leniency application, and an additional reduction of 15 per cent of the fine based on the settlement procedure.

**iv Criminal sanctions**

Criminal sanctions very rarely occur in French law. Only those individuals who have fraudulently taken a personal and decisive part in the conception, organisation or implementation of the prohibited practices can be fined up to €75,000 and even sentenced to a four-year term of imprisonment. The criminal court may order the undertaking to pay the criminal fine imposed on an employee.

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25 Decision No. 11-D-17 of 8 December 2011 concerning practices implemented in the laundry detergents sector.
26 Decision No. 13-D-12 of 29 May 2013 concerning practices implemented in the distribution of commodity chemicals sector.
27 Article L420-6 of the FCC.
28 Article L470-1 of the FCC.
Since the implementation of Criminal Law No. 2004-204 of 9 March 2004, criminal sanctions (fines only) can now also be imposed on companies infringing Article L420-1 of the FCC.

Such criminal sanctions cannot be issued by the Authority, which is only empowered to refer the criminal part of the case to the state prosecutor.

VI ‘DAY ONE’ RESPONSE

The Authority has extensive powers to conduct investigations (as described in Section I.iv) and any attempt to oppose an investigation may result in a fine.29 Therefore, it is of utmost importance that an undertaking subject to such an investigation is assisted by legal counsel as quickly as possible to efficiently protect its rights of defence without placing itself at risk.

In the event of an unexpected investigation, such as a dawn raid, an undertaking should immediately form a team of employees prepared to respond to such an investigation (including in-house and external counsel) and who will accompany the investigators. The identity of the inspectors should be checked and a copy made of the judicial authorisation.

The local representative of the company should lead the inspectors to their designated office and discuss the further practical proceedings. At that point, it is important to clarify the extent and the goal of the inspection, and which products, documents, time periods and countries the inspectors are interested in. Only documents covered by the scope of the investigation may be consulted and seized. Usually, however, the inspectors will only communicate the purpose of the inspection in a very broad manner. Employees should not destroy any document or electronic data (during or after the investigation) or try to warn other undertakings about the inspection. Generally, the inspectors will not wait until external legal counsel arrives on the premises before they begin the inspection. It is also recommended that the envisaged duration of the inspection be discussed, and secretaries named to note the exact questions asked by the inspectors and answers given by employees, to specify in writing all documents inspected and to make copies of all documents seized.

Employees or representatives of the undertakings should offer to assist the inspectors with copying documents. This could make it easier for the undertaking to make its own copies of the documents. Undertakings subject to inspection should also name one or more contact persons who will be the only individuals with the authority to provide any kind of information to the inspectors.

It is also important to try to create a friendly and cooperative atmosphere. As a general rule, however, it is advisable to avoid conversations of a general nature, in particular regarding the position of the employees in the undertaking. In such informal conversations there is always a danger that incriminating information regarding the subject matter of the inspection is unwittingly disclosed to the inspectors.

It is also useful to make at least two copies of the documents inspected (one for the undertaking and one for external legal counsel), and it is preferable to give only an oral explanation when questions are directly related to such documents.

Undertakings should not communicate to an inspector documents that are legally privileged (i.e., any exchange of correspondence between the undertaking and external counsel, or any other internal document summing up such exchange or correspondence).

29 See Section II of this chapter.
VII PRIVATE ENFORCEMENT

i The contribution of Directive 2014/104/EU

Private damages claims can be initiated before ordinary courts. Until recently, no specific rules applied, meaning that a claimant had to prove, pursuant to the default rules of tortious liability, that it had suffered harm caused by a defendant's wrongdoing.

Ordinance No. 2017-303 of 9 March 2017 implemented Directive 2014/104/EU, which governs actions for damages under national law for infringements to national and European competition law provisions. Some of its procedural aspects are already applicable. Its main substantive provisions are applicable to infringements committed as from March 2017.

Several important rules have been provided by this new legislation:

a Once a decision of the Authority or a French court can no longer be appealed and holds that an undertaking has taken part in an infringement, the participation of that undertaking to the infringement is presumed and cannot be rebutted. (New Article L481-2 of the FCC)

b The claimant is generally presumed not to have passed on the cartel overcharge to its own clients, so that it is up to the defendant to prove that the claimant did pass on the cartel overcharge. When the claimant considers it was harmed by its supplier passing on the cartel overcharge from its own supplier, the claimant will have to prove that its supplier did in fact pass on that cartel overcharge, and may do so by proving that (1) the defendant took part in an infringement to competition law; (2) that infringement caused the claimant’s supplier to pay a cartel overcharge; and (3) the claimant purchased the goods or services affected by that overcharge. In that case, the defendant has to prove that the claimant’s supplier did not pass the overcharge on to the claimant. (New Articles L481-3 and L481-4 of the FCC)

c Agreements among competitors are presumed to cause harm but this presumption can be rebutted. (New Article L481-7 of the FCC)

d If several undertakings participate in an anticompetitive practice, they are jointly and severally liable for all the damages. Once ordered to compensate the claimants, they will be able, as a second step, to seek compensation one from another. (New Article L481-9 of the FCC)

To access the documents relating to competition cases, Article L462-3 of the FCC states that the Authority may provide any document concerning anticompetitive practices on judicial request, excluding all information obtained through the leniency programme. In order to obtain the judicial request, a party has to prove that the documents are not in its possession and that they are necessary for its defence. The Paris Court of Appeal has clarified that this applies both to the claimant and the defendant so long as the requested information is necessary to the exercising of their rights.30

ii Class actions

Class actions have been available in France since 1 October 2014, after the adoption of the Hamon Law on 17 March 2014 and its implementing decree on 24 September 2014.

30 Paris Court of Appeal, Decision No. 12/06864 of 24 September 2014.
Class action is an opt-in, two-phase procedure. Duly authorised associations for the defence of consumers can introduce these actions to claim compensation for actual damage to economic interests resulting from any failure by a business to comply with its obligations, legal or contractual, for the supply of goods or services.

During the first phase, the judge rules on the liability of the undertaking. As regards antitrust damages, the liability of the undertaking is established once a final decision of a European or national authority or jurisdiction is adopted. This decision has to be definitive, at least as regards the liability of the undertaking. In the ruling on the liability, the tribunal has to specify in particular:

- the harm that might be compensated and its amount, or at least a method of calculation;
- the publicity measures to be taken to inform the consumers concerned, which will be implemented once the liability decision is definitive;
- the deadline (between two and six months after the publicity measures) for the consumers concerned to declare their intention to participate in the class action; and
- the deadline within which consumers must obtain compensation.

To join a class action, a consumer has to explicitly mandate the association and specify the amount of compensation requested. In the event of multiple associations, the consumer has to declare his or her membership of an association either to one of the associations or directly to the undertaking against which the class action is implemented. The class action may only include consumers who are in a similar or identical situation with respect to the same undertaking.

During the second phase, compensation is determined individually for each consumer. The disputes raised by the implementation of the liability judgment are submitted to a pretrial judge. In the case of a dispute before the pretrial judge, the deadline within which the consumers must receive compensation is suspended.

Mediation can take place at any time. However, the agreement should receive judicial approval.

We are not yet aware of any class actions lodged following a decision by the Authority to fine undertakings for breach of competition law.

VIII CURRENT DEVELOPMENTS

The main current developments under French law in the application of cartel and leniency regulation are as follows.

First, at the level of the Authority:

- The new President of the Authority recently announced the next priorities of the competition regulator as being the digital sector, the public health sector and the large retail sector. The Authority published a sector-specific investigation into online advertising in March 2018. Concerning the public health sector, the Authority


opened a sectoral inquiry into the pharmaceutical industry in November 2017. Within this framework, the Authority launched a public consultation in October 2018 to collect contributions from the relevant companies. Finally, concerning the large retail sector, parliament has enacted a new law to widen the scope of the Authority’s powers: Article L462-10 of the FCC now provides that certain purchasing agreements between undertakings active in the retail sector have to be provided to the Authority at least four months prior to their implementation. It is now foreseen that the Authority can assess the implementation of such purchasing agreements, on its own initiative or at the request of the Minister for the Economy. On such an occasion, it assesses whether the purchasing agreement makes a sufficient contribution to economic progress to compensate for possible restrictions of competition, taking into account its impact for producers, suppliers and retailers as well as for consumers. For this purpose, the Authority may request the parties to the agreement to submit a report showing the effect on competition of this agreement. If anticompetitive effects have been identified, the Authority sets a deadline for the parties to remedy those effects. The Authority may also take interim measures if the damage to competition is sufficiently serious and immediate. These may include an injunction to the parties to undo their cooperation or request a modification of the agreement.

In addition, there seems to be a growing trend for the Authority to rely on criminal investigations in France, which are more intrusive than dawn raids carried out pursuant only to the rules of competition law.

Second, follow-on litigation appears to intensify (with the exception of class actions) in the context of the implementation under French law of Directive 2014/104/EU on damages (although the French legal framework to implement that Directive is not yet applicable to most claims we have seen, those claims frequently, but wrongly, purport to rely on the various presumptions that have been created). This development of follow-on litigation is clearly encouraged at the national level. The Ministry of Justice has circulated a non-binding information memorandum on various practical aspects of follow-on litigation, and the Paris Court of Appeal has published a guide on how to estimate damages in competition law cases.

Third, the ECN+ Directive, the aim of which is to ‘empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the markets’, was adopted by the European Parliament on 14 November 2018. In French law, a legislative process that would tend to bring domestic legislation in line with this Directive is under way. Different measures are suggested to simplify the procedures and facilitate the work of the Authority while preserving its effectiveness.

33 Decision No. 17-SOA-01 of 20 November 2017 relating to the functioning of competition in the medicinal products and chemical pathology sectors.
35 Law No. 2018-938 to promote balanced commercial relationships in the agricultural and food sector and healthy, sustainable food has amended this article in November 2018.
Chapter 9

GERMANY

Petra Linsmeier and Matthias Karl

I ENFORCEMENT POLICIES AND GUIDANCE

Germany continues to be one of the hot spots for competition law. The Federal Cartel Office (FCO) is one of the most active competition authorities. In addition, a lot of damages claims are ongoing in Germany, the most prominent being the Truck cases. This trend for damages proceedings is further enhanced by the ninth amendment to the Act Against Restraints on Competition (ARC), which came into force on 9 June 2017 and has shown its first effects in the past few months. It not only implements the EU Directive on actions for damages for competition law infringements (the Damages Directive) but also introduced other significant changes (such as a new merger control threshold, special rules for market power in the digital economy and an extended parental liability). In its enforcement practice, the FCO focuses largely on ‘classic’ hard-core cartels but also on vertical restrictions. The internet economy continues to be high on the FCO’s agenda, as reflected by an ongoing investigation against Facebook (for which the statement of objections was sent to Facebook in December 2017 and where the decision is expected in early 2019) and proceedings concerning the online booking portals HRS and Booking.com, as well as selective distribution systems (e.g., Asics). In addition, the FCO opened proceedings against Amazon because of an alleged abuse of its market position in 2018: the FCO is investigating liability rules, withheld payments, seller accounts being blocked without explanation, the use of sellers’ information and other rules that seem to put sellers at a disadvantage. This investigation runs in parallel with the European Commission’s investigation of Amazon’s dual role as market place and reseller.

The FCO’s competencies have been extended to include responsibility for consumer protection issues. Although its powers in this regard are currently limited to sector enquiries, the FCO has already demonstrated that it intends to make use of these new powers intensively, having started two such enquiries within the first few months of practice and publishing the first results at the end of 2018.

When enforcing its policies, the FCO can make use of its huge resources (approximately 345 employees and several specialised enforcement units). The FCO also has far-reaching powers when it comes to dawn raids. The Special Unit for Combating Cartels (SKK) has the task of assisting the relevant decision-making divisions in the FCO, which are competent for all antitrust and merger cases relating to specific industrial sectors, in uncovering cartel agreements by deploying specialised personnel.

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1 Petra Linsmeier and Matthias Karl are partners at Gleiss Lutz.
2 Section 32e of the German Act against Restraints on Competition (ARC).
German competition law corresponds to EU competition law as far as anticompetitive agreements are concerned. Interpretation of the ARC must, in general, be in accordance with EU competition law.

The willful or negligent violation of Section 1 of the ARC (and of Article 101 of the Treaty for the Functioning of the European Union (TFEU)) can be fined as an administrative offence. The amount of the fine may be up to €1 million; beyond that, for each undertaking and association of undertakings participating in the infringement, the fine can be higher, but may not exceed 10 per cent of total turnover in the preceding business year. Section 1 of the ARC is addressed to undertakings and associations of undertakings. These entities are subject to the ARC and can be fined for competition law infringements under Section 81. German law also provides for the possibility of fining certain natural persons (a legal representative or other person in a comparable position) if such a person has personally contributed to the infringement or has not taken appropriate measures to prevent the anticompetitive conduct.

The FCO adopted formal guidelines on the calculation of fines on 15 September 2006, which, as a consequence of the *Grey cement* judgment of the Federal Court of Justice, were amended on 25 June 2013. In terms of policy and methodology, the initial notice followed the European Commission’s guidelines regarding the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No. 1/2003. In particular, the provision in Section 81(4) of the ARC (10 per cent limit) was interpreted as a cap for fines in antitrust violations, while the amended notice, as a consequence of the Federal Court of Justice’s *Grey cement* judgment, slightly deviates from this approach. However, the appeal court (Higher Regional Court of Düsseldorf) does not follow these guidelines, but often increases fines imposed by the FCO, using the 10 per cent limit as the highest amount possible when calculating a fine.

In addition, the FCO adopted a notice containing leniency regulations on 7 March 2006 (the Leniency Notice). The Leniency Notice takes account of both EU leniency policy and the model leniency programme developed by the European Competition Network (ECN). According to its wording, it only covers cartels. However, in practice, the FCO is prepared to take into account the cooperation of a participant in anticompetitive vertical behaviour and to grant significant reductions comparable to those under the Leniency Notice. This will most probably also be true for potential hub-and-spoke cases (but no case law exists at present).

In 2015, the FCO imposed a fine on a cartel for the first time (relating to car parts), which came to light through a tip-off via its whistle-blower hotline, which was established in 2012 and complements its leniency programme. Thanks to this hotline, interested parties may submit their information anonymously; according to the FCO, this has proven very effective. It is one of the reasons why the FCO claims that it has been less affected by the decline in leniency applications being felt at European level during the past few years. Another reason is that many investigations by the FCO were started because of complaints from competitors.

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3 Section 81(4)1 ARC.
4 Section 81(4)2 ARC.
5 Sections 130 and 30 of the Administrative Offences Act.
6 German Federal Court of Justice, decision of 26 February 2013, KRB 20/12 – *Grey cement* cartel.
7 Notice 38/2006 and Notice on calculation of fines in cartel cases, as amended on 25 June 2013.
8 See, for example, Higher Regional Court of Düsseldorf, decision of 12 October 2017, ECLI:DE:OLGD:2017:1012.2KART1.17OWI.00 – *Wallpaper* cartel.
9 Notice 9/2006 on the immunity from and reduction of fines in cartel cases (the Leniency Notice) – available in German, English and French on the FCO website (www.bundeskartellamt.de), as are all official legal texts and documents relating to German competition law.
and customers and the FCO’s own initiative. According to statistics available on the FCO website, only around 50 per cent of cases were started because of leniency applications. Nevertheless, according to the latest FCO statistics (orally communicated), the number of leniency applications decreased from 76 in 2015 to 27 in 2017, and fewer again in 2018. Most likely, the huge claims for damages that cartel members face nowadays are the main cause of this decline.

In 2017, the Federal Court of Justice also rendered a noteworthy judgment on compliance programmes. While this judgment focused on criminal and tax law, the part about compliance programmes, namely that the implementation of a compliance programme could lead to a reduction in the fine, is also important for other areas of law. Taking this judgment into consideration, the FCO intends to implement new guidelines. It feels forced to do so also because of the new competition registry that it has to implement by 2020, which will list companies that have violated competition law, among other things. Entries on the register for cartel violations may lead to exclusion from public procurement for up to three years. However, this period may be shortened if the company manages to prove that it ‘cleaned itself’, and the new guidelines will help companies to understand which criteria they need to fulfil to have their entry deleted.

II COOPERATION WITH OTHER JURISDICTIONS

The FCO has signed the statement regarding the Commission Notice on cooperation within the Network of Competition Authorities. It has thereby agreed to the exchange of information, mutual consultation, coordination of investigations, inspections on behalf of other competition authorities and discussions on the proposed course of action among European competition authorities. Specifically, the FCO is obliged to inform and liaise with both the European Commission and other national competition authorities (NCAs) within the ECN. Regarding leniency applications, the FCO is only obliged to pass on leniency applications and related documents to other authorities of the ECN in the cases specified in the Commission Notice. The most important case in this respect is where the applicant has consented to the information being passed on to another authority.

The Leniency Notice allows for the fact that an applicant for leniency might also file an application to the European Commission. In order to be informed of such potentially concurrent proceedings, the Leniency Notice obliges the applicant to state whether, and to which other competition authority, an application for leniency has been, or will be, filed besides the application to the FCO. If the applicant has also applied, or intends to apply, to the European Commission, and if the Commission is the best-placed authority according to the criteria of the Commission Notice on cooperation within the Network of Competition Authorities, then the FCO may exempt an undertaking that has placed a marker (see Section IV) from submitting a complete application. Whether the FCO grants this exemption depends on whether the Commission actually picks up the case. This merely confirms that the FCO respects the priority of proceedings at EU level in accordance with Article 11(6) of Regulation (EC) No. 1/2003.

10 German Federal Court of Justice, decision of 9 May 2017, 1 StR 2651/16.
The Leniency Notice contains no indication that an application in another EU Member State will have an effect on the applicant’s position in the proceedings in Germany, nor in what other way the FCO will interpret the relationship between the German proceedings and the others. An applicant will therefore have to file its application in any Member State in which it can expect to be liable to a fine.12 The FCO can be expected to apply the Commission Notice on cooperation within the Network of Competition Authorities in that respect. It also seems as if the new Directive of the European Parliament and European Council to empower the competition authorities of the Member States to be cost-effective enforcers and to ensure the proper functioning of the internal market (the ECN+ Directive) will not result in much change to the FCO’s enforcement practice.

The applicant must expect the FCO to share the information contained in the application with other competition authorities; however, the FCO will treat the identity of the applicant and its trade and business secrets as confidential, but only until a statement of objections has been issued to a cartel participant.

Besides the cooperation within the ECN, the US and German governments concluded an agreement on mutual cooperation regarding restrictive business practices on 23 June 1976. On the basis of this agreement, the FCO, the US Department of Justice and the Federal Trade Commission may exchange information, encompassing documents, memoranda and other materials, with regard to anticompetitive practices that have an effect on trade in the respective authority’s jurisdiction. What is more, the cooperation encompasses the right to send requests for information by one authority to undertakings domiciled within the other authority’s jurisdiction. Most importantly, the authorities will consult each other with respect to investigations relating to the same cartel activity having effects in both jurisdictions.

It must be stressed that pursuant to Section 50(b) of the ARC, the FCO is generally entitled to cooperate with NCAs of other EU Member States, and with other competition authorities outside the European Union; however, it has to observe certain limitations on the exchange of information containing confidential data, business secrets, and the like.

### III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

The FCO is entitled to investigate any agreement or conduct that raises concerns regarding its compatibility with German and EU competition rules.13 As a consequence, companies that are domiciled outside Germany may be investigated if they have engaged in anticompetitive behaviour that might have an effect on the German market.

The FCO’s investigative powers are fairly broad, but it is not authorised to execute investigative measures outside Germany; rather, the FCO has to rely upon legal and administrative assistance from other authorities, particularly within the framework of the ECN. In this context, the FCO might not be regarded as the best-placed authority to investigate a matter on the basis of joint conclusions among the ECN authorities as to the allocation of cases among the competition authorities within the ECN (see Section II).

However, during dawn raids the FCO feels competent to look into and to ask for IT data located on servers outside Germany as long as the company under investigation, the servers of which are based abroad, can access these data.

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12 Confirmed by European Court of Justice, C-428/14, ECLI:EU:C:2016:27.
13 Section 185(2) ARC.
IV LENIENCY PROGRAMMES

According to the FCO’s Leniency Notice, cartel members can receive (complete) immunity from fines or a reduction in fines of up to 50 per cent. As mentioned in Section II, according to the wording of the Leniency Notice, this only applies to cartels, not to vertical infringements or cases of unilateral abuse of market power. And yet, in practice, the FCO is prepared to take into account the cooperation of a participant in anticompetitive vertical behaviour and to grant significant reductions comparable to those under the Leniency Notice. For example, in the Lego case, cooperation with the FCO was one of the reasons for Lego’s small fine (only €130,000). A similar approach will most probably be taken in potential hub-and-spoke cases (which have not yet been explicitly fined, but more often declared to be vertical cases) and in unilateral conduct cases. However, there are no formal, specified rules in that respect, only the FCO’s statement on its website, according to which a cooperation may be taken into account when assessing the fine even though the Leniency Notice only applies in cases of horizontal agreements and concerted practices among competitors. The question of whether a leniency applicant qualifies for one of these options is particularly dependent upon the timing of the leniency application, the role the applicant played in the cartel, and the extent and nature of its contribution during the infringement proceedings.

Full immunity will be granted only to the first-in applicant and only under certain circumstances. The first applicant may be granted full immunity even after the FCO has learned of the cartel infringement and even if it was already in a position to obtain a search warrant. Subsequent applicants, or applicants not fulfilling the preconditions for full immunity, may receive a reduction of up to 50 per cent. If the applicant played a decisive role in the cartel, it cannot receive full immunity but is not generally excluded from being granted a reduction in the fine. As a further important condition, cooperation with the enforcement authority must be continuous and without reservation.

The Leniency Notice provides for the possibility of placing a marker (i.e., a cartel member’s declaration of its willingness to cooperate). The FCO will acknowledge receipt of the marker but will generally not decide on the extent of the reduction in the fine until the final decision is adopted. Only if the marker refers to an application for complete immunity will the FCO issue an assurance during the course of the proceedings that the applicant will be granted full immunity, provided that it was not the only ringleader of the cartel and did not coerce other undertakings into participating in the cartel.

There are no clear-cut requirements for a successful leniency application. The Leniency Notice requires any applicant to cooperate fully and continuously. The applicant is expected to provide all verbal and written information available to it, including documents and evidence relating to the cartel. In particular, all information necessary for calculating the fine must be handed over. Furthermore, the identity of all employees involved in the cartel agreement must be disclosed. If the application is intended to be filed for more than one legal entity belonging to the same group, the respective affiliated companies must be named in the application. The duty to hand over information, in whatever form, does not end with filing the application but continues throughout the proceedings. The FCO will not consider the cooperation as fulfilling the aforementioned requirements if the leniency applicant merely submits information or documents without any further explanation. In particular, the cooperation requires an oral or written description of the relevant cartel behaviour, including the time and place of meetings, details of the illegal behaviour and the identities of the companies involved.

To receive full immunity, the leniency application must enable the FCO to initiate further investigatory measures. Full immunity will be granted only if the application enables
the FCO to obtain a search warrant. If the FCO has already been able to obtain a search warrant with the information available to it, the applicant will be granted full immunity only if the information in the application enables the FCO to prove the offence. Consequently, the leniency applicant is required to gather and present the documents and the factual background of the relevant cartel behaviour to increase its chances of meeting these thresholds.

On the basis of the Leniency Notice, the conditions for full immunity depend on whether the FCO already has sufficient evidence to obtain a search warrant. If this is not the case at the time the application is filed, the applicant will automatically receive full immunity if it:

a. is the first participant in a cartel to contact the FCO before it has obtained sufficient evidence to obtain a search warrant;

b. provides the FCO with verbal and written information and, where available, evidence that enables it to obtain a search warrant;

c. ends its involvement in the cartel immediately on request by the FCO;

d. was not the only ringleader of the cartel and did not coerce others into participating in the cartel; and

e. cooperates fully and continuously with the FCO.

If, at the time the application is filed, the FCO is already able to obtain a search warrant, full immunity will be granted, as a rule, if:

a. the applicant is the first participant in the cartel to contact the FCO before it has sufficient evidence to prove the offence;

b. the applicant provides the FCO with verbal and written information and, where available, evidence that enables it to prove the offence;

c. the applicant ends its involvement in the cartel immediately on request by the FCO;

d. the applicant was not the only ringleader of the cartel and did not coerce others into participating in the cartel;

e. the applicant cooperates fully and continuously with the FCO; and

f. no cartel participant has been granted immunity before this applicant.

A sole ringleader of a cartel or an undertaking that has coerced other undertakings into participating in a cartel will not be eligible for full immunity under any circumstances. The Leniency Notice requires that the applicant ceases its participation in the cartel on request by the FCO.

With regard to the reduction in the fine, the Leniency Notice requires the applicant to hand over all the information and evidence it has available that makes a significant contribution to proving the offence. The value of the contributions to uncovering the illegal agreement is one decisive aspect in the amount of the reduction granted to the applicant. This provision proves to be problematic in practice. Companies that do not have particularly incriminating documents or information may be provoked into exaggerating the information in their possession and the facts that can be proved thereby.

Leniency applicants subsequent to the first-in, or not qualifying for full immunity under the first-in rule, may receive reduced fines. The maximum reduction that can be granted is 50 per cent. Applicants may receive full immunity even if they are not the first-in. The Leniency Notice does not exclude the possibility of the second applicant moving into the position of the first applicant. This might be the case if the first applicant is the sole ringleader or does not fulfil its obligation to cooperate. The prospect of overtaking the first applicant intensifies competition between applicants to offer the most value.
To qualify for a reduction, the applicant must adhere to the following obligations:

\[\begin{align*}
& a \quad \text{It must cooperate fully and continuously for the entire duration of the proceedings.} \\
& b \quad \text{It must hand over all the information and evidence available to it that is likely to make a significant contribution.}^{14} \\
& c \quad \text{It must end its involvement in the cartel immediately on request by the FCO.} \\
& d \quad \text{It must maintain confidentiality regarding its cooperation with the FCO until explicitly relieved thereof.} \\
& e \quad \text{It must name all employees involved in the cartel and ensure that they all adhere to the cooperation obligation.}
\end{align*}\]

Provided that the applicant fulfils these obligations, the FCO will determine the reduction in the fine on the basis of the value of the contribution and the order of applications.

No rules exist regarding immunity plus or amnesty plus. In addition, no rules exist as regards cooperation with the criminal prosecutors. In bid rigging cases for which criminal sanctions apply,\(^{15}\) this can create major issues for natural persons. They may be prosecuted even if they are granted full immunity by the FCO. In addition, the approach of the criminal prosecutors is hard to predict since there is not just one criminal prosecution office in Germany responsible for these kinds of offences; each competent local criminal prosecutor may take up such cases.

An application can be made as long as the FCO has not concluded the proceedings by way of a formal decision. In particular, a reduction is not excluded because the initiation of the investigation has become known; however, the later the applicant decides to file an application and the more information the FCO has already collected, the less significant the applicant’s information will be. On the other hand, the order of applications is not the only factor used in determining the amount by which a fine is reduced. If an early applicant is not able to present valuable information, then a later applicant will be able to achieve a more significant reduction by presenting data of greater value.

The applicant may initiate the leniency proceedings by contacting the special unit for combating cartels or the chairman of the competent decision-making division of the FCO.\(^{16}\)

The applicant, as already mentioned, may place a marker by announcing its unreserved willingness to cooperate with the FCO. Placing the marker does not require the undertaking to submit a complete application; it only has to contain a summary of the most important identifying features of the cartel, including details of the type and duration of the infringement, the product and geographical market affected, the identity of those involved and the other competition authorities to which applications have been, or are intended to be, filed. If the marker is intended to be placed for more than one legal entity belonging to the same group, the respective affiliated companies must be included in the marker. The marker may be placed verbally or in writing, and may be in English or German.

The FCO will then confirm that a marker has been placed and will set a time limit of not more than eight weeks for filing the complete application for leniency, containing all the necessary information. The application may be filed in written or verbal form and either in

\[\begin{align*}
& a \quad \text{There is no explicit definition of significant contribution in the Leniency Notice. The FCO has a very broad discretion as to whether it grants any reduction at all.} \\
& b \quad \text{Section 298 of the Criminal Code.} \\
& c \quad \text{Contact details are: Bundeskartellamt, Dr Katrin Roesen, Kaiser-Friedrich-Strasse 16, 53113 Bonn, Germany; Tel: +49 228 9499 386; Fax: +49 228 9499 560.}
\end{align*}\]
German or in English. In the latter case, a written German translation must also be provided. An application submitted by an undertaking will also be treated by the FCO as an application for its current and former employees, unless otherwise indicated. The FCO may exempt the applicant from filing a complete application if the European Commission is the best-placed authority to decide on the case and if the applicant intends to file, or has already filed, an application to the Commission.

Generally speaking, the FCO is an authority with a pragmatic and not very formalistic approach. This is also true when it comes to cooperation under the Leniency Notice.

V PENALTIES

A violation of ARC provisions is not in itself a criminal offence, but if the antitrust behaviour includes criminal offences such as bid rigging, the FCO must refer proceedings against any natural person to the public prosecutor under Section 41 Administrative Offences Act. As mentioned in Section IV, cooperation with the FCO may be relevant as a mitigating factor in any criminal proceedings, but generally does not prevent them.

If the FCO establishes an infringement of Section 1 of the ARC (or Article 101 of the TFEU), it might impose administrative fines against both the acting employees and the undertaking. The fine might be as much as €1 million or up to 10 per cent of the total turnover generated by the undertaking and its affiliates worldwide in the preceding business year. As mentioned in Section I, the FCO calculates fines on the basis of guidelines that were initially adopted in 2006 and amended as a consequence of the Federal Court of Justice’s Grey cement decision. The FCO’s method differs from the approach taken by the European Commission.

First, it is important to note that the FCO, pursuant to the Grey cement decision, does not treat the 10 per cent threshold regarding the cartelist’s worldwide group turnover as a cap, but rather as the maximum for a framework within which each fine must be calculated. Generally, the FCO takes account of 10 per cent of the turnover achieved from sales of the cartelised products or services during the existence of the cartel. The established amount will be multiplied by a factor that is dependent on the total turnover of the undertaking belonging to the investigated cartel. The factor ranges between two (for undertakings with an annual aggregate worldwide turnover of up to €100 million) and six (for undertakings with an annual aggregate worldwide turnover of more than €100 billion). This amount will be adjusted by specific circumstances relating to either the undertaking (e.g., level of activity in the cartel infringement, market position in the affected market) or the specific character of the cartel infringement (e.g., effects on the market, significance of the market, organisation of the cartel). Thus, the FCO must take into account both aggravating and mitigating factors.

However, as mentioned above, the competent appeal court, the Higher Regional Court of Düsseldorf, interprets the rules resulting from the Grey cement decision more strictly. As a result, the Court often increases fines significantly during proceedings against FCO fines. This leaves companies in the uncomfortable situation of only challenging fines imposed by the FCO if they are willing to take the risk that the court may increase the fine significantly.

In the case of a leniency application, the exact amount of the reduction will be decided in the FCO’s final decision. Generally, after receiving a leniency application, the FCO will only confirm receipt of the complete application; it will not decide whether and to what extent immunity or a reduction will be granted. The FCO will state only how the applicant is ranked and whether it fulfils its cooperation duties. Only if the undertaking fulfils the conditions for automatic full immunity (i.e., it applies for leniency before the FCO has sufficient information
to obtain a search warrant) will the FCO ‘assure the applicant in writing that it will be granted immunity from the fine subject to the conditions that it was neither the only ringleader of the cartel nor coerced others into participating in the cartel and fulfils its obligations to cooperate’.

As to the sanctioning of individuals, it is important to distinguish between employees entitled to represent the undertaking or to exercise managerial functions on the one hand, and those who are not entitled to do so on the other. If the latter engage in antitrust behaviour, they do not violate ARC provisions as their actions cannot be attributed directly to their employer. However, if their behaviour is facilitated by a lack of internal supervision, the people entitled to represent the undertaking or to exercise managerial functions will have violated their duty to supervise the undertaking within the meaning of Section 130 of the Administrative Offences Act, and can therefore be fined. The violation of this duty is an administrative offence that is imputed to the relevant undertaking under Section 30 of the Administrative Offences Act, which may then also lead to fines.

The Leniency Notice explicitly states that a leniency application filed on behalf of an undertaking will also be rated by the FCO as made on behalf of the natural persons participating in the cartel as former or current employees of the undertaking in question. However, an undertaking may declare that the application shall not be treated as representing its employees. The FCO leaves open the question of whether an application by a natural person on his or her own behalf will also be treated as representing the undertaking in question; it is generally assumed that this is not the case.

If the undertakings that are the subject of a fine have agreed to settle with the FCO, the FCO generally grants an extra bonus of 10 per cent of the initial fine.

VI ‘DAY ONE’ RESPONSE

Like the European Commission, the FCO is entitled to conduct inspections (dawn raids) of not only the premises of an undertaking but also private homes and cars, *inter alia*. In the event of a dawn raid, immediate action is required. It is advisable for an undertaking to have dawn-raid guidelines in place and properly implemented. It is of the utmost importance that an undertaking’s personnel are well aware of the steps that must be taken immediately after the FCO requests access to the premises.

First, it is crucial that the legal department and the responsible board members are informed immediately. Second, the legal representative should carefully review the search warrant that must be disclosed by the FCO’s officials. Third, the undertaking’s employees must not interfere with any investigative activities, otherwise the undertaking runs the risk that obstruction might be taken into account as an aggravating factor for the purposes of calculating the fine. Fourth, it is important to retain copies of the documents seized by the FCO officials. While the European Commission is only allowed to take copies of the original documents, the FCO usually insists on seizing the originals. It is therefore essential that the undertaking is in possession of copies of such documents to prepare a meaningful defence. The FCO is also authorised to seize electronic data; however, it is obliged to review the seized data within a reasonable period of two to three weeks to determine whether it might be used as evidence for the purposes of the investigation. If the seized data is not to be used for that purpose, it must be returned to the undertaking without delay. Finally, it is important to have a debriefing meeting with FCO officials, and advisable to have minutes taken directly at this meeting. Usually the FCO officials have a template available that can be used for this purpose.
If the FCO does not conduct a dawn raid but instead sends out a request for information, it is important that the request is answered by the undertaking within the set time frame (subject to a potential extension of the deadline) and that the response is correct and comprehensive, otherwise the undertaking runs the risk of being fined for non-compliance with the FCO’s investigation.

VII PRIVATE ENFORCEMENT

Germany is one of the jurisdictions within Europe where many follow-on damage actions are filed. Many legal issues relating to damages claims have already been clarified by the German courts (such as the standing of indirect customers, and the possibility of the pass-on defence). In addition, many topics within the Damages Directive have already been part of German law since the sixth amendment to the Act against Restraints on Competition in 2005. Nevertheless, the implementation of the Damages Directive by way of the ninth amendment to the Act has led to significant changes in German law: the amended ARC provides for the following.

i Standing of indirect purchasers and passing-on defence

Under German law, both direct and indirect customers have standing and may claim damages. The Federal Court of Justice confirmed the right of indirect purchasers to claim damages because of anticompetitive conduct in the ORWI judgment of 2013, and that defendants may raise the passing-on defence. Under the amended ARC, indirect purchasers (but not the cartel members) benefit from a rebuttable presumption that cartel overcharges are at least partially passed on to indirect purchasers.

ii Calculation of damages

German law is particularly plaintiff-friendly with respect to the calculation of damages. A judge might invoke Section 287 of the Code of Civil Procedure, thereby estimating the exact amount of the damages to be awarded. This provision is widely used by German courts and was also confirmed in the ORWI judgment. The Federal Court of Justice decided only three years ago in the Lottoblock II judgment that Section 287 of the Code of Civil Procedure may also help to establish whether any damage has been suffered at all. In that regard, the amended ARC has introduced a simplified form of a rebuttable presumption stating that a cartel causes harm. However, the presumption does not cover the amount of damage caused and whether the plaintiff was affected by the cartel. Here, the Federal Court of Justice rendered a landmark decision at the end of 2018, limiting the scope of these presumptions considerably.

iii Rules on disclosure of evidence

The rules on disclosure of evidence have changed considerably because of the amended ARC. These amendments are probably the most significant changes to German law resulting from

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17 German Federal Court of Justice, decision of 28 June 2011, KZR 75/10 – ORWI.
18 Section 33c(2) ARC.
19 German Federal Court of Justice, decision of 12 July 2016, KZR 25/14 – Lottoblock II.
20 Section 33a(2) ARC.
21 See German Federal Court of Justice, decision of 11 December 2018, KZR 16/17 – Rail cartel.

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the Damages Directive. *Inter alia*, the most important former provision on access to files, Section 406e of the Code of Criminal Procedure, no longer applies when bringing actions for damages, and has thus lost much of its importance.\(^\text{22}\)

German civil procedure law does not provide for rules comparable to those in the United States or the United Kingdom that enable a court to issue discovery or disclosure orders that oblige a party to disclose certain documents or a certain category of documents for use in civil proceedings. Although some commentators have claimed that Section 142 of the Code of Civil Procedure offers similar options, its scope is limited and this provision has not often been used.

The amended ARC includes very detailed provisions on disclosure, and introduces a completely new approach, which goes beyond the Damages Directive.

For example, the ARC foresees a new substantive claim for disclosure. Such a claim may be addressed to the defendants (i.e., the cartel members). However, it may also be addressed to third parties who were not involved in the cartel but may have substantial market knowledge. In addition, disclosure can be requested in proceedings before damages claims were filed. The ARC even foresees the possibility of using preliminary injunctions to get access to the requested information\(^\text{23}\) – a plan that has been especially criticised by the defendants’ side. However, in a first decision in 2018, the rule was interpreted narrowly, limiting the scope of this provision considerably.\(^\text{24}\) The most recent practice shows that such tools are being used, not only on the plaintiffs’ side, but also on the defendants’ side to get access to information about a potential pass-on.\(^\text{25}\)

Potential plaintiffs, however, mainly criticise the provision according to which the costs for such information gathering need to be borne by the plaintiffs’ side.\(^\text{26}\) In the legislative process, they unsuccessfully argued that this provision violates the Damages Directive since it may create an enormous hurdle for plaintiffs, especially where e-searching tools are used to gather information.

\vspace{1cm}

\textbf{Statute of limitations}

Another hotly debated topic has been the statute of limitations, owing to the lack of transitional provisions in the sixth amendment of 2005. A recent landmark decision by the Federal Court of Justice (*Grey cement II*) has brought some clarity in deciding that the provisions on suspension that were included in the sixth amendment to the ARC also apply to ‘old’ damage cases (i.e., cases in which the infringement had been terminated prior to July 2005).\(^\text{27}\)

The implementation of the Damages Directive led to an extension of the statute of limitations from three to five years.\(^\text{28}\) The suspensive effect of an ongoing investigation by the European Commission, the FCO or another national authority was confirmed, and the suspensive effect of the filing of an action for information or for the production of evidence

\(^{22}\) Section 89c(5) ARC.

\(^{23}\) See Section 89b(5) ARC.

\(^{24}\) See Higher Regional Court of Düsseldorf, decision of 3 April 2018, VI-W (Kart) 2/18, ECLI:DE:OLGD:2018:0403.VI.W.KART2.18.00 – *Truck cartel*.

\(^{25}\) See, e.g., Hanover District Court, decision of 18 December 2017, 18 O 8/17 – *Truck cartel*.

\(^{26}\) See Section 33g(7) ARC.

\(^{27}\) See German Federal Court of Justice, decision of 12 June 2018, KZR 56/12 – *Grey cement II*.

\(^{28}\) See Section 33h(1) ARC.
was introduced. In addition, the statute of limitations for contribution claims among cartel members will be changed: it shall only start to run when the plaintiff has been paid damages. Detailed transition provisions apply. In this regard, the Grey cement II decision does not bring clarity, and new questions have already been raised.

vi Other relevant topics

The amended ARC grants privileges to immunity recipients insofar as it limits their liability to that for their direct or indirect purchases or providers. To other injured parties, immunity recipients are only liable if full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law. However, this only applies to cases of full immunity.

Another topic with particular importance for proceedings in Germany relates to statutory lawyers’ fees in the case of interventions. Under current case law, the cost risk increases by every intervening party that decides to join the proceedings. As a result, a plaintiff needs to reimburse the costs not only of the defendant but also of all intervening parties if the plaintiff loses the proceedings. Under the new rules, this cost risk is being limited: regardless of the number of intervening parties, the legal fees to be reimbursed may not be higher than the legal fees that need to be reimbursed to the defendant.

vii Assessment

Many of the new provisions will be tested and interpreted in the numerous damages claim proceedings that are under way (such as the follow-on claims in the Sugar cartel or the Truck cartel). Current practice shows that Germany remains one of the hot spots for damage claims.

VIII CURRENT DEVELOPMENTS

While the main purpose of the ninth amendment to the ARC was to implement the provisions of the Damages Directive, the revised Act also changed some other aspects of German competition law. In particular, when it comes to fine proceedings, the amended Act defines ‘undertaking’ more or less in the same way as ‘single economic entity’ is defined under EU competition law (i.e., the FCO will also be able to fine a controlling parent company for violations committed by a subsidiary). Previously, imposing fines on the parent company was only possible when a representative of the parent company had committed a competition law violation or if the management of the parent company had been unable to supervise the actions of its subsidiaries sufficiently. However, the legislative refrained from including a provision according to which parent companies may be faced with damages claims because of a competition law violation committed by their subsidiaries. It shall be up to the courts to decide upon this still hotly debated matter.

The tenth amendment to the ARC is currently in preparation, albeit at a very early stage. It is most likely to focus mainly on new provisions regarding dominance in the internet economy.

29 See Section 33h(6) ARC.
30 See Section 33h(7) ARC.
31 See Section 186(3) ARC.
32 See Section 33e ARC.
33 See Section 89a(3) ARC.

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I ENFORCEMENT POLICIES AND GUIDANCE

i Statutory framework

The main legal instrument pertaining to the protection of undistorted competition in the Greek market is Law No. 3959/2011 (the Competition Act), which abolished and replaced Law No. 703/1977. The legislator’s intention was the production of a coherent statute (the previous regime of Law No. 703/1977 was amended numerous times), while further harmonising Greek legislation with EU best practices and promoting the effectiveness of the Hellenic Competition Commission (HCC).

Article 1 of the Competition Act provides that ‘all agreements and concerted practices between undertakings, and all decisions by associations of undertakings, which have as their object or effect the prevention, restriction or distortion of competition within the Hellenic Republic’ are prohibited. The Competition Act does not define the term ‘cartel’. Nonetheless, the notion of ‘prohibited agreements and/or concerted practices’ is used and, essentially, refers to the same practices as prohibited under Article 101 of the Treaty on the Functioning of the European Union (TFEU) (which, in any event, is applied in parallel in most investigations pursued by the HCC).

Any agreement between actual or potential competitors that fixes prices, limits output or shares markets, customers or sources of supply will generally be regarded as an agreement restricting competition (by object) within the meaning of the law.

While the Competition Act does not distinguish between hard-core and other types of horizontal collusive agreements, the HCC’s decisional practice corresponds to EU competition law jurisprudence. Indeed, the published guidelines on the method of setting fines postulate that horizontal price-fixing, market sharing and output limitation agreements are considered the most serious infringements of competition law. Similarly, both the leniency programme and the published guidelines on the settlement procedure adopt the same definition of hard-core cartels as in the EU context.

In general, the HCC follows the European Commission’s practice concerning both the notion of agreements and concerted practices falling within the scope of antitrust rules, as well as the constitutive elements of hard-core cartels and the ensuing substantiation of an infringement (including rules of evidence and the use of assumptions) – having due regard to pertinent EU case law; in particular, an infringement cannot be established exclusively on the basis of indicia of parallel behaviour (tacit collusion), thus the HCC must adduce...
corroborating evidence demonstrating that parallel behaviour stems from anticompetitive conduct, such as exchanges of commercially sensitive information (e.g., individualised intentions of future prices and quantities).

Participation in a cartel is both an administrative and a criminal offence (see Section V for more details). In this context, the HCC has wide discretion to impose substantial fines for cartel behaviour and for infringements of pertinent procedural rules (e.g., for failure to cooperate with inspectors in the context of a dawn raid). Nonetheless, the HCC is only competent to impose administrative fines; the power to impose criminal sanctions lies within the competence of the criminal courts.

ii The authority
The HCC is the competent authority for the enforcement of the Competition Act, as well as Articles 101 and 102 of the TFEU. According to Article 12 of the Competition Act, the HCC is constituted and shall operate as an independent authority, vested with administrative and financial autonomy; the HCC has legal personality and appears in its own right before any court, in all kinds of proceedings, whereas its members enjoy personal and functional independence.

In accordance with Regulation 1/2003, the HCC performs all the enforcement actions of a designated national competition authority (NCA) and, consequently, is fully competent to enforce Article 101 of the TFEU and Article 1 of the Competition Act (i.e., the domestic equivalent) on cartels. The HCC can initiate proceedings either ex officio or following a complaint. In more detail, as far as agreements and concerted practices are concerned, the HCC has the competence to:

- make decisions on finding an infringement of Article 1 of the Competition Act or Article 101 of the TFEU (or both) and impose administrative fines;
- take interim measures in the case of a suspected infringement;
- launch investigations and conduct dawn raids for the purpose of enforcing antitrust legislation;
- deliver opinions on competition issues either on its own initiative or at the request of the competent minister, in accordance with Article 23 of the Competition Act; and
- conduct sector and market inquiries.

The HCC has consultative competence in the areas of identifying and tackling regulatory barriers to competition and has taken various steps in recent years to diversify and expand its

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3 Note that Article 3(1) of Regulation 1/2003 provides that, if a national competition authority (NCA) within the European Union enforces domestic competition law to investigate a cartel that may affect trade between Member States, it must also apply Article 101 TFEU. Moreover, national competition rules should not be used to prohibit agreements that are compatible with EU competition rules (the convergence rule).
4 Hellenic Competition Commission (HCC) decisions can be appealed before the Athens Administrative Court of Appeals within 60 days of their notification to the parties concerned. The decisions of the appellate court can be further appealed to the Supreme Administrative Court (Conseil d’État). The appeal to the Supreme Court is limited to points of law.
5 The HCC has extensive powers of investigation and inspection, including the power to demand the production of information, take statements from individuals, search private premises and seal premises or business records (Article 39 of the Competition Act).
advocacy efforts. In this vein, it has published practical guides on compliance and awareness (which are accessible online) and often organises training seminars and conferences to promote awareness on antitrust matters.

II COOPERATION WITH OTHER JURISDICTIONS

Pursuant to Article 28 of the Competition Act, the HCC closely cooperates with the European Commission and NCAs in all EU Member States, with a view to enforcing EU competition rules in the context of Regulation 1/2003, notably through the European Competition Network.\(^6\)

In addition, the HCC cooperates with other (non-EU) competition authorities (e.g., mutual legal assistance treaties, memoranda of understanding, cooperation agreements),\(^7\) notably in its capacity as a member of both the Organisation for Economic Co-operation and Development and the International Competition Network.

Further, if an undertaking having its seat or exercising its activity in Greece refuses to allow the inspection provided for under EU law, the HCC, acting either *ex officio* or at the request of the designated bodies of the European Commission, shall ensure overall proper conduct of the investigation, providing in particular all necessary assistance, as envisaged under Article 38 et seq. of the Competition Act.

As far as leniency applications are concerned, the HCC processes summary applications having due regard to the status and overall progress of the corresponding leniency application filed before the European Commission, giving precedence to the main proceedings at EU level (by way of comity), notwithstanding that no such strict obligation applies.\(^8\)

The HCC often cites in its reasoning the relevant EU court judgments and infringement decisions made by the European Commission and other NCAs.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Extraterritoriality

The Competition Act applies to all restrictions of competition that affect or might affect the Greek market, even if such restrictions are due to agreements or concerted practices between undertakings implemented or entered into outside Greece, and even if such undertakings

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\(^6\) For example, NCAs may ask each other for assistance in collecting information in their respective territories and can also exchange information for the purpose of applying Article 101 TFEU. Members of the European Competition Network also cooperate with a view to ensuring the efficient allocation of cases (best-placed authority); the HCC will normally be best placed if the agreement mainly affects competition within the Greek market. Furthermore, the HCC has a duty to inform the European Commission immediately when it starts an Article 101 TFEU investigation; it may also inform other NCAs. Information containing sensitive business information can be communicated between NCAs. For further details, see Commission Notice on Cooperation within the Network of Competition Authorities (2004/C 101/03).


\(^8\) Case C-428/14, DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v. Autorità Garante della Concorrenza e del mercato, EU:C:2016:27.
have no establishment in Greece. Hence, undertakings domiciled outside Greece can be investigated and fined, as long as they have entered into anticompetitive agreements or practices that might have an effect on the national market.

ii Affirmative defences and exemptions

Agreements or concerted practices falling within the ambit of Article 1(1) of the Competition Act are valid, in whole or in part, if they cumulatively meet the following criteria set out in Article 1(3), mirroring those of Article 101(3) of the TFEU:

- they contribute to improving production or distribution of goods, or to promoting technical or economic progress;
- at the same time, they allow consumers a fair share of the accruing benefit;
- they do not impose restrictions on the undertakings concerned beyond those that are indispensable for attaining said objectives; and
- they do not afford the possibility of eliminating competition in a substantial part of the relevant market.

Be that as it may, under HCC practice, it is most unlikely that a hard-core cartel agreement (considered an infringement by object) could possibly qualify for such an exemption. Similarly, cartel-type agreements typically cannot benefit from EU Block Exemption Regulations (which are also applicable in Greece).

In line with the provisions of Regulation 1/2003, there is no prior notification mechanism; undertakings are responsible for conducting their own self-assessment and ensuring compliance with antitrust rules.

The Competition Act applies to all economic activities; there are no industry-specific defences or exemptions.

IV LENIENCY PROGRAMMES

i Overview

In 2011, the HCC (via Decision No. 526/VI/2011) introduced a revised leniency programme (the leniency programme was first introduced in the domestic legal order in 2005) with a view to promoting full alignment with current EU applicable standards. According to the HCC, international experience to date confirms that leniency programmes are considered to be the most appropriate and effective measure in combating cartels and, hence, it is expected that putting an effective leniency regime in place will be a key factor in the fight against cartels, which, owing to their covert nature, are hard to detect without the active cooperation of the undertakings or individuals involved. Nonetheless, until very recently, the HCC’s leniency programme had not yielded any significant results.²

In short, the pertinent conditions for immunity or reduction of fines include, *inter alia*, the timing of the application, the degree to which the application enhances the ability of the HCC to establish to the requisite level the existence of an anticompetitive agreement, the

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² The first successful leniency application was made in 2013 in the context of the construction cartel, which was subsequently sanctioned by the HCC in 2017 following an extensive investigation (see Section V.iv).
significance and completeness of the evidence and information submitted\textsuperscript{10} and, especially, whether the information provided substantially enhances the authority’s ability to establish critical facts of the infringement at hand. In substance, the HCC’s leniency programme essentially conforms to the ECN Model Leniency Programme.

In line with the EU regime, an applicant can investigate the applicability of the leniency programme before proceeding to a formal application, requesting clarification as to the applicability of the programme to the case at hand, by presenting the evidence at its disposal on a hypothetical and anonymous basis.

There are no deadlines for initiating or completing an application for immunity or partial leniency. In this vein, the applicant may request a ‘marker’ (i.e., protecting the applicant’s place in the queue for a given period of time (decided by the president of the HCC on an \textit{ad hoc} basis)), thus allowing it to collect all the evidence needed to meet the conditions and requirements for immunity. As long as the information and evidence requested is duly adduced, the latter is deemed to have been submitted at the time when the marker was granted. An undertaking wishing to apply for leniency should contact the HCC president, who immediately informs the HCC’s director general or, provided the case has been already prioritised and assigned to a member of the HCC board, the competent rapporteur member.

\textbf{ii Requirements}

The programme applies to prohibited horizontal anticompetitive agreements or concerted practices in the form of a cartel; it does not apply to vertical agreements or abuses of dominant position. The general requirements of a leniency application (fully or partial) can be summarised as follows.

\begin{itemize}
  \item [\textit{a}]] The undertaking concerned cooperates fully and continuously throughout the HCC’s investigative procedure and has not destroyed or concealed evidence pertaining to the cartel.
  \item [\textit{b}]] Its involvement in the anticompetitive agreement or practice has ended at the latest when the application was filed.
  \item [\textit{c}]] The applicant has treated its application as fully confidential until the issuance of a statement of objections by the HCC.\textsuperscript{11}
\end{itemize}

\textbf{iii Immunity from fines and reduction of fines}

The programme provides for either full immunity from fines or reduction of fines.

Full immunity (Type 1A) can be granted to the applicant who is the first to submit evidence enabling the HCC to initiate a targeted inspection with regard to a suspected cartel, as long as the HCC was not already in possession of sufficient evidence at the time of the application, allowing it to initiate the investigative procedure. Alternatively, full immunity

\textsuperscript{10} The applicants should accompany their leniency applications with a detailed description of the alleged cartel and its objectives, the products or services concerned, its geographical coverage, duration and background.

\textsuperscript{11} The identity of the applicant is kept confidential until the issuance of the statement of objections and the initiation of proceedings against the alleged cartelists. This is in line with the general obligation of the officials of the Directorate General and the members of the HCC to treat as confidential any material gathered during the investigation of cases. The Competition Act also provides (Article 41) that any information gathered in the context of the examination of any case, may be used in relation only to that particular case.
(Type 1B) shall be granted to the applicant who is the first to submit evidence enabling the HCC to establish an infringement, where the evidence already in the HCC’s possession was not sufficient in this respect.

If the conditions for granting immunity are not met, a reduction in the fine that would otherwise have been imposed (Type 2) may be granted to the applicant who provides the HCC with evidence relating to a suspected cartel, as long as that evidence brings about significant added value to the evidence already in the HCC’s possession.

Importantly, as far as natural persons are concerned, the granting of total immunity also absolves them from criminal liability (see Section V), while the granting of a fine reduction is regarded as a mitigating circumstance, resulting in the imposition of a reduced sanction in line with stipulations of the Greek Penal Code.

Note that an undertaking that took out actions to coerce other companies to participate in the collusive agreement is not eligible for Type 1A or Type 1B immunity. This exception, however, does not apply to individuals – officers or employees – of the undertaking concerned.

iv  Leniency and settlement
It should be stressed that leniency and settlement (see Section V for more details) are not mutually exclusive; where applicable, the reduction of fines under the settlement procedure will be cumulative with the reduction of fines under the leniency programme.

V  PELALTIES
As already mentioned, participation in a cartel is both an administrative and a criminal offence.

i  Administrative sanctions
According to Article 25(2) of the Competition Act, the fine imposed for infringement of Article 1 of the Competition Act or Article 101 of the TFEU may be up to 10 per cent of the total turnover of the undertaking concerned in the financial year in which the infringement ceased or, should the infringement continue, in the financial year preceding the issuance of the decision. Where it is possible to calculate the level of the economic benefit the undertaking concerned derived from the infringement, the fine shall be no less than that, even if that amount exceeds the aforementioned 10 per cent cap.

The HCC has published guidelines on the method of setting fines, mirroring the methodology set out in the European Commission’s Fining Guidelines. In short, when determining the level of the fine, account shall be taken of the gravity, duration and

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12 A leniency application filed by a company automatically covers all natural persons that would otherwise also be liable for fines.

13 As far as associations of undertakings are concerned, the fine imposed may be up to 10 per cent of the total turnover of its members. If the association is not solvent, it shall be required to call for contributions from its members to cover the amount of the fine. Further, where such contributions have not been made within the time limit set by the HCC, the latter may require payment of the fine directly from each of the undertakings whose representatives were members of the decision-making bodies concerned.

14 Note that the fine provided for under the Competition Act shall be capped at €10,000 for each day of delay in complying with the HCC decision, commencing from the date postulated in it.

15 Guidelines on the method of setting fines imposed pursuant to Article 23(2) of Regulation 1/2003 (2006/C 210/02).
geographical scope of the infringement, as well as the duration and nature of participation in the infringement by the undertaking concerned. Additional adjustments are possible on the basis of other objective factors, including the specific economic characteristics of the undertakings in question, whereas in recent decisions the financial turbulence of certain sectors of the Greek economy has been taken into consideration as a mitigating circumstance.

Be that as it may, the Administrative Court of Appeals has confirmed that the HCC has a wide margin of appreciation when setting the level of fines on companies. Thus, in practice it can be difficult to assess beforehand and with sufficient certainty the penalty that will be imposed.

In this vein, the highest fines imposed by the HCC in respect of cartel-type cases include the following examples.

a. In 2017, record total fines of approximately €81 million regarding several collusion schemes in tenders for public works of infrastructure (construction cartel).

b. In 2017, total fines of €19 million for anticompetitive agreements between wholesalers of luxury cosmetics pertaining to indirect price-fixing by setting a uniform maximum level of discounts. Note, however, that the pertinent decisions were ultimately quashed by the administrative appellate court due to a breach, on the HCC’s part, of the statute of limitations.

c. In 2013, total fines of approximately €40 million regarding price-fixing in the production and distribution of poultry meat in Greece.

d. In 2007, total fines of approximately €48 million regarding anticompetitive agreements in the dairy products market.

Notwithstanding the fact that the Greek regime does not provide for an individual sanction in the form of director disqualification, the Competition Act also identifies the natural persons obliged to comply with applicable antitrust provisions, which are (1) in the case of individual undertakings, the owners, (2) in the case of civil and commercial companies and joint ventures, the managers and all general partners, and (3) in the case of public limited companies, the members of the board and those persons responsible for implementing the relevant decision. The aforementioned natural persons shall be liable, by means of their personal assets, jointly and severally with the undertaking concerned for payment of the fine. In addition, the HCC may impose on such persons a separate administrative fine of between €200,000 and €2 million if they have demonstrably participated in preparatory acts, the organisation or commission of the anticompetitive agreement or practice. To date, no such separate administrative fine has been imposed upon a company executive.

ii. Criminal liability

Moreover, according to Article 44 (Criminal Sanctions) of the Competition Act, any person who executes an anticompetitive agreement, makes a decision or applies a concerted practice, shall be punished by a fine of between €15,000 and €150,000. If such an act further pertains to undertakings that are actual or potential competitors (a provision interpreted as covering cartels), a term of imprisonment of between two and five years and a fine of between €100,000 and €1 million shall be handed down. As mentioned above, the power to impose criminal sanctions lies within the competence of the criminal courts, not the HCC.
iii Parallel proceedings

Note that from a practical perspective, even though administrative and criminal sanctions can be pursued in parallel with regard to the same conduct, public prosecutors usually initiate proceedings following the adoption of an infringement decision by the HCC or otherwise stay proceedings until the HCC has issued a decision on the case at hand.¹⁶

iv Settlement

The possibility of settlement in cases of horizontal anticompetitive agreements was recently introduced into the Greek legal order by virtue of Law No. 4389/2016. The specifics of the procedure are laid out in HCC Decision No. 628/2016,¹⁷ which to a great extent mirrors the provisions of the European Commission Notice. Note, however, that the settlement procedure also applies, albeit exceptionally, if the HCC has already issued a statement of objections.¹⁸

The settlement procedure is wholly distinct from the commitments procedure. Settlement decisions establish the existence of a cartel infringement, setting out all the relevant parameters thereof, require the termination of the infringement and impose a corresponding fine. By contrast, commitment decisions do not establish an infringement, nor do they impose a fine, but instead bring an alleged infringement (not pertaining to cartels) to an end, by imposing on companies the commitments offered to appease the HCC’s concerns.

In short, the settlement procedure concerns cases where undertakings make a clear and unequivocal acknowledgement of liability in relation to their participation in horizontal agreements and the subsequent breach of competition law (Article 1 of the Competition Act or Article 101 of the TFEU). As a result, undertakings can obtain a reduction of the imposed fine up to 15 per cent, which is a greater reduction compared with what is provided for in the EU context, provided that certain conditions are fulfilled. Settlement discussions commence at the parties’ initiative at any stage of the investigation; if a statement of objection has been issued, undertakings must express their interest not later than 35 days prior to the hearing before the HCC. The procedure is initiated by a decision by the HCC, which enjoys unfettered discretion in determining whether a specific case is suitable for settlement.¹⁹ Consequently, the HCC may discontinue the procedure at any time. Furthermore, a party may withdraw at any time, in which case the normal procedure will be initiated upon completion of the settlement procedure for the rest of the undertakings.

¹⁶ Article 44 (5) of the Competition Act.
¹⁷ According to the HCC, the settlement procedure aims to simplify and speed up the handling of pending cases. It is stated that it would allow the HCC to achieve efficiencies through a streamlined administrative process, resulting in a more expedited adoption of infringement decisions in cartel cases. In addition, the procedure provides scope for a reduction in the number of appeals before administrative courts; this will allow a better allocation of resources, to deal with more cases, thereby increasing the deterrence effect of the HCC’s enforcement action.
¹⁸ In such cases, procedural efficiencies are obviously less likely to occur, but the HCC has apparently made the policy choice to encourage settlement as much as possible.
¹⁹ Factors taken into account include the number of companies involved, the nature of the alleged infringements, whether efficiencies and resource savings can be realised, etc.
The procedure’s key parameters are the following:

a Upon commencement of the settlement proceedings, bilateral discussions between the parties and the HCC take place, with a view to presenting each undertaking that is considering settlement with the necessary information concerning the case and the range of the possible fines. The bilateral meetings do not imply bargaining about such matters as the existence of the infringement or pertinent evidence. However, the undertakings concerned shall be heard effectively and shall have the opportunity to present their comments about the alleged infringement.

b On completion of the bilateral discussions, as long as the HCC considers that there is room for settlement, a deadline for submissions is set. The official settlement proposals shall include, *inter alia*, unequivocal acknowledgement of participation and liability; acceptance of the maximum amount of the fine that may be imposed; confirmation that the parties waive their right to obtain full access to the file and to be heard in an oral hearing; and waiver of the right to challenge the validity of the procedure followed.20

c If the settlement proposals reflect the consensus reached under the bilateral discussions, a settlement recommendation is drafted by the HCC and served to the parties, who are asked to confirm (settlement declaration) its content unconditionally.

d Note that the recommendation is not binding; if the HCC decides to settle, it issues a simplified decision accepting the settlement.

As an aside, according to Article 44(3) of the Competition Act, as recently amended pursuant to Law No. 4389/2016, criminal liability for any relevant crimes based on the infringement duly acknowledged by the undertaking is effaced, as long as the fines ultimately imposed are paid in full.

Interestingly, since the adoption of the settlement procedure, the HCC has already issued three settlement decisions, whereas a large number are said to be pending. Notably, in March 2017, the HCC found that 15 undertakings active in the construction sector in Greece participated in collusive schemes (running from 1981 to 2012) regarding tenders for public works of infrastructure, and imposed fines totalling approximately €81 million. One undertaking also received full immunity from fines. This is the first successful application of the leniency programme in Greece (see also Section VIII) and the first settlement procedure to be initiated by the HCC. It is also the first hybrid settlement case, as some of the alleged infringers declined the opportunity to settle (publication of the standard infringement decision against them is pending). Further, in December 2018, the HCC decided to settle a case against two companies in the market for the production and marketing of dairy products (horizontal market segmentation pertaining to their participation in public tenders). Importantly, this is the first case in which all implicated parties expressed their interest in settling the case and without prior issuance of a statement of objection. The HCC reduced the fines imposed on each of the undertakings involved by 15 per cent.

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20 Submissions and other statements made in the course of settlement discussions are considered confidential and cannot be disclosed in the context of other administrative or judicial proceedings (including follow-on damages claims). Further, if the procedure is discontinued, settlement submissions and declarations are not binding upon the party and cannot be used in other proceedings, either before the HCC or the competent courts.
VI ‘DAY ONE’ RESPONSE

Pursuant to Articles 38 and 39 of the Competition Act, the HCC has extensive investigative powers (which essentially mirror those of the European Commission pursuant to Regulation 1/2003). To establish the existence of an infringement, HCC officials can:

- inspect and take copies or extracts of any kind of book, record, document or electronic business correspondence;
- seize books, records, documents and electronic means of storage;
- conduct searches at the business premises and means of transport of the undertakings concerned;
- seal business premises and books or records for the period and to the extent necessary for the inspection;
- carry out inspections in the residences of managers, directors, chief executive officers and of the staff of the undertaking concerned, where there is reasonable cause to suspect that they are keeping books or other pertinent documents; and
- take sworn or unsworn testimonies and ask for explanations of facts or documents and record the answers.

Before conducting a dawn raid,21 HCC officials must obtain written authorisation from the HCC president or another official appointed by the president, specifying with sufficient clarity the subject matter and purpose of the inspection and the penalties22 provided for under the Competition Act in the case of obstructions or a refusal to present the requested books, information, inter alia.

A court warrant is not a prerequisite to conducting an inspection of business premises but must be obtained if the undertaking concerned refuses to accept the investigation. However, in all inspections of non-business premises, a judge or public prosecutor should be present.

Before submitting to the inspection, the company has the right to request that the inspectors produce their identification documents and the relevant written authorisation. External legal counsel may be present at all stages of the inspection; HCC inspectors are normally willing to accept a reasonable delay for the arrival of an external lawyer. The company may invoke legal privilege23 or privilege against self-incrimination. Nonetheless, there is no absolute right to silence and an individual may not refuse to answer questions on facts or provide information that may be used as evidence for the establishment of the

21 The HCC would decide to launch a dawn raid for the investigation of cases, notably suspected cartel infringements, that have been prioritised on the basis of the criteria stipulated in Article 14 of the Competition Act, as further specified in the HCC’s Decision No. 525/VII/2011 (the prioritisation of cases).
22 The company is obliged to cooperate fully and actively with the inspection. According to Article 39 of the Competition Act, a fine of at least €15,000, capped at 1 per cent of the previous year’s turnover, shall be imposed by a decision of the HCC on undertakings that obstruct or hamper investigations, in any manner, or that refuse to submit to relevant inspections, produce records and other documents requested, etc. In addition, pursuant to Article 44(7), criminal sanctions (at least six months’ imprisonment) are imposed on any person who obstructs investigations carried out by the HCC (especially by concealing evidence), refuses the provision of information or knowingly provides false information, or refuses after being duly summoned by an HCC official to make a sworn or unsworn statement before it.
23 In principle, legal privilege does not extend to communications between the client and in-house lawyers; however, the HCC has accepted that legal privilege extends to communication with in-house lawyers, when the latter simply reproduces communication by external counsel.
infringement. The company also has the right to raise objections or make remarks that must be recorded in the relevant minutes. Therefore, it is advisable for an undertaking to have guidelines in place for dawn raids.

The HCC has so far adopted three procedural infringement decisions against undertakings and associations of undertakings for failure to cooperate or otherwise obstruct a dawn raid, all of which have subsequently been confirmed by the Administrative Court of Appeals.

The HCC officials largely follow the same rules and procedure as the European Commission. Upon completion of the dawn raid, the HCC prepares a relevant report containing a description of the procedure and any pertinent objections or remarks made by the company, which is then notified to the company. Electronic data gathered in the course of inspections are usually copied (or hard discs imaged) and then reviewed by investigators at the HCC’s premises.

VII PRIVATE ENFORCEMENT

Private antitrust litigation, albeit still at an embryonic stage (like most other EU Member States, Greece does not have a tradition or any meaningful track record when it comes to private enforcement), is an expanding area of legal practice that has emerged from the growing public enforcement of competition law in recent years, as well as the legislative initiatives of the European Commission in this field. Notwithstanding the fact that the Greek government and the HCC played a pivotal role in the negotiations and ensuing adoption of Directive 2014/104/EU (the Damages Directive) on antitrust damages action during the Greek presidency of the European Union, Greece has only recently transposed the Damages Directive into domestic law.

In this vein, by virtue of Law No. 4529/2018, enacted by the Greek parliament in March 2018, a set of substantive and procedural rules was introduced with the aim of facilitating the effective exercise of the rights of injured parties to seek compensation for antitrust infringements. This specialised legal framework complements, and further exemplifies, the general rules of civil liability under the Greek Civil Code (CC), which was, until the enactment of the aforementioned law, the only applicable set of rules for antitrust damages claims. Consequently, the recently introduced provisions are systematically integrated into the general civil liability framework of the CC. Be that as it may, the provisions of Law No. 4529/2018, being lex specialis, prevail over those of the CC. However, regarding issues on which Law No. 4529/2018 is silent, the pertinent CC provisions are applicable. The same applies as regards the general rules on civil procedure.

In brief, the new provisions facilitate the disclosure of evidence, including that obtained by public authorities, the passing-on defence and the quantification of harm, thereby expected to result in a more effective and consistent application of the right to compensation. However, it remains to be seen how they will be applied by courts in practice.

VIII CURRENT DEVELOPMENTS

In recent years, the HCC has aimed at maintaining a consistent level of antitrust enforcement, while adapting its prioritisation and focus to cases with increased systemic effect in the marketplace.
The introduction of a new system for prioritising cases enhanced the HCC’s ability to reject complaints and significantly reduced the backlog of pending cases, thereby freeing up human resources, but it has not yet translated into an increased number of cartel-focused investigations. The HCC continues to pursue a high number of vertical cases.

Moreover, the revision of the Leniency Notice (so as to conform to the ECN Model Leniency Programme) has similarly not produced the desired outcomes until very recently. The low response from companies is partly due to the prevailing market features linked to a small-market economy and family-run, less sophisticated businesses.

Nonetheless, by using its investigative powers extensively (notably in dawn raids) and by improving its market reflexes, the HCC has still managed in recent years to unveil several collusive practices that have spanned a long period of time. The construction cartel infringement decision (see Section IV), with fines totalling €81 million, is likely to be a turning point: first, the complexity and intensity of the case attests to the HCC’s enhanced capabilities, thereby increasing detection and deterrence; second, the exemplary conduct of the investigation as such helps to consolidate cartel enforcement, particularly considering that it marks the first successful application of both the leniency programme and the settlement procedure.

Overall, the HCC has continued to adopt a relatively high number of infringement decisions against trade associations and other professional bodies, which is a particularity compared to most other Member States. But it comes as a direct result of the disproportionate number of self-employed professionals and of the intra-profession protectionist culture that is still widespread in services markets. The sustained focus of the HCC on these types of cases is a means of promoting a genuine competition culture and encouraging self-regulation that respects competition rules.
Chapter 11

HONG KONG

Felix KH Ng, Olivia MT Fung and Christina HK Ma

I ENFORCEMENT POLICIES AND GUIDANCE

i Features of Hong Kong’s competition regime

Enacted in June 2012, the long-awaited Competition Ordinance (the Ordinance) came into full force in Hong Kong on 14 December 2015. The significance of the Ordinance lies in the fact that it establishes the first cross-sector competition law regime in Hong Kong. In the past, only the telecommunications and broadcasting sectors were subject to competition law. Hailed as an encouraging development for the international business and financial hub, this is still a much belated initiative compared to its counterparts in the Asia-Pacific region. For instance, Australia’s earliest competition legislation dates back to the 1970s, Singapore adopted a full competition regime in 2006 and the Anti-Monopoly Law took effect in mainland China in 2008.

The Ordinance draws international influence from the competition legislations of the European Union, the United Kingdom, Australia and Singapore. In terms of enforcement structure, Hong Kong adopts a prosecutorial model akin to that of the United States, Canada and Australia. This means that while the Competition Commission of Hong Kong has the powers to investigate and prosecute, it must bring enforcement actions before an independent competition tribunal to seek pecuniary penalties and other sanctions. This is in stark contrast with the administrative model adopted by the European Union and most of the Asian jurisdictions, where the competition authorities assume both prosecutorial and adjudicative functions.

Another remarkable feature is that Hong Kong has not criminalised cartel offences unlike the United States and the United Kingdom.

ii Statutory framework

The Ordinance prohibits three major forms of anticompetitive practices:

a The First Conduct Rule prohibits anticompetitive agreements and cartel activities.3

b The Second Conduct Rule regulates the abuse of a substantial degree of market power.4

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1 Felix KH Ng is a partner, Olivia MT Fung is an associate and Christina HK Ma is a trainee solicitor at Haldanes.
2 Cap 619, Laws of Hong Kong.
3 Section 6, Competition Ordinance.
4 Section 21, Competition Ordinance.
The Merger Rule concerns the control of any merger that has or is likely to have the effect of substantially lessening competition. Unlike other major jurisdictions, this is not an economy-wide merger control regime, and the application of the Merger Rule is limited to the telecommunications sector only.5

Cartel conduct falls within the realm of the First Conduct Rule, which is the subject matter of discussion in this chapter.

iii The First Conduct Rule
The First Conduct Rule prohibits any agreement, concerted practice or decision between undertakings in which the object or effect is to prevent, restrict or distort competition in Hong Kong. This provision is largely similar to the equivalent prohibition in the European Union, namely Article 101 of the Treaty on the Functioning of the European Union. The First Conduct Rule comprises the following key concepts.

Agreements
Broadly speaking, all forms of written or oral agreements, arrangements, informal agreements and ‘gentlemen’s agreements’ are caught by the First Conduct Rule.6 In addition to horizontal agreements between competitors, the First Conduct Rule covers vertical agreements (i.e., agreements between undertakings at different levels of the supply chain).

Concerted practices
Collusion falling short of an actual agreement may be regarded as a concerted practice,7 which effectively provides the Commission with a fall-back option to combat the more surreptitious and connived form of anticompetitive conduct.

Serious anticompetitive conduct
The Ordinance further defines certain hardcore activities as ‘serious anticompetitive conduct’ within the First Conduct Rule, which consist of classic cartel conduct between competitors such as price-fixing, bid rigging, market allocation and output control.8 These are considered more serious violations and will be subject to stricter enforcement action. For instance, the de minimis exclusion9 is not applicable to serious anticompetitive conduct.

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5 Paragraphs 3 and 4, Schedule 7, the Ordinance; ‘carrier licence’ and ‘carrier licensee’ as defined in Section 2, Telecommunications Ordinance (Cap 106).
6 Section 2(1), Competition Ordinance.
7 Although not defined in the Ordinance itself, a ‘concerted practice’ means ‘a form of co-operation, falling short of an agreement, where undertakings knowingly substitute practical co-operation for the risks of competition’, according to Paragraph 2.27 of Commission’s Guideline on the First Conduct Rule.
8 Section 2(1), Competition Ordinance.
9 Paragraph 5, Schedule 1, the Ordinance; see analysis in Section III of this chapter.
Undertakings

It should be noted that both corporations and individuals could be liable for anticompetitive conduct under the Ordinance. The term ‘undertaking’ effectively covers limited companies, partnerships, small and medium-sized enterprises as well as sole proprietorship.10

iv Enforcement regime

The Ordinance established two specialist bodies for competition enforcement, namely the Competition Commission (the Commission) and the Competition Tribunal (the Tribunal).

The Commission

The Commission is vested with a broad range of powers to investigate and prosecute suspected breaches, which include the power to require production of documents and information,11 to require individuals to attend interviews before the Commission,12 and to enter and search premises with warrants issued by the Court of First Instance.13 The Commission also has the power to commence enforcement action and apply to the Tribunal for pecuniary penalty if it has reasonable cause to believe that the First Conduct Rule has been contravened.14

While the Commission is the principal competition authority responsible for enforcing the Ordinance, the Communications Authority has concurrent jurisdiction with the Commission in regulating undertakings licensed in the telecommunications and broadcasting sectors.15 Both authorities have signed a memorandum of understanding to coordinate their functions and enforcement actions.

The Tribunal

The Tribunal is an independent adjudicating body that hears competition matters, including:

a applications made by the Commission regarding any alleged contravention of the Ordinance;

b applications for the review of determinations by the Commission, including decisions relating to exemptions, exclusions, commitments and leniency;

c follow-on private actions after a violation of the Ordinance is established; and

d appeals against any interlocutory decisions, determinations or orders.

The Ordinance does not specifically deal with the burden of proof in Tribunal proceedings. It is anticipated that the Commission will have the onus of establishing infringement of the First Conduct Rule based on the normal civil standard of proof, which is balance of probabilities. Decisions made by the Tribunal may be appealed to the Court of Appeal.16

10 Under Section 2 of the Ordinance, ‘undertaking’ is defined 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’.

11 Section 41, Competition Ordinance.

12 Section 42, Competition Ordinance.

13 Section 48, Competition Ordinance.

14 Section 92, Competition Ordinance.

15 Section 159, Competition Ordinance.

16 Sections 154 and 155, Competition Ordinance.
v Guidelines, policies and enforcement focus

To date, the Commission and the Communications Authority have issued six guidelines relating to substantive and procedural matters of each of the Conduct Rules (the Conduct Rules Guidelines), which provide guidance on how these authorities intend to interpret and apply the provisions of the Ordinance.

In addition, the Commission has published two policy documents to elaborate its policies and enforcement focus (the Enforcement Policy) and leniency applications (the Leniency Policy), as well as a Guideline on Investigations and guidance notes concerning the investigation powers of the Commission and legal professional privilege.

According to the Enforcement Policy and recent annual reports published by the Commission, it prioritises enforcement against conduct that is clearly harmful to competition and consumers in Hong Kong. In the context of the First Conduct Rule, this includes cartel conduct and other agreements causing significant harm to competition, such as retail price maintenance.

With respect to cartel conduct, the Commission places particular emphasis on bid rigging and market sharing as demonstrated by its enforcement actions and public campaigns since the inception of the Ordinance. These enforcement priorities can also be shown in the two Tribunal proceedings commenced by the Commission in 2017. The first case involves alleged bid rigging by five technology companies concerning a tender for the supply and installation of an information technology server system, and the second case concerns alleged market sharing and price-fixing by 10 construction and engineering companies in the provision of renovation services at a public housing estate.

At the time of writing, the Tribunal judgment of the first proceedings is still pending, while the trial of the second proceedings continued during November and December 2018.

II COOPERATION WITH OTHER JURISDICTIONS

The Ordinance does not contain any express provisions on cooperation with competition authorities in other jurisdictions. Nevertheless, the Commission has indicated that it will consider the competition precedents of other jurisdictions, especially in the early days of enforcement. The Commission has also started to establish working relationships with many overseas competition agencies, both bilaterally and through intergovernmental bodies.

One of these major efforts was the Commission’s participation in the International Competition Network (ICN) in 2013, before the Ordinance came into operation. The ICN is an international network established in 2001 comprising more than 130 member competition authorities with the common aim of addressing competition enforcement and policy issues. It is not an intergovernmental organisation but organised by and for the competition authorities.

In December 2016, the Commission signed a memorandum of understanding with the Competition Bureau of Canada17 with the purpose of enhancing cooperation, coordination

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17 Memorandum of understanding between the Competition Commission of Hong Kong, the Special Administrative Region of the People's Republic of China, and the Commission of Competition, Competition Bureau of the Government of Canada regarding the Application of Competition Laws and the Sharing of Information, dated 2 December 2016.
and information sharing between the two agencies on competition issues of mutual concern. This is the Commission's first bilateral cooperation instrument on competition law and policy and more international exchange with overseas agencies is expected in the future.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Extraterritoriality

It should be noted that Section 8 of the Ordinance provides a far-reaching extraterritorial application of the First Conduct Rule – so long as the anticompetitive conduct may affect competition in Hong Kong, it could be caught by the Ordinance regardless of where the conduct takes place, where the agreement is entered into, and where the undertakings are located or incorporated.

The chairperson of the Commission, Ms Anna Wu Hung-yuk, summarised this position in her speech in October 2015: ‘[T]he international nature of Hong Kong’s economy also makes it necessary for us to take a wider international perspective in our enforcement strategy. Our law in fact provides for extraterritorial effect for actions taken outside our jurisdiction that result in effects felt within the jurisdiction.’

ii Exclusions and exemptions

The Ordinance provides for a range of exclusions and exemptions, which are designed to screen out market conduct that would benefit consumers and the community as a whole, activities that are unlikely to have a material adverse effect on competition, or where legal or policy considerations outweigh the relevant anticompetitive effects. The more important of these are as now described.

Economic efficiency exclusion

The Ordinance excludes agreements that can enhance overall economic efficiency, such as those that would contribute to improving production or distribution or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit.18

De minimis exclusion

The Ordinance also contains a general exclusion for ‘agreement of lesser significance’, which excludes application of the First Conduct Rule from agreements between undertakings with a combined worldwide turnover not exceeding HK$200 million in the preceding financial year. It should be noted that this exclusion is not applicable to serious anticompetitive conduct.19

Statutory body exclusions and other general exclusions

The blanket exclusion afforded to statutory bodies20 is one of the most controversial features of the Ordinance. The exclusion means that statutory bodies are not subject to the Conduct Rules or other enforcement provisions of the Ordinance, even if their activities would cause harm to competition.

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18 Paragraph 1, Schedule 1, Competition Ordinance.
19 Paragraph 5, Schedule 1, Competition Ordinance.
20 Section 3, Competition Ordinance.
For example, the Airport Authority, the Housing Authority and the Trade Development Council in Hong Kong engage in economic activities and have significant market power. The mere fact that they are bodies subject to statutory duties offers no assurance they will not restrict or distort competition, yet this blanket exclusion shields them from any competition scrutiny under the Ordinance.

**Block exemption**

Furthermore, the Commission has the authority to grant block exemption orders to exclude a particular category of agreements from the application of the First Conduct Rule because of the economic efficiencies and policy considerations involved.\(^{21}\)

On 8 August 2017, the Commission issued its first block exemption order for vessel sharing agreements (VSAs) between liner shipping companies, on the condition that the parties to a VSA do not collectively exceed a market share of 40 per cent.\(^{22}\) VSAs are made between carriers within a shipping consortium to operate a liner service along a specified route using a specified number of vessels. The Commission is of the view that the economic efficiencies generated by a VSA outweigh the potential restriction of competition. The block exemption order is effective for five years and will be reviewed by the Commission before its expiry.

**IV LENIENCY PROGRAMMES**

Cartel activities are economically harmful yet difficult to detect due to their secretive and organised nature. A leniency programme is a key investigative tool used by competition authorities around the world to combat cartel conduct and to encourage cooperation in investigations.

Section 80 of the Ordinance empowers the Commission, in exchange for a person’s cooperation in an investigation or in proceedings, to enter into a leniency agreement with the person that it will not bring or continue proceedings in the Tribunal for a pecuniary penalty. However, a leniency agreement does not preclude follow-on private actions by persons who have suffered loss or damage as a result of the cartel.

1. **Key elements of the leniency programme**

The mechanics of the leniency programme adopted by the Commission are detailed in its Leniency Policy for Undertakings Engaged in Cartel Conduct (the Leniency Policy). The essential elements are as follows:

- **Leniency** is available only in respect of cartel conduct that contravenes the First Conduct Rule.
- **Only undertakings** may apply for leniency under the Leniency Policy.
- **Leniency** is available only for the first undertaking that reports the cartel conduct to the Commission and meets all the requirements for leniency. The Commission has indicated that, absent any exceptional circumstances, the Commission will not enter into a leniency agreement with more than one cartel member in any given case.

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\(^{21}\) Section 15, Competition Ordinance.

\(^{22}\) Competition (Block Exemption for Vessel Sharing Agreements) Order 2017.
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.

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 this basis, the Tribunal may make an order under Section 94 of the Ordinance declaring that the applicant has contravened the First Conduct Rule by engaging in the cartel.23

First to report
Since leniency is available only for the first cartel member who reports the cartel conduct to the Commission and satisfies all the stipulated requirements, there is therefore a strong incentive for a cartel member to be the first leniency applicant under the Commission’s marker system (discussed below).

Subsequent leniency applicants
That said, for subsequent cooperating parties who are not eligible for leniency, the Commission may exercise its enforcement discretion and 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 (i.e., orders that may be made by the Tribunal in relation to contraventions of competition rules). In this connection, the Commission may consider making joint submissions to the Tribunal with the cooperating undertaking.24

ii Leniency application procedures25

Step 1: Application for marker
Under the Leniency Policy, the only way to apply for leniency is to call the leniency hotline provided by the Commission. The Commission adopts a marker system to record the date and time of the communication so as to establish a queue for determining the priority of a particular leniency application.

To obtain a marker, an applicant is required to provide sufficient information to identify the cartel conduct, including:

- the identity of the undertaking applying for the marker;
- information about the nature of the suspected cartel (such as the products and services involved);
- the main participants in the cartel conduct; and
- the contact details of the caller.

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23 Paragraphs 2.1 to 2.5, Leniency Policy.
24 Paragraphs 4.1 to 4.3, Leniency Policy.
25 Paragraphs 2.6 to 2.30, Leniency Policy.
If the above conditions are satisfied, a marker that identifies the time and date of the call will be given to the applicant.

**Step 2: Invitation to apply for leniency**

If the Commission is satisfied that the reported conduct is potential cartel conduct and leniency is available, it will inform the undertaking with the highest ranking marker that it may make an application for leniency. The applicant will be required to sign a non-disclosure agreement prior to the application.

**Step 3: Submission of proffer**

The application for leniency is subsequently done by a proffer that contains the following information:

a. a detailed description of the cartel;
b. the entities involved;
c. the role of the applicant in the cartel;
d. a timeline of the conduct;
e. evidence in the form of documentary proof or witness testimony, or both;
f. explanations as to how the cartel conduct affects or relates to competition in Hong Kong in order to establish a jurisdictional nexus; and
g. an estimation of the value or volume of sales affected by the cartel in Hong Kong.

The proffer may be made in hypothetical terms and through a legal representative on a ‘without prejudice’ basis. It may also be made orally or in writing within a specific period, ordinarily within 30 calendar days.

Should the undertaking fail to submit its proffer within the specified period, or any extension to it as might be agreed by the Commission, its marker will automatically lapse and the next undertaking in the marker queue will be invited by the Commission to make an application for leniency.

**Step 4: Offer of a leniency agreement**

If the applicant satisfies the conditions of leniency, the Commission will invite the applicant to enter into a leniency agreement to confirm that:

a. it has provided and will continue to provide full and truthful disclosure to the Commission;
b. it has not coerced other undertakings to engage in the cartel conduct;
c. it has taken prompt and effective action to terminate its involvement in the cartel conduct;
d. it will keep the leniency application and process confidential unless with the Commission’s prior consent or the disclosure is required by law;
e. it will provide continuing cooperation, at its own cost, to the Commission, including in proceedings against other undertakings;
f. it will agree to and sign a statement of agreed facts admitting to its participation in the cartel; and

g. it is prepared to continue with, or adopt and implement, at its own cost, an effective corporate compliance programme to the satisfaction of the Commission.
Step 5: Execution of leniency agreement

Upon executing the leniency agreement, the applicant is required to provide the Commission with all non-privileged information and evidence in respect of the cartel conduct without delay. Witnesses will also be interviewed by the Commission and may be required to testify before the Tribunal in due course.

iii Confidentiality issues concerning leniency applications

The Ordinance imposes a general obligation on the Commission to preserve confidentiality of information provided to the Commission, including those submitted by unsuccessful leniency applicants.26

In a decision handed down on 14 March 2018,27 the Tribunal confirmed that communications between the Commission and parties who unsuccessfully seek leniency are privileged and need not be disclosed in later proceedings, bearing in mind the public interest considerations of encouraging leniency applicants. Mr Justice Godfrey Lam of the Tribunal held that the public interest in non-disclosure of communications between the Commission and unsuccessful leniency applicants outweighs the contrary interest in disclosure. Any other approach would place unsuccessful leniency applicants in a ‘worse position than those who have not applied for leniency at all’.

The above ruling on preservation of secrecy is particularly crucial since private litigants may wish to seek discovery of materials surrendered as part of a leniency program for pursuing follow-on private actions against cartel members.

iv Cooperation with overseas authorities

Since cartels may operate in multiple jurisdictions, leniency applicants in Hong Kong are expected to provide the Commission with details of other leniency applications that they have submitted to competition authorities in other jurisdictions. In appropriate cases, the Commission may require a leniency applicant to authorise the Commission to exchange confidential information with those overseas authorities.

V PENALTIES

i The Commission – warning notices and infringement notices

Following an investigation, if the alleged contravention of the First Conduct Rule does not amount to ‘serious anticompetitive conduct’, the Commission must issue a warning notice requesting the undertaking to cease the conduct in question within a specified period. Should the undertaking fail to comply with the warning notice or repeat the anticompetitive conduct, the Commission may commence Tribunal proceedings against the undertaking.28

If the conduct concerns ‘serious anticompetitive conduct’, no warning notice can be issued. The Commission has the option of directly bringing proceedings in the Tribunal, or

26 Section 125, Competition Ordinance.
28 Section 82, Competition Ordinance.
issuing an infringement notice describing the infringing conduct, setting out the evidence gathered by the Commission and stipulating the terms on which the Commission would be willing to settle the matter without resorting to Tribunal proceedings.\footnote{29}{Sections 67 and 69, Competition Ordinance.}

\section*{ii The Tribunal – pecuniary and non-pecuniary sanctions}

Under the Ordinance, the Tribunal may impose a wide array of pecuniary and non-pecuniary penalties for cartel activities or other infringements of the First Conduct Rule.

Unlike jurisdictions such as the United Kingdom and the United States, these penalties are civil in nature and no criminal sanctions are provided for with respect to cartel infringement.

\subsection*{Fines}

The Commission can apply to the Tribunal to impose a financial penalty of up to 10 per cent of the Hong Kong turnover of the undertaking concerned for each year in which the contravention took place, for a maximum of three years.\footnote{30}{Section 93, Competition Ordinance.}

\subsection*{Damages}

The Tribunal can order a person to pay damages to aggrieved parties who have suffered loss or damage as a result of a contravention of the competition rules.\footnote{31}{Paragraph 1(k), Schedule 3, Competition Ordinance.}

\subsection*{Disgorgement of profits}

The Tribunal can order any person to pay to the government, or to any other specified person, the illicit profit gained or loss avoided by that person as a result of the contravention.\footnote{32}{Paragraph 1(p), Schedule 3, Competition Ordinance.}

\subsection*{Order to pay the Commission’s investigation costs}

In addition, an offender may be liable to pay to the government the investigation costs reasonably incurred by the Commission in connection with proceedings for the contravention.\footnote{33}{Section 96, Competition Ordinance.}

\subsection*{Contractual and behavioural sanctions}

In addition to financial penalties, the Tribunal has powers to impose a series of contractual and behavioural sanctions to restore healthy competition in the market. These sanctions are set out in Schedule 3 of the Ordinance and include:

\begin{itemize}
  \item a declaration that a person has contravened a competition rule;
  \item an injunction restraining or prohibiting a person from engaging in conduct that contravenes the Ordinance;
  \item restoring parties to the position they were in prior to the contravention;
  \item restraining or prohibiting from dealing with property; and
  \item declaring the whole or part of the agreement void or voidable.
\end{itemize}
**Director disqualification orders**

The Tribunal may also, upon application by the Commission, impose a director’s disqualification order against a person for up to five years.34

**iii Sentencing principles**

No sentencing guidelines have been set out in the Ordinance or Conduct Rules Guidelines issued by the Commission. The only reference on sentencing in the Ordinance is that, in determining the amount of any pecuniary penalty, the Tribunal must have regard to the following factors:35

- the nature and extent of the conduct that constitutes the convention;
- the loss or damage, if any, caused by the conduct;
- the circumstances in which the conduct took place; and
- whether the person has previously been found by the Tribunal to have contravened the Ordinance.

It remains to be seen how the Tribunal interprets and applies these general principles for sentencing purposes.

**VI ‘DAY ONE’ RESPONSE**

**i Investigative powers of the Commission**

As mentioned in Section I.iv, the Commission has extensive powers to investigate suspected cartel activities and other suspected breaches of the Ordinance, including:

- issuing written notices requiring the production of documents or specific information (commonly referred to by the Commission as a Section 41 Notice);36
- compelling individuals to attend interviews to answer questions and to give a declaration confirming the accuracy of the answers (a Section 42 Notice);37 and
- conducting ‘dawn raids’ (i.e., entering and searching premises upon obtaining search warrants from the Court of First Instance to seize evidence and documents relevant to the investigation).38

The Commission has indicated in its Guideline on Investigations that it does not need to exercise the powers of issuing Section 41 and Section 42 Notices before applying for a search warrant for dawn raid purposes.39

**ii Right against self-incrimination**

It is important to note that under the Ordinance and the Guideline on Investigations, a person cannot remain silent at investigation interviews or refuse to produce documents or offer explanations based on the right against self-incrimination.

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34 Section 101(2), Competition Ordinance.
35 Section 93(2), Competition Ordinance.
36 Section 41, Competition Ordinance.
37 Section 42, Competition Ordinance.
38 Section 48, Competition Ordinance.
Nonetheless, the evidence obtained by the Commission under compulsion by Section 41 and Section 42 Notices is not admissible against that person in any criminal proceedings, or proceedings concerning financial or pecuniary penalties.40

iii  Legal professional privilege

A search warrant issued by the courts empowers the Commission to seize and copy relevant documents, computers and other electronic devices found on the premises. Both the Ordinance41 and the Commission’s Guideline of Investigations42 contain provisions on the protection of legal professional privilege (LPP) enshrined in the laws of Hong Kong.43 The Commission has also published Guidance Notes on the Investigation Powers of the Competition Commission and Legal Professional Privilege (the LPP Guidance Notes) with respect to handling privilege claims during dawn raids.

Definition of LPP

LPP applies to confidential communications between lawyers and clients made for the dominant purpose of obtaining legal advice. Privilege extends to communications with in-house counsel where they are providing independent legal services.

Privilege also applies to communications between a lawyer and a third party that come into existence after litigation is contemplated or commenced and made with a view to the litigation. This is commonly known as litigation privilege.

Procedures for claiming LPP

An investigated party may assert a claim for LPP during the execution of a search warrant, and the Commission is not allowed to review such materials unless and until the issue is resolved in the manner detailed below.

If the Commission agrees that a document is privileged, and the privileged document can be separated from non-privileged materials, the Commission will not copy or seize the document. If the Commission disputes the privilege claim, or if the document is only partly privileged, the Commission will seal the document in an envelope or other container and remove it from the premises.

The investigated party must then, within seven days, prepare an index of the materials and provide a supporting statement setting out the basis for its privilege claim in relation to each item.

The Commission will return an item if satisfied that the item is privileged, based on the supporting statement. If only part of a document is privileged, arrangements will be made for privileged information to be redacted.

If a dispute on the privilege claim remains, the Commission will confer with the party claiming privilege on a mutually agreeable approach, for instance, instructing an independent third-party lawyer to review the LPP claim. If the dispute cannot be resolved, either party may apply to the court for the matter to be determined.

40  Section 45, Competition Ordinance; Paragraphs 5.41 and 5.42, Guideline on Investigations.
41  Section 58, Competition Ordinance.
42  Paragraph 5.38, Guideline on Investigations.
43  Article 35, Basic Law of Hong Kong; Citic Pacific Ltd. v. Secretary for Justice and Another [2015] 4 HKLRD 20.
iv Handling a dawn raid
The key to handling a dawn raid is to have trained staff on the premises to assist with the investigations, and to expeditiously engage external legal counsel, particularly on contentious matters such as LPP claims. It is crucial to appoint an in-house counsel or a compliance officer ready to act as a dawn raid coordinator and to train key employees, who may include the receptionist, heads of various departments, information technology staff and the in-house legal team.

v Criminal sanctions in relation to Commission investigations
Individuals and corporations are under a duty to cooperate with the Commission in competition investigations, failing which they may be liable to criminal sanctions.

The Ordinance stipulates criminal offences for providing false and misleading information, destroying or falsifying documents, obstructing a search or disclosing confidential information provided by the Commission, which are punishable by fines of up to HK$1 million and imprisonment for up to two years.44

VII PRIVATE ENFORCEMENT

i No stand-alone private action
Unlike many other jurisdictions, the Ordinance does not permit private stand-alone actions for contravention of competition rules. In other words, absent a Tribunal determination on an alleged infringement of the Ordinance, victims cannot commence court actions to pursue damages for the offenders’ breaches. This position was confirmed by a judgment handed down by the Court of First Instance in April 2017.45 In this case, the court dismissed the claim on grounds that stand-alone or private litigation is not envisaged by the Ordinance, and the only court that can make a ruling on contravention of the Ordinance is the Tribunal.

The implications of this judgment are that parties suffering loss or damage from a breach of the Ordinance only have one realistic remedy – lodging a complaint before the Commission. Once a contravention is established by the Tribunal, the victim can bring a follow-on action under the Ordinance against the offender or any party involved in that contravention.46

ii No class action available
At present, no class action procedure is available in Hong Kong generally and with respect to competition claims.

44 Sections 52 to 55, Competition Ordinance.
45 Loyal Profit International Development Ltd v. Travel Industry Council of Hong Kong (HCMP 256/2016), 27 April 2017.
46 Section 110, Competition Ordinance.
iii Liability, quantum and limitation period
The Tribunal’s ruling as to liability will be binding in any follow-on actions and the claimant is only required to prove causation and quantum. Further, the limitation period for such actions is three years from the expiry of the appeal period following a Tribunal decision that the Ordinance has been contravened.

iv Leniency provides no immunity
It should also be noted that a leniency agreement does not provide immunity from follow-on actions. The signed statement of agreed facts and declaration of contravention made by the Tribunal during the leniency application process could provide the evidential basis for victims to pursue follow-on actions.

VIII CURRENT DEVELOPMENTS
The Hong Kong community is eagerly awaiting the ruling in two trials heard by the Tribunal in 2018. In particular, there will be considerable interest in the Tribunal’s interpretation and application of legal principles relating to big rigging, price-fixing and market-sharing behaviour, as well as its sentencing approach if a contravention is established.

There were significant changes in the senior management of the Commission during 2017. The new leadership has a wealth of overseas experience in antitrust enforcement, including the new Chief Executive Officer, Mr Brent Snyder, who handled criminal cartel investigations in the Antitrust Division of the Department of Justice in the United States, and the new Executive Director of Operations, Mr Jindrich Kloub, a former cartel official with the European Commission. With the Commission’s extra litigation funding, it is anticipated that there will be vigorous enforcement actions against cartel activities in the years to come.

Finally, the senior management of the Commission has indicated its intention to decide whether certain aspects of the Ordinance need to be reviewed. It is expected that the more controversial issues would form the subject matter for review, such as introducing an economy-wide merger control scheme, establishing the right to bring stand-alone litigation under the Ordinance, removing the exemption for statutory bodies and expanding the leniency protection to cover subsequent applicants.
I ENFORCEMENT POLICIES AND GUIDANCE

i Statutory framework

The Competition Act 2002 (the Act), in conjunction with various regulations, forms the competition regime in India. While there are many sectoral regulators responsible for maintaining fair competition in their respective sectors, the Competition Commission of India (CCI), established under Section 7 of the Act, is the principal regulator for anticompetitive behaviour across all sectors.

Provisions of Section 3 of the Act and various regulations, particularly the Competition Commission of India (Lesser Penalty) Regulations, 2009 (Leniency Regulations), deal with anticompetitive agreements, including cartels. ‘Cartel’ has been defined under the Act to include ‘an association of producers, sellers, distributors, traders or service providers who, by agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services’. Therefore, to establish the existence of a cartel, the existence of an ‘agreement’ needs to be proved first.

‘Agreement’ under the Act has been defined very widely and includes an arrangement or understanding or acting in concert, and is not limited to written formal agreements. Section 3(1) of the Act sets out a general prohibition on all agreements that have or are likely to have an appreciable adverse effect on competition (AAEC) within India, while Section 3(3) specifically sets out that certain horizontal agreements, including cartels, will be presumed to have an AAEC in India, thereby shifting the burden of proof to the accused to rebut the presumption. These horizontal agreements include those that:

a. directly or indirectly determine purchase or sale prices;

b. limit or control production, supply, markets, technical development, investment or provision of services;

c. share 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

d. directly or indirectly result in bid rigging or collusive bidding.

The CCI is the enforcing body, assisted by its investigative arm, the office of Director General, CCI (DG). Most cartel investigations have been initiated by the CCI upon receipt of information either as a complaint or a leniency application, although the CCI has also initiated suo moto action or has initiated proceedings upon receipt of a reference made by a

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1 Farhad Sorabjee and Amitabh Kumar are partners at J Sagar Associates.
government or statutory authority. The CCI directs the DG to commence an investigation if it is of the view that there exists a *prima facie* case warranting an investigation. The DG cannot initiate an investigation *suo moto*. Once the DG submits an investigation report to the CCI, the CCI can either direct the DG to investigate further or it can continue with its inquiry and call upon the parties to make written and oral pleadings. On reaching a positive finding of the existence of a cartel and any resulting infraction, the CCI may impose a penalty and pass any other order that it deems fit. The order of the CCI can be appealed before the National Company Law Appellate Tribunal (NCLAT). Any order of the NCLAT is finally appealable before the Supreme Court of India (SC).

The penalty that may be imposed in the case of any anticompetitive conduct cannot be more than 10 per cent of the average of the turnover of the contravening enterprise for the three preceding financial years. However, in the case of a cartel, the CCI can impose a penalty of up to three times the profit of the contravening enterprise or 10 per cent of the turnover of the contravening enterprise, for each year of the continuance of the cartel, whichever is the greater. Recently, the SC held that the penalty to be imposed on enterprises for violation of provisions of the Act should be calculated on the basis of relevant turnover of the enterprise and not the total turnover, that is to say turnover pertaining to products and services that have been affected by a contravention and not the total turnover. Further, the directors and other employees of the contravening entity found responsible can also be penalised under the Act.

The CCI has held that an agreement by itself cannot be the basis of cartel prosecution, and that there have to be economic consequences arising out of such an agreement. Cases in which the CCI has prosecuted cartels will show that the CCI relies not only on direct evidence but also on indirect evidence and economic analysis.

There are no criminal sanctions in India for cartelisation. However, non-compliance with the orders of the CCI or the NCLAT can attract criminal liability.

### Guidelines and policy

The substantive provisions of the Act dealing with anticompetitive behaviour have only been in force since 2009. Competition jurisprudence is still developing in India. Both legal practitioners and the CCI rely on cases decided upon by the courts of the United States and the European Commission for guidance. The CCI has not issued any policy or guideline for cartels.

### Cartel enforcement

Cartel enforcement has been a focus for the CCI since the beginning but has taken time to gain traction. During the past year, the CCI has been aggressive in investigating cases relating to cartels. Apart from imposing monetary penalties on several companies, including their officers, the CCI has also conducted dawn raids on companies found to be active in the alcoholic beverage and dry cell battery markets.

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2 The National Company Law Appellate Tribunal replaced the Competition Appellate Tribunal with effect from 26 May 2017.
3 *Turnover* is to be interpreted as relevant turnover as held by the Supreme Court in the case of *Excel Crop Care Ltd v. Competition Commission of India*, Civil Appeal No. 2480 of 2014.
4 *ibid.*
As at November 2018, the CCI has passed a total of 72 orders (of which 12 have been in 2018) penalising companies (including their officers) for cartel infringements. The total in monetary fines imposed by the CCI for cartel infringements to date is approximately 80 billion rupees (fines totalling more than 5 billion rupees have been imposed in the past year alone).

The CCI has been adopting a more cautious approach to penalties since the judgment of the Supreme Court of India (SC) in *Excel Crop Care Limited. v. Competition Commission of India (Excel Crop)*, in which the SC interpreted the turnover to be ‘relevant turnover’ and laid down guidelines and procedures to be followed by the CCI while imposing penalties. Since *Excel Crop*, the CCI has been imposing penalties on relevant turnover or profit and providing more detailed reasons (i.e., after considering aggravating or mitigating factors) for imposing penalties.

The year 2018 has been interesting as the CCI passed four orders in cases involving leniency applications. Each of these orders provides an insight into the factors that are considered by the CCI while deciding the penalty and immunity of the respective cartel members who have claimed immunity. Notably, in 2018, the CCI also passed a leniency order in which for the first time it granted a 100 per cent reduction in penalty to the first applicant, which enabled the CCI to form a *prima facie* opinion regarding the existence of the cartel.

In terms of the procedural aspects, the NCLAT has remanded several important cartel cases to the CCI for procedural improprieties. After hearing afresh, the CCI reimposed penalties in all these cases. Further, in a major win for the CCI, the NCLAT upheld the CCI’s order imposing penalties on 11 cement companies and trade associations for cartelisation in the cement industry.

### II COOPERATION WITH OTHER JURISDICTIONS

The CCI has been granted extraterritorial jurisdiction over any anticompetitive conduct occurring outside India if such conduct has caused or is likely to cause an AAEC within India. To date, the CCI has not exercised this extraterritorial jurisdiction.

Section 18 of the Act permits the CCI to enter into any memorandum or arrangement, with the prior approval of central government, with any agency of any foreign country for the purpose of discharging its duties or performing its functions under the Act. The CCI has executed memoranda of understanding on cooperation with several competition agencies, including those of the United States, the European Union and Australia, in an attempt to set up a framework for cooperation and exchange of information. The scope and content of these arrangements are not publicly known.

It is believed that there is a fair amount of coordination and dialogue with regulators in other jurisdictions through the International Competition Network and other channels, although there is no provision permitting the CCI to share information or documents with other jurisdictions without the consent of the concerned parties.

### III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

As mentioned in Section II, an action taking place outside India but that has or is likely to have an AAEC in the relevant market in India may be the subject of an inquiry by the CCI under Section 32 of the Act.
The Act provides for certain affirmative defences and exemptions, namely:

a joint venture: while certain horizontal agreements have been presumed to harm competition, an exemption from this presumption is offered to an efficiency-enhancing joint venture. The burden of demonstrating such efficiencies lies with the enterprise seeking the exemption. If the efficiency gain is shown to exceed the harm to competition, the party is not likely to be held to be in contravention of the anticompetitive behaviour on an application of the rule of reason;

b intellectual property rights defence: the Act provides that, notwithstanding the anticompetitive agreement provisions of the Act, a person shall be free to impose restrictions insofar as the restrictions imposed are reasonable, and for the protection of, and prevention of any infringements of, any intellectual property rights granted under India’s intellectual property laws;

c export cartels exemption: the Act provides that restrictions relating to anticompetitive agreements, including cartels, do not apply to the right of any person to export goods from India to the extent that the agreements relate exclusively to production, supply, distribution or control of goods or provision of services. This exemption may be read to exclude export cartels (i.e., cartelisation of markets outside India); and

d statutory exemption: under Section 54, central government can exempt any class of enterprise from the application of competition law in the interests of security of the state or public interest (exemption has been granted to vessel-sharing agreements within the liner shipping industry from the provisions of Section 3 of the Act for a period of one year from 20 June 2017).6

IV LENIENCY PROGRAMMES

The leniency policy in India is governed by Section 46 of the Act read with the Leniency Regulations, which set out the requirements for qualification, the procedure to be followed for the imposition of a lesser penalty and the benefits available.

The Leniency Regulations provide for a reduction in the penalty of up to 100 per cent if an applicant makes some vital disclosure about the existence of a cartel to the CCI and if no reduction in penalty has been granted to any other applicant by the CCI. This benefit of reduction in penalty would be given to an applicant only if the CCI did not have sufficient evidence, or any evidence at all, to establish the existence of a cartel.

In August 2017, far-reaching amendments were made to the Leniency Regulations (2017 Amendment). By way of the 2017 Amendment, the scope of an ‘applicant’ under the Leniency Regulations has been expanded to specifically include an individual who has participated in a cartel on behalf of an enterprise to make a leniency application to the CCI for a grant of a lesser penalty. Further, the 2017 Amendment provides an option to an enterprise making a leniency application, to include the names of individuals involved in the cartel (on behalf of the enterprise) for whom it wishes to seek a lesser penalty.

The most laudable development pursuant to the 2017 Amendment is that the grant of a reduction in penalty to an applicant (including an individual) who meets the conditions

6 Notification No. SO 1933(E) [F.No.5/20/2011-CS]. The exemption to vessel-sharing agreements has been repeatedly granted since 2013.
required is now mandatory. Prior to the 2017 Amendment, it was at the discretion of the CCI to reduce a penalty and by how much, if at all. However, the percentage by which a penalty would be reduced is still discretionary and there is still no guarantee of a full reduction.

The leniency regime also sets out a marker system for applicants. An applicant can approach the CCI on a no-names basis and provide details of the infringement and the evidence in its possession. The CCI will employ a priority status based on the time of the initial contact. The first applicant to contact the CCI, albeit orally, will be given the status of first applicant. If the initial contact is oral, the applicant will need to ensure that the documentary evidence is provided to the CCI within 15 calendar days of receiving a direction from the CCI to submit the application. Failure to do so will result in the loss of the priority status.

The Act and applicable regulations do not provide for any specific guidance as to the nature and level of detail of the evidence required. Once a marker has been given, the CCI does not deal with another applicant until a decision regarding the first applicant has been made.

The conditions that need to be met for an applicant to qualify for the benefit of a reduced penalty include:

a. ceasing to have further participation in the cartel from the time of its disclosure, unless otherwise directed by the CCI;
b. providing vital disclosure in respect of a violation under Section 3(3) of the Act;
c. providing all relevant information, documents and evidence as may be required by the CCI;
d. cooperating genuinely, fully, continuously and expeditiously throughout the investigation and other proceedings before the CCI; and
e. not concealing, destroying, manipulating or removing the relevant documents in any manner that may contribute to the establishment of a cartel.

Subsequent applicants may be granted a reduction in penalty on making a disclosure by submitting evidence that, in the opinion of the CCI, may provide significant added value over and above the evidence already in the possession of the CCI or the DG to establish the existence of a cartel. The applicant marked second in the priority status may be granted a reduction of up to 50 per cent of the leviable penalty, while the applicant marked third or later in the priority status may be granted a reduction of up to 30 per cent of the leviable penalty. Neither a successful nor an unsuccessful applicant for leniency is given immunity from civil claims.

In terms of the applicable regulations, no leniency application can be entertained after the DG’s investigation report is received by the CCI.

As such, under the Leniency Regulations, the CCI grants confidentiality regarding the applicant’s identity, and the information and evidence furnished by an applicant. However, pursuant to the 2017 Amendment, the DG is allowed to disclose the information and evidence furnished by an applicant to any party if the DG deems the disclosure necessary for the purposes of the investigation. Nevertheless, disclosure can only be made after obtaining prior approval from the CCI in the form of a reasoned written order.

As at November 2018, the CCI has passed five orders in cases involving leniency applications (of which four were passed in 2018). In 2018, the CCI granted a reduction in penalty to leniency applicants in three cases. The trend in recent leniency cases indicates that the CCI will consider granting a 100 per cent reduction in fines or complete immunity only when the leniency applicant has disclosed evidence relating to the cartel that the CCI has used as the basis for starting its investigation.
In April 2018, companies involved in the supply of zinc-carbon dry cell batteries were found guilty by the CCI of fixing prices and restricting output. The CCI initiated an investigation pursuant to a leniency application filed by Panasonic Japan for itself and its Indian subsidiary, Panasonic India. During investigations, the DG carried out simultaneous search and seizure operations (dawn raids) at the premises of Eveready, Nippo and Panasonic India and seized incriminating material and documents. While the DG’s investigation was in progress, Eveready and Nippo, also filed leniency applications with the CCI. While considering the leniency applications, the CCI granted Panasonic and its individuals a 100 per cent reduction of their penalty; Eveready, and its individuals, a 30 per cent reduction in the penalty; and Nippo and its individuals, 20 per cent reduction in penalty. The order provides an insight into the factors that are considered by the CCI while deciding the penalty and immunity of the respective cartel members who have claimed immunity. The CCI noted that the leniency application filed by Panasonic Japan made true and vital disclosures, which enabled the CCI to form a prima facie opinion regarding the existence of the cartel.

In May 2018, the CCI granted partial leniency to four of six leniency applicants involved in bid rigging relating to tenders floated by Pune Municipal Corporation for procurement of municipal organic and inorganic solid waste processing plants. The CCI started the investigation pursuant to a complaint filed by Nagrik Chetna Manch (a public charitable trust based in Pune). During the course of investigations, all six parties under investigation filed leniency applications. The CCI granted a 50 per cent reduction to the first applicant since it did not file the leniency application until a later stage in the investigation when some evidence had already been collected.

In July 2018, the CCI granted a 100 per cent reduction in penalty to leniency applicants Globecast India Private Limited and Globecast Asia Private Limited (collectively referred to as Globecast), and their respective responsible officers, for bid rigging in tenders floated by various sports broadcasters for the procurement of broadcasting services in India. It has also granted a 30 per cent reduction to Essel Shyam Communication Limited (now Planetcast Media Services Limited) (ESCL) and their responsible officers. The CCI initiated its investigation pursuant to a leniency application made by Globecast whereby it disclosed the existence of a bid-rigging arrangement between ESCL and Globecast.

In an interesting case in November 2018, the CCI closed a cartel investigation into the flashlights market. The investigation was started pursuant to a leniency application filed by Eveready Industries. Four days later, Panasonic India also filed a leniency application. After a detailed investigation, the CCI held that although there was evidence of an exchange of commercially sensitive information between the parties, there was no evidence to establish that the prices of flashlights were determined pursuant to those activities.7

V PENALTIES

Under the Act, in the case of cartels, the CCI has the power to impose a penalty of up to three times the profit or 10 per cent of the turnover of each participating enterprise for each year of continuance of a cartel agreement, whichever is the greater. If an enterprise is a ‘company’, any of its directors or officials who are guilty are also liable to be proceeded against.

While the CCI has not framed any guidelines or offered any sort of guidance on calculating penalties, the SC in Excel Crop limited the penalty levied on multi-product

7 In Re: Alleged Cartelisation in Flashlights Market in India.
companies to the turnover attributable solely to the product that was the subject of the contravention (i.e., the ‘relevant turnover’). Further, the SC provided a two-step methodology for calculating a penalty:

- **a** Step 1: determining the relevant turnover – the relevant turnover should be the entity’s turnover pertaining to products and services that have been affected by a contravention; and
- **b** Step 2: determining the appropriate percentage of penalty based on aggravating and mitigating circumstances.

The guidelines laid out by the SC will help to eliminate the application of disproportionate penalties on enterprises and demonstrate appropriate mitigating circumstances for the imposition of a lesser penalty.

In addition to the imposition of penalty, the CCI may also pass orders, _inter alia_, directing the parties to terminate the agreement and to refrain from re-entering such an agreement, or to modify the terms of the agreement.

The Act does not provide for criminal liability other than for wilful default in implementing orders issued by the CCI. Non-compliance with CCI orders may result in a fine of up to 250 million rupees or imprisonment for up to three years, or both, while non-compliance with orders issued by the NCLAT may lead to a fine of up to 100 million rupees or imprisonment for up to three years, or both.

Non-cooperation during an investigation may also lead to the imposition of a penalty by the CCI. The CCI imposed a fine of 10 million rupees on Google for its failure to comply with the directions given by the DG seeking information and documents. The CCI also imposed a fine of 15 million rupees on Monsanto and its affiliate companies for their failure to provide information sought by the DG in respect of its authorised representatives.

### VI ‘DAY ONE’ RESPONSE

The information received from an ‘informant’ or collected _suo moto_ is reviewed by the CCI to determine whether there exists a _prima facie_ case that warrants an investigation by the DG.

Both the CCI and the DG have been conferred with the same powers as those conferred on an Indian civil court, including the power to summon any person and enforce his or her attendance, and powers of discovery and enforcement of production of documents. Additionally, the DG has been vested with the power to conduct searches and seizures.

Following the repeal of the Companies Act 1956 and the enactment of the Companies Act 2013, the DG is no longer required to obtain a court-issued warrant to conduct a search and seizure.

According to media reports in October 2018, the CCI raided the offices of three top beer producing companies – United Breweries Holdings Limited, Carlsberg A/S and Anheuser-Busch InBev SA/NV – as part of an investigation into an allegation of cartelisation in the beer market.

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As referred to in Section IV, the CCI conducted a dawn raid in August 2016 at the premises of Eveready, Nippo and Panasonic India and seized incriminating material and documents in relation to cartelisation in the dry-cell batteries market.\(^{10}\)

**VII PRIVATE ENFORCEMENT**

The Act does not provide for the private enforcement of rights. Compensation claims for damages by private parties have to be filed before the NCLAT. The NCLAT is yet to pass an order addressing a claim for damages.

As per the Act, such claims can be made either after the CCI arrives at a finding of contravention, or after the NCLAT arrives at a finding of contravention if the decision by the CCI is appealed. However, as a matter of practice, the NCLAT awaits the decision of the SC on merits before proceeding to hear compensation claims. The Metropolitan Stock Exchange has filed an application seeking compensation from the National Stock Exchange of India (NSE) for abusing its dominance to oust players from the market. However, the NCLAT has deferred hearing the compensation application until the SC decides whether the NSE abused its dominance or not. Similarly, in two other cases,\(^{11}\) compensation applications were filed by Crown Theatre against Kerala Film Exhibitors Federation for facilitating cartelisation between film distributors to deny the screening of Tamil and Malayalam films in the State of Kerala, and by Sai Wardha Power Limited against Coal India Limited for abuse of dominance in the market for the production and supply of non-coking coal to thermal producers in India. Both are currently pending before the NCLAT.

Although damages jurisprudence is yet to develop in India, it is possible for one or more persons, with the approval of the NCLAT, to file compensation claims on behalf of many.

If a loss is shown to have been suffered by a party as a result of a contravention of the substantive provisions of the Act, the suffering party can approach the NCLAT for an award of restitutive compensation. If many persons have suffered loss or damage from an action of the same enterprise or group of enterprises, an application for an award of compensation can be made by just one of those persons on behalf of them all. However, since the quantum of the fine is indicative of the severity of the offence, it may be an important factor that is considered when calculating the award.

**VIII CURRENT DEVELOPMENTS**

Apart from the significant amendments in the leniency regime and leniency orders, there have been some notable decisions in relation to cartel enforcement in India during the past year.

In October 2018, the SC set aside an order passed by the CCI penalising 45 manufacturers of liquefied petroleum gas (LPG) cylinders for cartelising and bid rigging in a tender floated by Indian Oil Corporation Limited for supplying 14.2kg-capacity LPG cylinders. The SC observed that price parallelism is not sufficient to prove concerted action. The market conditions prevalent were that of an oligopsony and parallel behaviour was not

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\(^{10}\) *In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India, suo moto Case No. 02 of 2016.*

\(^{11}\) *Crown Theatre v. Kerala Film Exhibitors Federation, CA (AT) (COMPAT) No. 1 of 2017 in Competition Appeal (AT) No. 16 of 2017; Sai Wardha Power Ltd v. Coal India Ltd & Ors, Transfer CA (AT) (Compensation) No. 01/2017.*
the result of any concerted practice. It was observed that in an oligopsony, parallel pricing *simpliciter* would not lead to the conclusion that there was a concerted practice and there has to be other credible and corroborative evidence.

In September 2018, the Delhi High Court upheld the DG’s right to expand the scope of investigations and investigating individuals. Earlier, the CCI had passed an order directing the DG to investigate the conduct of certain pharmaceutical companies and an association (a *prima facie* order); however, Cadila Healthcare Limited (Cadila) was not named as an opposite party in the *prima facie* order. During the investigation, the DG issued notices to Cadila seeking certain information. After submission of the DG’s investigation report, Cadila became aware that it is also under investigation. Aggrieved by its inclusion in the investigation, Cadila filed a writ petition before Delhi High Court challenging the jurisdiction of the CCI and the DG to investigate Cadila’s conduct. The Court observed that, based on the *prima facie* order, the DG was directed to look into the subject matter and could expand the scope of its investigation to include parties that are not named in the *prima facie* order, including third parties. Further, the subject matter of the case includes not only the one alleged party, but other allied and unenumerated ones, involving others (including third parties).

In July 2018, the NCLAT upheld the 63 billion rupee penalty imposed by the CCI on 11 cement companies and their trade association, the Cement Manufacturers Association (CMA), for price-fixing and limiting and controlling the production and supply of cement. The NCLAT observed that the cement companies were utilising the platform of their trade association, the CMA, to discuss prices and other sensitive information relating to production, capacity, dispatch, *inter alia*.

In September 2018, the CCI imposed penalties on 18 sugar mills and two trade associations (the Indian Sugar Mills Association and Ethanol Manufacturers Association of India) for rigging the bids in respect of a joint tender floated by oil marketing companies in 2013 for the procurement of ethanol for blending with petrol. Under the order, a total penalty of 3.805 million rupees was imposed on the sugar mills and their trade associations.

In September 2017, the Bombay High Court set aside the CCI’s order directing an investigation against telecommunications operators, namely Bharti Airtel Limited, Vodafone India Limited and Idea Cellular for forming a cartel to limit the entry of a new player, Reliance Jio. The Court held that, while in principle the CCI could exercise jurisdiction over enterprises and persons regulated by their respective sectoral authorities, in this particular case the core of the allegation was governed by contracts falling within the purview of regulations issued by the Telecom Regulatory Authority of India (TRAI) and the terms of their licences issued by the Department of Telecommunications. Therefore, any dispute relating to the interpretation and regulation of such points of interconnection fell within the exclusive domain of authorities constituted under the TRAI Act.

Separately, by way of a notification dated 4 July 2018, the Ministry of Corporate Affairs granted an additional three-year extension to the vessel sharing agreement (VSA) exemption in the liner shipping industry. This exempts VSAs from scrutiny under Section 3 (i.e., anticompetitive agreements) of the Act. The applicability of the VSA exemption extends to carriers of all nationalities, operating ships of any nationality from any Indian port as long as the agreements do not include concerted practices involving price-fixing, limitation of capacity or sales, or the allocation of markets or customers.
Chapter 13

INDONESIA

Asep Ridwan, Farid Fauzi Nasution, Anastasia Pritahayu RD and Wisnu Wardhana

I ENFORCEMENT POLICIES AND GUIDANCE

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 activities respectively, set out provisions prohibiting cartel conduct in relation to price, production or market, as well as bid rigging. In addition, provisions on restrictive agreements or activities are contained in other laws and regulations, such as Article 382 bis of the Indonesian Criminal Code, which prohibits unfair competition.

The competition authority responsible for the enforcement of the ICL, from the research on certain industries, investigations and, examinations to the imposition of sanctions, is the Commission for the Supervision of Business Competition (KPPU). The KPPU may commence investigations and examinations as well as issue decisions and impose administrative sanctions against all violations of the ICL. The KPPU has the power to summon undertakings, witnesses or experts to obtain, examine and evaluate documents or other instruments of evidence.

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 in the market or may cause harm to consumers. Particularly for the bid rigging clause, the ICL does not clearly address whether it shall be understood as covering a purely horizontal or vertical arrangement. However, in its guidelines on this matter, the KPPU adopts both arrangements.

The cartel substantive test in the ICL takes either the ‘per se illegal’ or ‘rule of reason’ approach in each article. The provisions that consist of the phrase ‘which may result in monopoly or unfair business practices’ generally adopt the rule of reason approach. In the application, the provisions consider that an agreement or conduct violates the ICL only after the KPPU conducts an in-depth assessment to establish whether the agreement or conduct has an adverse impact on the market or on the competition. This assessment applies to certain cartel conduct, such as output restriction, market allocation and bid rigging.

The per se illegal approach refers to provisions that do not include the above-mentioned phrase. In this approach, the KPPU does not have to analyse the effect on the market of conduct or an agreement as the existence of a prohibited agreement or conduct is itself

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2 Komisi Pengawas Persaingan Usaha, the Indonesian competition commission.
considered a sufficient violation of the provisions. This approach is similar to the application of the ‘per se illegality’ rule in other jurisdictions and is applicable to price-fixing and boycott provisions in the ICL. To date, the KPPU has issued several guidelines relating to cartel assessment, namely guidelines on the assessment of bid rigging, restrictions on output and marketing, and price-fixing.

II COOPERATION WITH OTHER JURISDICTIONS

The ICL does not have any specific provision for cross-border competition issues. However, the KPPU has so far officially cooperated with Japan, Korea, Mongolia, Australia, New Zealand, and last year, Singapore in its attempt to administer the cross-border aspect of competition law. Since the nature of cooperation is bilateral, the scope of cooperation with a certain competition commission from one jurisdiction might differ from another.

Cooperation with Japan is in the form of an economic relationship under the Indonesia-Japan Economic Partnership Agreement (IJEPA). This agreement was implemented in 2007 and includes a special section on competition policy, particularly concerning notification of law enforcement, information exchange and technical assistance. This partnership agreement is a means of support for the Japan Fair Trade Commission (JFTC) and the KPPU to enforce competition law in both countries.3

In 2014, the KPPU established a bilateral cooperation with the Korea Fair Trade Commission. The cooperation aims to contribute to the effective implementation of the competition laws of each party by promoting cooperation in competition law and policy between Indonesia and Korea. In 2017, the KPPU established a cooperation agreement with the Authority for Competition and Consumer Protection Mongolia, whereby they agreed to build the capacity of competition agencies through technical assistance programmes, data exchanges and sharing knowledge. Cooperation with Australia (the Australian Competition and Consumer Commission) and New Zealand (the NZ Commerce Commission) on competition policy is covered under the ASEAN-Australia-New Zealand Free Trade Agreement.4

In August 2018, the KPPU signed a memorandum of understanding (MOU) with the Competition and Consumer Commission of Singapore, the first-ever MOU between competition authorities in ASEAN Member States. This signifies the strengthening of the long-standing relationship between the two authorities. The aim of the MOU is to generate more consistent and effective competition outcomes and remedies so that business will have more regulatory certainty in a cross-border matters (particularly the Indonesian-Singapore issue) by having a cooperation framework that encourages notification of enforcement activities that potentially affect one party’s interests, facilitates the exchange of information between the competition authorities, ensures the confidentiality of information and coordinates the cooperation in handling cases of mutual interest. It also addresses exchanges of employees.5

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4 ibid.
Although the cooperation between the KPPU and competition authorities in other jurisdictions covers, among other things, the exchange of information in relation to competition law enforcement, to date there has been no precedent of this cooperation, particularly regarding information exchanges with respect to the investigation or examination of cartels or any other competition cases. However, the KPPU has issued a notification of law enforcement to the JFTC concerning the KPPU’s decision on a cartel on automatic scooters committed by two multinational Japan-based companies (Yamaha and Honda), and the JFTC has made a notification to the KPPU for the CTR case. These notifications were made based on the IJEPA. Another implementation of the IJEPA was in the Donggi-Senoro LNG case, in which the KPPU notified the JFTC immediately after the release of its decision due to the involvement of Mitsubishi Corporation.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

The ICL generally applies to prohibited conduct that occurs abroad only if the conduct has an adverse effect in Indonesia. The KPPU will also investigate whether a defendant is established or domiciled in Indonesia, or directly or indirectly engages in business activities in Indonesia. In one bid rigging case, the KPPU included a foreign undertaking as a defendant.

In KPPU Decision No. 3/2016 regarding the tender for jack-up drilling rig services, which was conducted by Husky-CNOOC Madura Limited (HCML), the KPPU included HCML as one of the defendants although the company is established in British Virgin Islands. Note, however, that HCML had an office and was engaged in business activities in Indonesia. HCML was accused of conspiring with PT China Oilfield Services Limited Indo (COSL), an Indonesian entity, to win COSL. HCML and COSL, both of which were deemed to be affiliates owing to their ownership of shares, were found guilty and fined by the KPPU. However, the decision was later overruled by the district court.

If none of the conditions above is satisfied, the KPPU may pursue a case by enforcing its decision against local subsidiaries or affiliates of the foreign companies. This extraterritorial doctrine has been applied several times by the KPPU in investigations of violations of the ICL.

In the Temasek case (KPPU Decision No. 7/2007), the KPPU accused Temasek, a Singaporean entity, of committing anticompetitive behaviour by having ownership of majority shares in both Telkomsel and Indosat, two major telecommunication providers in Indonesia. According to the KPPU, the cross-ownership had resulted in the control of more than 50 per cent of the Indonesian cellular market, which led to the lessening of competition. This situation then allowed Telkomsel to apply excessive prices for its services, which led to consumer loss. The KPPU’s decision to include Temasek as a defendant created controversy about whether a foreign entity can be subject to the enforcement of the ICL. In its decision, the KPPU states that with reference to national and international law, the ICL may be enforced extraterritorially as long as the requirements regarding implementation doctrine or the single economic entity doctrine are satisfied.

7 See, for example, KPPU Decision No. 3/2016.
8 See, for example, KPPU Decision No. 7/2007.
Further, the KPPU argued that it implemented the Single Economic Entity (SEE) Doctrine to the defendant. The KPPU viewed Telkomsel, Indosat and other companies within the Temasek Business Group as a single economic entity. This is based on the KPPU’s conclusion that Temasek, through its subsidiaries, was able to (1) appoint its representation within the management of Telkomsel and Indosat, (2) influence the business policy of Telkomsel and Indosat, and (3) access sensitive and confidential information about Telkomsel and Indosat. The Supreme Court has upheld the Temasek case and thus the KPPU has since been consistent in applying the SEE doctrine and the extraterritorial application of the ICL in any investigation, assessment or other case involving any foreign undertaking, either cartel-related or not, for example in the Barclay Premier League case (KPPU Decision No. 03/2008, a non-cartel case) and the Amlodipine cartel (KPPU Decision No. 17/2010).

There is no industry-specific exemption applicable under the ICL. The ICL provides general exemption to certain agreements or activities, as follows:

- conduct (actions) or agreements for the purpose of implementing prevailing regulations;
- agreements relating to intellectual property rights, such as licensing, patent, trademark, copyright, industrial product design, integrated electronic circuit, and trade secrets and agreements relating to franchising;
- agreements on technical standardisation of goods or services that do not restrict or impede competition;
- agreements relating to agencies that do not contain provisions to resupply goods or services for less than the agreed price;
- agreements on research cooperation to increase or improve the standard of living of the society at large;
- international agreements that have been ratified by the government of the Republic of Indonesia;
- export-oriented agreements or actions that do not distract demand or supply for the domestic market;
- undertakings falling within the category of small-scale enterprises; or
- activities of cooperatives that exclusively serve the interests of their own members.

However, there are precedents in which the KPPU had a different view in interpreting the exemption on point (a), above. In the Garlic case (KPPU Decision No. 5/2013), the KPPU alleged that 19 garlic importers, as well as several government institutions, were colluding and impeding the production or distribution of imported garlic. According to the applicable regulations, importers are required to obtain certain approvals from the Ministry of Trade to import garlic. The KPPU decided to include the Minister of Trade and the Directorate General of International Trade as defendants relating to an allegation that they were colluding with the 19 importers in issuing import approval. In its decision, the KPPU found the Minister and the Directorate General guilty although they had acted within their statutory powers and did not engage in any business or commercial activities.9

There is also a case in which the actions of the defendants were based on a written and formal instruction from the Ministry of Agriculture, which in this matter should be regarded as a valid policy as there were sanctions for those who ignored the instruction; however, the KPPU had a different view on that. In the Chicken case (KPPU Decision No. 2/2016), the KPPU alleged that 12 breeders were limiting the production of broiler chickens. The

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9 See, for example, KPPU Decision No. 5/2013.
allegation was based on the fact that the defendants had conducted an early culling of parent stocks and hatchery egg final stocks in 2015. The KPPU viewed such early culling as an attempt by each defendant to jointly limit their output, even though it was done according to an official instruction from the Ministry of Agriculture. The instruction itself was issued by the government as an effort to mitigate the effects of oversupply of live birds, which was detrimental to small-scale farmers. Regardless of these facts, the KPPU held the view that the defendants were limiting their output and found them guilty. The district court recently annulled the decision and the KPPU sought an appeal to the Supreme Court, but the Supreme Court upheld the district court decision.

The above precedents indicate that the KPPU will not apply the exemption set out in point (a) above as an absolute exemption. Hence, it is necessary for undertakings to be aware of their businesses even if they are based on or under the government’s instruction or authority.

IV LENIENCY PROGRAMMES

The ICL does not regulate leniency. A draft amendment of the ICL is being discussed by the government and parliament. This draft amendment introduces a high-level provision on leniency whereby the KPPU may fully exonerate or reduce the sanction for an undertaking that confesses or reports any activity that allegedly violates the ICL. As yet, it is unclear how the leniency programme will be designed, for example regarding the mechanism and the benefits for applicants.

V PENALTIES

When the KPPU concludes that a violation has occurred, it has the authority to impose administrative sanctions, such as annulling the agreements or cancelling any provisions of an agreement that would violate the ICL, imposing pecuniary penalties (between a minimum of 1 billion rupiah and a maximum of 25 billion rupiah) or awarding compensation for damage incurred by companies or individuals as a result of anticompetitive conduct. In some 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 (debarment).

Article 47 of the ICL reads as follows:

1. The KPPU has the authority to impose administrative sanctions to undertakings that are proven to have violated the ICL.
2. Administrative sanctions as referred in Paragraph (1) of this Article can be in the form of:
   a. a decision to annul agreements;
   b. an order to discontinue vertical integration;
   c. an order to discontinue practices that may cause monopolistic practices or unfair business competition;
   d. an order to discontinue the abuse of a dominant position;
   e. a decision to annul the merger or amalgamation and shares acquisition;
   f. a decision to pay compensation for damages; or
   g. a fine ranging from 1 billion to 25 billion rupiah.
The KPPU issued Regulation 4/2009, which serves as guidelines for Article 47 of the ICL on administrative measures. This regulation is used by KPPU as the basis for determining administrative fines. The KPPU will first determine the base amount of the fine, which is the sales value of an undertaking in the relevant market. In general, the sales value will be calculated based on the total sales value for the year prior to the violation.

The KPPU will use the estimate that best describes the actual sales value, and consider the following:
\[\begin{align*}
 & a \quad \text{the scale of the company}; \\
 & b \quad \text{the type of violation}; \\
 & c \quad \text{the combined market share of the reported parties}; \\
 & d \quad \text{the geographical scope of the violation}; \text{ and} \\
 & e \quad \text{whether or not the violation has occurred}.
\end{align*}\]

The KPPU will also consider other relevant factors that might increase or decrease the amount of the fine. The factors that might result in a fine increase are (1) the defendant continuing or repeating its violation of the ICL, or (2) the defendant refusing to be examined, to render information during the investigation or examination, or obstructing the investigation or examination process. Extenuating factors include:
\[\begin{align*}
 & a \quad \text{the defendant submitting evidence that it has ceased its violation shortly after the KPPU initiates an investigation}; \\
 & b \quad \text{the defendant submitting evidence that the violation was unintentional}; \\
 & c \quad \text{the defendant submitting evidence that it has minimum involvement in the violation}; \\
 & d \quad \text{the defendant being cooperative during the investigation or examination}; \\
 & e \quad \text{the conduct being under the order of the applicable laws}; \text{ and} \\
 & f \quad \text{the defendant stating its willingness to change its behaviour}.
\end{align*}\]

Further, the KPPU will also consider the ability of the defendant to pay the fine. Pursuant to a defendant’s request, the KPPU could grant an individual reduction if there is objective evidence that shows that the fine will lead to the bankruptcy of the defendant. Based on the aforementioned formula, it is possible that the amount of the fine imposed by the KPPU is below the minimum amount stipulated in Article 47, Paragraph (2)g of the ICL (see above). There have been some precedents of the KPPU imposing a fine of less than 1 billion rupiah. For instance, in the Garlic case, each defendant was fined between 11 million and 900 million rupiah. In the Beef case (KPPU Decision No. 10/KPPU-I/2015), the KPPU imposed fines of less than 1 billion rupiah on nine of the defendants found guilty, the lowest amount being 71 million rupiah. There has been no precedent, however, of the KPPU imposing a fine that exceeds the maximum amount stipulated by the ICL. The guidelines on administrative measures are also silent on this matter.

The ICL does not directly apply criminal sanctions for violation of the ICL. Criminal sanctions can be imposed only under two sets of circumstances: when the undertaking or individual is obstructing a KPPU investigation, or when the defendants do not comply with a final and binding decision. In either of these situations, a criminal investigation may be initiated, and the undertaking or individual may face criminal sanctions in the form of a fine and imprisonment. Depending on the gravity of the offence, criminal penalties vary from a fine of between 1 million and 100 billion rupiah or imprisonment for between three
and 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 up to five years, and injunction orders.

The ICL has no option for agreeing a settlement. Once a case has been initiated, all stages of the examination must be concluded until the final judgment.

VI  ‘DAY ONE’ RESPONSE

The KPPU does not have authority to conduct searches and seize documents. Pursuant to Article 36 of the ICL, the KPPU is authorised to investigate or examine alleged cases of monopoly or unfair business competition practices, summon undertakings, witnesses and experts, request information from the government, and impose administrative sanctions for undertakings that violate the provisions of the ICL.

Furthermore, if undertakings, witnesses, experts, or any person who is not willing to fulfil a KPPU subpoena, the KPPU may seek the assistance of law enforcers, such as police officers, prosecutors and others, to ensure the parties attend a KPPU examination (Article 36g). This is followed up by memoranda of understanding with the national police (2010) and the attorney general’s office (2013). The scope of cooperation between the KPPU and the national police includes guidance, operation and exchange of information relating to competition law enforcement. The scope of cooperation between the attorney general’s office and the KPPU includes data or information, studies, expert and legal aid, human resources development and socialisation of competition law enforcement.

VII  PRIVATE ENFORCEMENT

In general, the ICL does not clearly regulate on undertakings that seek indemnity for alleged violations committed by certain undertakings. However, in its Regulation No. 1/2010 on case-handling procedures, the KPPU classifies two types of reporting parties: requesting indemnity and not requesting indemnity. In the case of a reporting party’s request for indemnity, the alleged violation report will be moved directly to the examination stage. The reporting party requesting indemnity will be the party directly confronting the defendant at the hearing, and the Commission Council shall decide the case. This is unlike a reported case without indemnity, in which the parties at the hearing will be the KPPU’s investigator, the defendant and the Commission Council.

However, since the implementation of Regulation No. 1/2010, the KPPU has not received any alleged violation reports from undertakings requesting indemnity.

VIII  CURRENT DEVELOPMENTS

The ICL is undergoing a process of amendment. The stakeholders of this amendment are expecting the law to be enacted in the first quarter of 2019 at the latest. The final draft law is not available to the public but, according to the latest draft that is publicly available and media releases, the following are the changes that are expected to take place once the law is enacted.
Leniency procedure

The draft amendment introduces provisions for a whistle-blower to be given a fine reduction by participating in a leniency programme. The draft does not elaborate about the procedures, stating that it will be further directed by government regulations. Note, however, that leniency will not apply to conspiracies during tender or bid rigging. Leniency might also be granted to a firm making a confession, which makes it easier for the antitrust enforcer to produce proof. Leniency programmes could reveal conspiracies that may otherwise not be detected by the antitrust authority and make the investigation more efficient and effective.

Increase in administrative fines

Under the current law, the maximum fine that can be imposed on each undertaking is 25 billion rupiahs. Parliament is proposing that the amount of the fine be increased to between 5 and 30 per cent of the sales value during the period of the infringement. However, the government opposes these figures and proposes a maximum of 25 per cent of the sales value relating to the relevant market during the period of the infringement. As yet, there has been no further discussion between the government and parliament.

Aside from the amendment, there is an Indonesia Constitutional Court (ICC) decision that affects implementation of the ICL. Through its judicial review (Decision No. 85/PUU-XIV/2016), the ICC determines that:

- the use of the phrase ‘other party’ in Articles 22, 23 and 24 of the ICL was conditionally contradictory to the 1945 Constitution of the Republic of Indonesia and is not legally binding so long as it is not understood as other than ‘and/or party related to other undertakings’; and
- the phrase ‘investigation’ in Article 36(c), (d), (h) and (i), and Article 41, Paragraphs 1 and 2 of the ICL, conditionally contradicts the 1945 Constitution of the Republic of Indonesia and is not legally binding so long as it is not understood as ‘collection of evidence as an examination material’.

Therefore, based on ICC Decision No. 85/PUU-VII/2016, the addition of the wording ‘and/or other parties related to other undertakings’, Articles 22, 23 and 24 of the ICL should be read as follows:

Article 22

Undertakings are prohibited from conspiring with other undertakings and/or other parties related to other undertakings to arrange or determine the winner of a tender resulting in the occurrence of unfair business competition.

Article 23

Undertakings are prohibited from conspiring with other undertakings and/or parties related to other undertakings to obtain information of their competitors’ business activities classified as a company secret resulting in the occurrence of unfair business competition.

Article 24

Undertakings are prohibited from conspiring with other undertakings and/or parties related to other undertakings to restrict production and/or marketing of goods and/or services being offered or supplied in the relevant market for the purpose of reducing the quantity, quality or required punctuality.
All three of the above articles are conspiracy-related. Through this Decision, the ICC is of the view that in order to respond and counter-balance the complexity of conspiracy, ‘other party’ must not be conventionally understood as ‘other undertaking’ but also as ‘party related to other undertaking’. This serves as a limitation to the application of ‘other party’ as it has been used until the issuance of ICC Decision No. 85/PUU-VII/2016, which, according to that decision, was applicable to anyone and without limit. Nevertheless, the ICC does not further classify the definition of ‘related to’. Owing to the absence of a definition, there is the possibility of any party freely assuming it to be, for example, a person or individual, or a tender committee that is in relation to the other undertaking.

Furthermore, the ICC, through Decision No. 85/PUU-VII/2016, confirms that the KPPU is a state auxiliary organ having the authority to enforce competition law within the reach of state administrative law. This confirms that the KPPU can only impose administrative sanctions. The ICC further confirms that criminal sanctions can only be applicable to an undertaking for not implementing a KPPU decision, providing that the KPPU decision is final and binding. If that is the case, the KPPU decision shall be submitted to the law enforcer to be further processed, as stipulated under Articles 48 and 49 of the ICL regarding principal and additional criminal sanctions.

To date, there is neither a new regulation nor a new guideline from the KPPU regarding implementation of ICC Decision No. 85/PUU-VII/2016, specifically in relation to conspiracy and cartel cases.
IRELAND

Vincent Power

I ENFORCEMENT POLICIES AND GUIDANCE

The vibrant Irish regime relating to cartels and leniency (or, as the latter is known in Ireland, immunity) is the result of an interesting mixture of law, policy and practice, with each of these three dimensions influenced by the EU, Irish, common law and US legal regimes.

The underlying Irish legal regime is a common law one, owing its origins to English law. The EU regime, which has applied in Ireland since 1973, is the inspiration for the Irish substantive – but not procedural – rules on cartels. The Irish Constitution of 1937 (Bunreacht na hÉireann) provides that the imposition of criminal sanctions (e.g., fines) is reserved to the courts. This means that Ireland’s Competition and Consumer Protection Commission (CCPC)2 (the successor to the Irish Competition Authority (the Authority)3) may investigate alleged cartels and recommend immunity, but the institution of serious prosecutions and the granting of immunity is the responsibility of the Director of Public Prosecutions (DPP),4 while the imposition of sanctions is a function reserved to the courts. Consequently, in contrast to many competition agencies internationally, the CCPC may not grant immunity or impose fines in its own right. During the past two decades, the Authority (now the CCPC) and the Irish courts have been influenced by development not only by in the European Union but also in North America, because some Authority and CCPC members have been drawn from the United States and Canada, as well having a staff that is international in origin and experience. Despite – or perhaps because of – these diverse influences, the Irish regime has carved out its own unique identity, and anyone outside Ireland would make a grave error in assuming that the Irish regime is the same as any other abroad, or that practice and procedures elsewhere are easily transplanted to Ireland.5

i Statutory framework

The key statutory framework in Ireland on cartels is contained in the Competition Acts 2002–2017,6 which are statutes enacted by parliament (Oireachtas). These statutes provide for possible civil and criminal liability being imposed not only on economic operators in the market (known as undertakings) but also on others, such as directors and managers

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1 Vincent Power is a partner at A&L Goodbody.
2 On the CCPC, see www.ccpc.ie.
3 The Authority existed from 1 October 1991 to 31 October 2014, when it was replaced by the CCPC.
4 On the DPP, see www.dpp.ie. The DPP is Ireland’s independent criminal prosecutor of serious crimes.
5 On Irish competition law, see Power, Competition Law and Practice (Tottel) and McCarthy and Power, Irish Competition Law: Competition Act 2002 (Tottel).
6 For the legislation, see www.ccpc.ie and www.oireachtas.ie.
of undertakings. The immunity framework in Ireland is not contained in legislation but is instead embodied in a notice published by the CCPC, namely the CCPC’s Cartel Immunity Programme (CIP), and a great deal depends on the evolving and dynamic practice in the area, as the CIP is not entirely prescriptive, so it is prudent to bear in mind that there can be differences between cases.

ii Institutional structure

The institutional framework relating to competition law in Ireland involves:

- the *Oireachtas*;
- the Minister for Business, Enterprise and Innovation (formerly the Minister for Jobs, Enterprise and Innovation) (the Minister);
- the CCPC;
- the DPP;
- the European Commission; and
- the Irish and EU courts.

First, the *Oireachtas* enacts the legislation on competition (including cartels) and the legislation relating to the prosecution of offences generally. Second, the Minister proposes legislation to the *Oireachtas* and keeps a watching brief on policy issues but does not become involved in individual cases in this area. Third, the CCPC is an independent statutory body that investigates potential cartels (and competition generally, concentrations and consumer protection issues). It does so on the basis of its own suspicions, information received from other agencies (whether inside Ireland or outside), complaints, tip-offs, monitoring the media, or on the basis of immunity applications under the CIP. It conducts its investigations using its own staff and detectives seconded from the police force (*Garda Síochána*). Under Article 34 of the Irish Constitution, the imposition of criminal sanctions is reserved to the courts (being a judicial function), so the CCPC (unlike, say, the European Commission or the UK’s Competition and Markets Authority (CMA)) does not have the power to impose fines (this may change under the EU’s proposal to enhance the position of national agencies but it is not yet clear whether it will do so). Fourth, the DPP decides independently (and with relatively little public scrutiny) whether to prosecute suspected serious breaches of law in the courts. It is therefore the DPP rather than the CCPC that decides whether to grant immunity or to bring prosecutions. However, investigations are conducted by the CCPC and the *Garda Síochána* (rather than the DPP), so the immunity programme does involve cooperation between the DPP, the CCPC and the *Garda Síochána*.

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iii Key policies
As a matter of policy, the CCPC treats the detection and punishment of cartels as the most important of a small number of priorities; the CCPC (and previously the Authority) has often stated that the pursuit of cartels is a top priority for it.8 Some judges in the Irish courts have also indicated their intention to incarcerate those individuals who breach competition law.

For example, Mr Justice McKechnie in the High Court (who has since been elevated to the Supreme Court) stated that:

[competition crimes are particularly pernicious.9 Coupled with that, and the low likelihood of recidivism amongst perpetrators, this means that in order to be effective, sanctions must be designed and utilised for, and have the purpose of, deterring offenders from committing crimes in the first place . . . [i]n my view, there are good reasons as to why a court should consider the imposition of a custodial sentence in such cases.10]

iv Guidance
The CCPC receives a significant number of complaints or tip-offs alleging cartels, some of which lead to investigations. The DPP and CCPC have given formal guidance by virtue of the CIP as well as various public statements over time. The CIP was published by the CCPC but was compiled in conjunction with the DPP because prosecutions are at the discretion of the DPP rather than the CCPC. The DPP does not often speak in public about policies, but there have been some comments over time,11 and there is a sense that the prosecution of white-collar crime is becoming more commonplace and cartel enforcement is particularly strong (with over 30 convictions to date (including a conviction for bid rigging) and a number of other prosecutions that were not successful). In trying to discern the DPP’s policy, it is often useful to take note of the CCPC’s comments, because the latter is in a position to speak more freely than the DPP.

v Grey areas and controversies
Despite some initial resistance to the idea of criminalising cartels, the principle is now well established in Irish law and practice. The Oireachtas criminalised some breaches of competition law in 199612 and bolstered the criminal regime in 2002.13 The courts have accepted criminalisation and have been willing to impose increasingly stiff penalties.

There have been two particular controversies in this context that are worth noting. First, both the Authority and CCPC have expressed a desire to have ‘civil fines’ imposed by the courts, which would mean that cartels could be penalised by a court on the lower civil standard of proof (on the balance of probabilities) rather than the higher criminal standard of proof (beyond reasonable doubt). This idea has apparently been abandoned and somewhat discredited (at least for now) as the possibility of enacting a regime providing for civil fines

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8 Curiously, the 2001 CIP stated this in its preface, but the 2015 CIP does not.
9 Ed., the learned judge was speaking in the specific context of cartels.
11 For example, the previous DPP spoke on ‘The Week in Politics’, RTÉ Television on 16 May 2010 on prioritising white-collar crime; see also Lally, ‘DPP Moots Changes to White-collar Trials’, The Irish Times, 17 May 2010, p. 4.
12 Competition (Amendment) Act 1996 (the 1996 Act) (now repealed).
13 Competition Act 2002 (the 2002 Act) (as amended).
was not taken up when the Competition (Amendment) Act 2012 (the 2012 Act)\textsuperscript{14} was enacted (or, indeed, as part of the wider Competition and Consumer Protection Act 2014 or in legislation since), and there is a belief that it would currently be unconstitutional. There may also be doubts about ‘civil fines’ for criminal activity in the context of human rights law. The possibility of some new penalties being imposed is being discussed as part of the EU’s ECN+ proposals but it is not yet clear how this will unfold.

The second controversy has centred on the ability of witnesses and suspects in cartel investigations to be represented by the same lawyer. An attempt by the then Authority (now the CCPC) to control legal representation by adopting a notice on the subject was annulled by the Irish High Court in \textit{Law Society v. Competition Authority}.\textsuperscript{15} The Irish Supreme Court has since held in \textit{DPP v. Gormley}\textsuperscript{16} that persons being questioned are entitled to legal representation throughout their questioning, so restrictions on persons being questioned having legal advice would be seen as unconstitutional.

\section{COOPERATION WITH OTHER JURISDICTIONS}

Ireland has a very open economy with a great deal of foreign direct investment, which means that cooperation with other jurisdictions is necessary. The CCPC cooperates, as the need arises, with other competition agencies abroad. The most relevant agencies would be the European Commission, the CMA, the US Department of Justice and the Federal Trade Commission. The CCPC would be willing to cooperate with international agencies wherever it is necessary and lawful to do so. It is likely to cooperate both inwards and outwards, but it will be mindful of the need to comply with Irish (and, where relevant, EU) law and will not want to prejudice any trial before the Irish courts. Despite this general background, relatively little is publicly known about the CCPC’s approach to these matters.

\subsection{Statutory basis for cooperation}

Section 23 of the 2014 Act provides explicitly for cooperation with foreign competition bodies. Section 23(4) defines, for the purposes of the Section, the term ‘foreign competition or consumer body’ as meaning:

\begin{quote}
\textit{a person in whom there are vested functions under the law of another state with respect to the enforcement or the administration of provisions of that state’s law concerning . . . competition between undertakings (whether in a particular sector of that state’s economy or throughout that economy generally).}
\end{quote}


\textsuperscript{16} [2014] IESC 17.
The CCPC may, pursuant to Section 23(1) of the 2014 Act and with the consent of the Minister, enter into arrangements with a foreign competition body whereby each party to the arrangements may:

a furnish to the other party information in its possession if the information is required by that other party for the purpose of the performance by it of any of its functions; and

b provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.

The CCPC may not, because of Section 23(2) of the 2014 Act, furnish any information to a foreign competition body pursuant to such arrangements unless it obtains an undertaking in writing by that foreign competition body that it will comply with terms specified in that requirement.

Conversely, under Section 23(3) of the 2002 Act, the CCPC may give an undertaking to a foreign competition body that it will comply with terms specified in a request made of the CCPC by the body to give such an undertaking where:

a those terms correspond to the provisions of any law in force in the state in which the body is established, being provisions that concern the disclosure by the body of the information referred to in point (b), below; and

b compliance with the requirement is a condition imposed by the body for furnishing information in its possession to the CCPC pursuant to the arrangements referred to in Section 23.

ii Extradition

There has been no reported case to date concerning a foreign state seeking an extradition from Ireland for cartel offences (or vice versa). In principle, extradition should be possible given that cartel activity has been a criminal offence in Ireland since 3 July 1996, when the 1996 Act entered into force, but each case will turn on its own circumstances. The decision on whether to allow the extradition of persons in Ireland to foreign states is reserved to the courts.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

To date, the Irish courts have not had to opine on the geographical and jurisdictional reach of Irish competition law, but the legislation gives some guidance. In essence, it appears to provide that an individual and a corporation may be exposed to liability under Irish competition law notwithstanding the fact that they have no physical presence in Ireland.

i Geographical reach

Irish competition law applies to any behaviour or conduct that affects trade in Ireland or any part of Ireland irrespective of where in the world the conduct occurred. This means that a cartel formed and operated from outside Ireland may still be prosecuted and punished inside

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17 That is, the Republic of Ireland.
18 See Sections 4 to 7 of the 2002 Act.
Ireland provided there was some effect on trade in Ireland. As such, it is legally possible for a person not based in Ireland to be prosecuted and convicted of breaching Irish competition law but, in practice, all cases to date have involved persons in Ireland.

ii Parent-subsidiary liability issues

The Irish courts have not yet had to consider the parent-subsidiary liability issue that has been considered at an EU level. It is likely that the courts will be influenced by the relevant EU jurisprudence in so far as it is applicable.

iii Breach of EU law

Curiously, a breach of some provisions of EU law is, in certain circumstances, punishable under the 2002 Act. This is because Sections 4 to 7 of the 2002 Act render a breach of Articles 101 and 102 of the EU’s Treaty on the Functioning of the European Union also a breach of the 2002 Act in the circumstances specified in that statute. It is unlikely that Ireland would be interested in prosecuting for breaches of EU law that had no Irish connection, but the possibility is significant because it means that non-undertakings (such as directors of undertakings) may be held liable and punished (even imprisoned\(^{19}\) or fined\(^{20}\)) for breaches of EU competition law when such breaches constitute breaches of the 2002 Act. There may well be interesting issues relating to possible double jeopardy that would have to be considered.

IV LENIENCY PROGRAMMES

Ireland operates a ‘first-in receives qualified immunity’ regime. The decision on whether to prosecute for a criminal breach in the area of serious cartels rests with the DPP rather than the CCPC, but it is the CCPC that interacts with the applicant and makes the recommendation to the DPP on whether to grant the immunity.

To qualify for leniency, the applicant:

\[ a \] must not have taken steps to coerce another party to participate in the cartel;

\[ b \] must do nothing to alert its associates in the cartel that it has applied for immunity under the CIP, and must refrain from commenting publicly on the activities of the cartel in which it has been involved pending the conclusion of any prosecutions;

\[ c \] from the time that the applicant first considered applying for immunity, must not have destroyed, hidden, made unusable or falsified any evidence relating to the offence or offences;

\[ d \] must, in an ongoing cartel, take effective steps, to be agreed with the CCPC, to ensure that it does not involve itself in any further illegal cartel activity following its application. Interestingly, in exceptional circumstances, the CCPC may require an applicant to act in a manner that would, in the CCPC’s view, be required to preserve the integrity of the CCPC’s investigation; and

\[ e \] must, throughout the course of the CCPC’s investigation and any subsequent prosecution, provide comprehensive, prompt and continuous cooperation.

\(^{19}\) Under the 2002 Act (as amended by the 2012 Act), the maximum term of imprisonment for a breach of the 2002 Act is 10 years.

\(^{20}\) Under the 2002 Act (as amended by the 2012 Act), the maximum fine for a breach of the 2002 Act is €5 million.
The applicant (including individuals who require personal immunity) has a positive duty to:

a reveal any and all cartel offences under the Act in which the applicant may have been involved and of which it is aware;

b provide full, frank and truthful disclosure of all the evidence and information that is in its possession or control, or that is known or available to the applicant, including all documentary, electronic and other records, wherever located, relating to the offences under investigation;

c preserve and not tamper with any evidence that is capable of being under the applicant’s control;

d ensure to the best of the applicant’s ability that current and former directors, officers and employees cooperate fully with the CCPC’s investigation and any subsequent prosecutions;

e generally, from the time that the applicant first considered applying for immunity, not disclose to third parties any dealings with the CCPC (including the fact of its immunity application) without the CCPC’s prior written consent, except where required to do so by law. If disclosure is required, the CCPC must be notified prior to the applicant releasing any such information. However, this restriction shall not prevent the applicant from disclosing the existence or content of the application to another competition authority or to an external lawyer for the purpose of obtaining legal advice, provided that the applicant ensures that the lawyer does not disclose any such information to any third party;

f disclose to the CCPC, unless otherwise prohibited, all applications made by the applicant for immunity in other jurisdictions;

g cooperate fully with the CCPC, on a continuing basis, expeditiously and at no expense to the CCPC throughout the investigation and with any ensuing prosecutions; and

h assist the CCPC by producing to it individual persons who would give clear and comprehensive statements of evidence that will then be recorded by the CCPC.

If the first applicant to request immunity fails to meet the requirements of the CIP or conditional immunity is later revoked, another applicant may be considered for immunity under this programme. It may therefore be useful to table an immunity application even if there is already an immunity applicant because an earlier applicant may lose its position in the queue.

In the case of an applicant that is an undertaking, whatever its legal form, the applicant must be able to show that it has made a formal decision to apply for immunity. A person making an application on behalf of a corporate undertaking must satisfy the CCPC that he or she is duly authorised to act on behalf of the corporate undertaking in question. If an undertaking qualifies for immunity, all current and former directors, officers, partners and employees who admit their involvement in the anticompetitive activity and who comply with the conditions of this programme will also qualify for immunity. Applications can be made on behalf of an individual who is not an undertaking. Such an application will not be regarded as having been made on behalf of an undertaking.

The immunity process commences with obtaining a marker by calling the CCPC’s cartel immunity phone line. The applicant or its legal adviser must present an outline of the facts of the case, including the market and the kind of practice involved. Such an enquiry may be made without disclosing the applicant’s identity. This will enable the CCPC to determine whether a marker can be granted in this case. The marker protects the applicant’s place in
the queue for immunity for a short period of time. This is intended to allow the applicant
time to gather the necessary information and evidence needed to complete its application for
immunity. The second step is to perfect the marker. To perfect the marker, the applicant must
provide the CCPC with its name and address as well as information concerning:

a an outline of the process that led to the immunity application, including the form of
formal decision to make the application;
b the parties to the alleged cartel;
c in the case of a corporate applicant, the individual or individuals that require immunity;
d the affected product or products;
e the affected territory or territories;
f the duration of the alleged cartel;
g the nature of the alleged cartel conduct (including a description of the applicant's role);
h information on any past or possible future immunity or leniency applications in other
jurisdictions in relation to the alleged cartel; and
i an outline of the nature of the evidence at the applicant's disposal.

The applicant may provide all the above information orally. If a marker expires before it is
perfected, or the application is otherwise refused by the CCPC or by the DPP, the CCPC
will consider any other applications for immunity that are in the queue and any subsequent
applications. Nothing prevents the holder of an expired marker from reapplying, but in those
circumstances, its original place in the queue will not be protected. Joint applications for
immunity by two or more independent undertakings will not be considered. This does not
preclude applications by a single economic entity on behalf of its constituent companies.

The third step is the granting of conditional immunity by the DPP, the fourth step is
full disclosure by the applicant and the final step is that full immunity is granted when the
conditions are fully satisfied.

V PENALTIES

The penalties for breaching Irish competition law are severe. In general, individuals may be
jailed for up to 10 years and fined up to €5 million, while undertakings may be fined up
to 10 per cent of their worldwide turnover. These criminal penalties are supplemented by
potential civil actions for damages, exemplary damages, injunctions or declarations. These
penalties are real in that the courts have seen convictions (e.g., 18 in the Oil cartel), but no
people have served jail sentences for cartel activities as such (jail sentences to date have either
been suspended or served for non-payment of fines). There are certain limited circumstances
in which exemplary damages would not be available but it is best to assume that they may
be available.

VI ‘DAY ONE’ RESPONSE

The CCPC has extensive search, seizure and investigative powers. It may search both business
and private property (e.g., homes). It conducts several raids each year, and these are typically
at the offices of businesses or trade associations; however, it may only exercise those powers
after receiving court consent (unless the party being visited voluntarily accepts the visit,
although this may be open to some doubt) and must operate within the confines of the law.
The raids are conducted by several ‘authorised officers’ from the CCPC, who are often accompanied (at least, for a short period of time) by members of the Garda Síochána. The CCPC conducts dawn raids to gather evidence about alleged breaches of competition law. Dawn raids are usually the result of *ex officio* investigations by the CCPC or investigations following complaints to the CCPC by third parties.

The CCPC may visit at any time during normal working hours, which could be first thing in the morning, and visits can last an entire day or longer. The CCPC arrives unannounced and may enter premises by force if necessary. Its representatives must present a copy of the District Court warrant that authorises the CCPC to conduct the dawn raid. Typically, the investigators divide into groups: one reads through files, diaries and other documents, another photocopies documents, and a third examines computers and makes copies of computer files. The CCPC may also seize original documents to take them away, and may seize computers and laptops as well as copy entire hard drives. After reviewing the information on-site, the CCPC may interview persons in the building about matters under investigation or may interview them later. The CCPC will provide an inventory of the documents that have been copied and the original documents it has seized. This inventory does not have to be signed, but a copy should be taken.

One person in the organisation should take charge of the situation, and this person should act as coordinator. The warrant presented by the CCPC should be checked. Does it correctly name the business? Does it relate to the correct address? Proof of identity should be obtained from each investigator, and a copy taken of each. The CCPC should be asked to wait for the coordinator to arrive (although it is not obliged to do so). It should also be established whether the CCPC is simultaneously raiding premises of subsidiaries of the business or homes of employees.

Specialist competition lawyers should be contacted, and they should travel immediately to the organisation’s offices. All relevant management personnel, the head office, and public relations teams or consultants should be alerted.

Members of the management team should accompany every CCPC official at all times and note as much as possible of what they say and do.

The CCPC may photocopy all relevant documents or choose to seize the originals, but it should not read or copy correspondence with lawyers as that is ‘privileged’. If the CCPC’s representatives try to read or copy such documents, a formal objection should be lodged and the documents put to one side for lawyers to discuss with the CCPC after the dawn raid. If this does not happen, it would be wise to ask that all such documents be sealed for later determination by the CCPC with the company’s team of lawyers – the CCPC has stated that it respects in-house privilege.

A second set of the documents being copied by the CCPC should be made. A copy should also be made of each original document that the CCPC proposes to remove. These copies should be read, along with the originals taken by the CCPC. This is particularly important for anyone who may be asked questions by the CCPC.

The CCPC may decide to copy computer files. Its representatives may only copy files relating to the business named in the search warrant. If they try to copy other files (or seize a computer or laptop), objections should be formally raised and the copy (or computer or laptop) requested to be put to one side for lawyers to discuss with the CCPC after the dawn raid whether it may be copied or taken. If not, it should be requested that it be sealed until the company’s lawyers have been able to verify the relevance of the contents with the CCPC. A copy should be made of whatever computer records are copied or taken.
If the CCPC questions employees, they should only answer if the CCPC compels an answer. Before answering, it should be stated that the question is being answered under compulsion. Answers must be truthful and accurate, as it is an offence to mislead the CCPC. If an employee does not know the answer to a question, then it is best that he or she says so. Legal advice should ideally be sought before answering any questions but particularly before answering questions that could be incriminating. If an employee is cautioned (e.g., by the *Garda Síochána* or the CCPC), he or she should normally invoke the right to silence.

Detailed contemporaneous notes should be kept and a tape recorder made available for any interview. Press releases or public comment should not be made unless the matter becomes public knowledge, but staff should certainly be advised that confidentiality is imperative and that they should not discuss the dawn raid with any third party.

Cooperation with the CCPC is paramount; while the investigation may seem unreasonable, the CCPC has wide powers of search and investigation.

After the dawn raid, employees should be gathered for a full debrief, and any steps identified that may be required to correct any errors during the dawn raid.

The Irish Supreme Court has held that the CCPC had acted unlawfully in seizing documents outside the scope of their powers in one dawn raid so it is expected that some of the procedures deployed by the CCPC will change. Unfortunately for the CCPC, the legislation is not entirely clear and it is often difficult to undertake a detailed, precise investigation on a particular issue in the context of a large business with a complex IT system. This case, relating to Irish Cement, is considered below, in Section VIII.

Dawn raids in Ireland may also be carried out by the European Commission; for further details, see the European Union chapter.

### VII PRIVATE ENFORCEMENT

Private enforcement of competition law has been encouraged since 1 October 1991, when the Competition Act 1991 entered into force and 'aggrieved persons' (irrespective of whether they were undertakings) were given the statutory right to institute court proceedings to recover remedies. An explicit private right of action exists in the Competition Acts to deal with both Irish and EU competition law. Aggrieved persons may seek damages, injunctions and declarations. Ireland has implemented the EU’s Damages Directive. A form of collective action is possible, but not class actions in the US sense of the term. The Competition Acts do not prescribe how damages would be calculated; the funding of private litigation is not very well developed in Ireland, and there will be some doubt about the legality of funding actions in certain circumstances.

### VIII CURRENT DEVELOPMENTS

The 2012 Act was one development that has facilitated private enforcement and assisted public enforcement. The 2012 Act increased the maximum fine of €4 million to €5 million for indictable offences and increased the maximum prison sentence for indictable cartel offences from five to 10 years. It also disapplied the application of the Probation of Offenders Act 1907 to competition law offences. In certain circumstances, the statute provided that

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21 Directive 2014/104/EU.
where a person is convicted of an offence under the 2002 Act, the court must order the person to pay to the relevant competent authority (i.e., either the CCPC or the Commission for Communications Regulation) a sum equal to the costs and expenses, measured by the court, incurred by that competent authority in relation to the investigation, detection and prosecution of the offence, unless the court is satisfied that there are special and substantial reasons for not so doing.

Section 10 of the 2002 Act did not enter into force until 3 October 2011. It provides that in jury trials, the trial judge may order that copies of any of the following documents be given to the jury:

- any document admitted in evidence at the trial;
- a transcript of the opening speeches of counsel;
- any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial;
- a transcript of the whole or any part of the evidence given at the trial;
- a transcript of the closing speeches of counsel; and
- a transcript of the trial judge's charge to the jury.

The 2014 Act merged the Authority with the National Consumer Agency to form the CCPC, which has meant that both the competition and consumer protection dimensions need to be considered.

The powers of the CCPC to conduct dawn raids and seize documents was the subject of litigation before the High Court and Supreme Court in the Irish Cement litigation. The Supreme Court held that the CCPC must respect the privacy rights of those being inspected in dawn raids and the CCPC is therefore not entitled to inspect, review or use materials that are unrelated to the specific investigation and outside the scope of the warrant. The judgment was a setback for the way that the CCPC used to conduct dawn raids but it is working to address the issues raised by the Supreme Court. No one should believe that dawn raids will cease to occur – indeed, they have occurred since the judgment.

In 2018, a fine imposed in 2017 on an individual by the Central Criminal Court (i.e., the High Court exercising criminal jurisdiction) for a bid rigging cartel was increased by the Court of Appeal. (The appeal against the fine of €10,000 imposed on the company failed because the appellate court believed it was appropriate and within the discretion available to the sentencing judge). The appellate court believed the fine of €7,500 imposed on the individual was not just lenient but unduly lenient. The court said that:

[he] was the person with overall responsibility for the events that occurred in that he effectively orchestrated them and indirectly stood to benefit from them. [He] was in reality the person who orchestrated, authorised and conducted the criminal behaviour in question [therefore] . . . a fine of €7,500 was unduly lenient. The fine should more closely have reflected the actual financial gain accruing from the activity in question, which was in the region of €31,000. The court is also of the view that, save in exceptional circumstances, a fine should be for a sum greater than the financial gain so that it satisfies the requirement that it is punitive and acts as a deterrent. The court will therefore impose a fine of €45,000 on the second respondent and will hear submissions as to a reasonable period in which to pay that fine. In respect of the suspended [three-month] prison sentence imposed on [him] the court is satisfied that this was reasonable and proportionate, and indeed appropriate, and therefore will not interfere with it. Any activity undertaken to impede a prosecution for offences committed is itself a serious crime and will invariably attract a sentence of imprisonment.
I ENFORCEMENT POLICIES AND GUIDANCE

Since the 1990s, the Japan Fair Trade Commission (JFTC), the principal enforcement agency of the Antimonopoly Act, has given top priority to enforcement against cartels. The JFTC’s policy of continuing strong and high-impact cartel enforcement has been publicly reiterated and approximately 10 cartel cases are cracked down on every year.

Under the Antimonopoly Act, cartels are prohibited if they cause substantial restraint of competition in the relevant market. This means that cartels are not illegal per se in the strict sense. However, cartels are generally considered to have a strong tendency to substantially restrain competition and the JFTC therefore usually has no difficulty in proving that cartels cause such a restraining effect in the relevant market. In this sense, cartels are generally treated as being almost illegal per se in Japan.

The most significant sanction against cartels in Japan is administrative surcharges. An attempt by the JFTC to enhance effective cartel enforcement has resulted in several amendments to the legal system of administrative surcharges, including an increase in surcharge rate (e.g., from 6 to 10 per cent in 2005). Most notably, the introduction of the leniency programme on administrative surcharges in 2005 has drastically changed the landscape of cartel enforcement in Japan. There have been 1,165 leniency applications up to 2017 (103 in 2017 alone) and the cartel cases recently cracked down on by the JFTC have generally been triggered by leniency applications. In March 2014, an administrative surcharge of ¥13.1 billion was imposed on a certain shipping company in the Car Shipping case, the highest administrative surcharge ever imposed against one company. This cartel case was triggered by leniency applications.

It can therefore be seen that the JFTC enforces the Antimonopoly Act against cartel violations as vigorously as other major competition authorities in, for example, the United States and the European Union.

II COOPERATION WITH OTHER JURISDICTIONS

i Information sharing with other competition authorities

The JFTC has entered into bilateral cooperation agreements on competition law enforcement with the competition authorities of the United States, the European Union and Canada. Under these agreements, information sharing on competition law enforcement can be
conducted between the JFTC and the competition authorities of these countries. Even without such formal cooperation agreements, the JFTC is entitled to conduct information sharing under certain conditions, as set out in the Antimonopoly Act.

In fact, the JFTC has cooperated with other competition authorities in several international cartel investigations, including the Artificial Graphite Electrode case, the Modifier case, the TFT-LCD Flat Panel case, the Marine Hose case, the Cathode Ray Tube for Television case, the Power Cable case, the Auto Parts case, the Car Shipping case and the HDD suspension case.

However, the JFTC has declared that it will never provide other competition authorities with any documents or materials submitted under the leniency programme without a waiver of confidentiality by the leniency applicant. Of course, a waiver is not a condition for leniency being granted. Furthermore, the JFTC usually does not disclose documents and materials obtained from non-public sources (such as those seized during dawn raids) to other competition authorities.

ii Extraterritorial discovery

No discovery system exists under Japanese law domestically or internationally; therefore, neither the Japanese courts nor the government will conduct discovery in foreign countries.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Extraterritorial application

There is no provision addressing extraterritorial application under the Antimonopoly Act.

The JFTC’s position and the generally accepted view in Japan is that the Antimonopoly Act would be applicable to any conduct outside Japan as long as the conduct entails certain effects on the Japanese markets.

The remaining issue is how to enforce against alleged foreign cartel participants who have no physical presence in Japan. In light of international comity, it is unlikely that the JFTC will exercise its investigative powers against foreign cartel participants, although it can do so through service by publication. Rather, it is customary for the JFTC first to request a foreign cartel participant to voluntarily appoint a lawyer in Japan, and then serve
the reporting order to that lawyer. Moreover, the necessity of extraterritorial enforcement has been decreasing because of the leniency programme under which foreign applicants will voluntarily provide evidence located outside Japan.

In this context, it should be noted that parent companies would never be liable automatically for their subsidiaries’ actions under the Antimonopoly Act. Furthermore, parent companies would not be held liable for their subsidiaries’ actions merely because they have exercised control over the subsidiaries’ businesses. This is true even where parent companies hold 100 per cent of the shares in their subsidiaries. Parent companies are held liable in the event that they themselves have engaged in at least part of the cartel actions.

ii  Cartel exemptions

In the past, cartel exemptions were set forth under a variety of laws, but most of these laws have been abolished because of the JFTC’s hard-line policies against cartels. The surviving cartel exemptions include those under:

\[a\] the Marine Transportation Act;  
\[b\] the Road Transportation Act;  
\[c\] the Civil Aeronautics Act;  
\[d\] the Insurance Business Act;  
\[e\] the Agricultural Cooperatives Act; and  
\[f\] the Small and Medium-Sized Enterprise Cooperatives Act.

IV  LENOIVITY PROGRAMMES

i  Characteristics of the Japanese leniency programme

As described in Section I, the most significant sanction against cartels in Japan is administrative surcharges; thus, the Japanese leniency programme provides immunity from administrative surcharges according to the order of application.

Note that under the Japanese leniency programme, unlike in the European Union, the JFTC does not have such broad discretion to apply and adjust the terms of immunity. This feature results mainly from:

\[a\] a fixed number of eligible applicants (a maximum of five companies);  
\[b\] fixed reduction rates according to the application order (100, 50 or 30 per cent);  
\[c\] a marker system for all applicants (not only for the first applicant); and  
\[d\] substantially, no requirement to provide added-value evidence (even for subsequent applicants).

However, the JFTC appears to be trying to adjust the immunity terms under the leniency programme by exercising its practical discretion in delineating the scope of leniency and of the sales amounts subject to surcharge calculation, as described in Section IV.iii.

ii  Leniency applications before a dawn raid

Before a dawn raid, the first applicant to come forward is fully exempted from administrative surcharges. The second applicant is granted a 50 per cent reduction of administrative surcharges, while the third, fourth and fifth are each granted a 30 per cent reduction.

Under the leniency programme, the leniency applicant must identify facts of the cartel in detail and submit relevant evidence in accordance with the prescribed procedures.
More specifically, parties applying for leniency prior to a dawn raid must first submit to the JFTC an application form (Form 1) by fax. Form 1 requires only an outline of the cartel, such as the relevant product, the type of cartel conduct (e.g., price-fixing, bid rigging or market allocation) and the duration of the violation, without the need to attach any evidence. All applicants, not only the first applicant, who submit Form 1 are granted marker status, and subsequent applicants essentially cannot leapfrog preceding applicants, unless the preceding applicant fails to secure leniency status, provides false information or refuses to cooperate in investigations conducted by the JFTC. Those considering making a leniency application can anonymously confirm the marker order to be granted with the JFTC. Note that in a practical sense, the leniency applicant will have to admit the facts of the cartel but not have to admit the illegality of the cartel in its leniency application document. The illegality of a cartel will be determined by the JFTC.

To secure leniency status (which is conditional on continuing cooperation), applicants must submit Form 2 and thereby provide more detailed information, within a period to be designated by the JFTC. The JFTC generally designates a two-week period to secure leniency status, but may grant a longer period (e.g., one or two months) in cases of complex cartels or foreign applicants, taking into account the difficulties in communicating internationally and the time necessary for translation (any leniency application forms and evidence to be attached must be written in Japanese). Form 2 requires information on the identities of other cartel participants, and the names and titles of individual employees of the applicant and other cartel participants who are involved in the cartel. Form 2 also requires evidence of the relevant cartel to be attached; this may include the minutes or notes of meetings at which the collusion was discussed and formed, or written statements prepared by employees involved in the cartel. Under the leniency programme, the fourth and fifth applicants are required to provide evidence that represents added value for the JFTC, but in practice this requirement can be easily fulfilled by written statements from employees, including concrete descriptions of events.

Applicants who have obtained leniency status will be definitively granted immunity if they continue to cooperate with the JFTC until the JFTC issues a cease-and-desist order or a surcharge payment order (or until the JFTC notifies the first applicant that it will not issue either a cease-and-desist order or a surcharge payment order). Under this duty to continue to cooperate with the JFTC, leniency applicants may be required by the JFTC to submit additional reports and materials, and failure to submit the required reports and materials, or submitting false ones, will disqualify applicants from receiving immunity. In practice, leniency applicants, especially the first applicant, will be subject to a barrage of questions from the JFTC during the first several months after submitting a Form 2.

iii  Leniency applications after a dawn raid

Even after a dawn raid, leniency applicants are granted the same 30 per cent reduction of administrative surcharges if both the following requirements are met: (1) they are the fifth or earlier of all applicants either before or after a dawn raid; and (2) they are also the third or earlier of all applicants only after a dawn raid.

Under the leniency programme, this leniency is available for 20 business days after the dawn raid. In practice, however, most seats for leniency are occupied on the same day as the dawn raid, or by the following day at the latest.

Applicants who apply after a dawn raid must submit a Form 3 to the JFTC. Form 3 seemingly requires detailed information and evidence to the same extent as Form 2 (the
follow-up report form to be used before the dawn raid). However, this does not mean that Form 3 cannot be submitted to the JFTC until the internal investigation is sufficiently complete for the whole form to be filled in; a Form 3 accompanied by less comprehensive information and without attached evidence is enough to secure the marker. Form 3 must be completed with more detailed information and evidence within 20 business days of the dawn raid to secure leniency status. As with a leniency application before a dawn raid, this leniency status is conditional on continuing cooperation with the JFTC. Under the leniency programme, any applicants after the dawn raid must also provide evidence that represents added value for the JFTC, but in practice this requirement can be fulfilled easily, as described above.

As in other major competition regimes, a dawn raid will trigger a leniency race in Japan. The leniency programme does not provide for a leniency-plus system under which penalties for already detected cartels would be considerably reduced by the fact that the cartel participants under investigation have reported another undetected cartel to the competition authority. In international cartel cases, however, similar systems in other major competition regimes will trigger a leniency race extending to other related products, even in Japan. A leniency race is accelerated by the JFTC’s formalistic and rigid view in delineating the scope of leniency. Recently, the JFTC has become more and more inclined to grant leniency status within only a very narrow scope. For example, a leniency applicant may be granted leniency status for only one product and not for another related product. Naturally, leniency applicants want the scope of leniency to be as broad as possible, because they do not want to find themselves in a position where they have obtained full immunity on one product but have had full fines imposed in relation to another. However, as previously mentioned, the JFTC seems to adopt a very formalistic view in delineating the scope of leniency, sometimes even on a customer-by-customer basis if there are customers who have purchased large amounts. Of course, even in such cases, companies filing a leniency application regarding one customer may file another application regarding another customer when they discover cartels against that customer; however, the second application may not be eligible for the same protection as the original application if other applicants file for leniency in between times. In this way, the race for leniency has accelerated more and more, even in Japan.

iv Group filing for leniency

When the leniency programme was first introduced, all applicants were required to file a leniency application individually and separately from the other applicants, even those who were part of group companies. This was true even in international cartels in which several multinational group companies engaged in the same cartel or cartels. This meant that group companies had to make their leniency applications as individual companies, potentially leading to one company receiving full immunity, while the others received some reduction or no reduction at all.

Not surprisingly, this separate application system came under heavy criticism from leniency users. This resulted in an amendment to the leniency programme in 2009 to allow a single joint application by certain group companies. This single joint application enables all group companies named as applicants to be granted the same leniency status. As a result, if a single joint application is filed by a group company first, before a dawn raid, all the group companies listed in the application will be granted full immunity from administrative surcharges.
Two features of the single joint application system should be noted: how the group is defined and in what cases such an application is allowed. For the purpose of the leniency programme, a company is considered a parent company of another company when the parent directly or indirectly owns more than 50 per cent of voting rights in the other company (a subsidiary) and the group consists of the parent and its subsidiaries. According to this definition of a group, for example, a joint venture equally owned by two joint venture partners is not considered a subsidiary of either partner. Therefore, neither partner can file a leniency application with the joint venture. Moreover, a single joint application is allowed only where the joint applicants have been within the same group during the entire period (for a maximum period of five years) of the relevant cartels, or one of the joint applicants in the same group has assumed all the cartel violations of the other joint applicants. This latter feature is intended to deter cartel participants from misusing the single joint application system, but has been criticised by leniency users for being awkward to use.

This single joint application system can cause confusion if an applicant is unsure which corporate entities within its group were engaged in the relevant cartels, which sometimes occurs in practice, and particularly in multinationals. Of course, additional leniency applications can be filed by group companies found at a later stage to have been engaged in the relevant cartels, but these additional applications will not be considered to have been made at the time of the original application, and thus will not be granted the same leniency status as that granted to the original application. For example, if Company A files a leniency application as first-in but later finds that one of its group companies, Company B, also engaged in the relevant cartels, Companies A and B can jointly file another application upon discovery of Company B’s involvement. However, if another company, Company C, which is a competitor of Companies A and B, files an application as second-in after Company A’s original application but before the joint application by Companies A and B, then Company B will not be granted the leniency status of first-in, and will only be granted the status of third-in. This conclusion leads to considerable differences, since the first-in is granted full immunity, while the third-in is granted only a 30 per cent reduction.

v  Discovery issues

Under Japanese law, there are no discovery procedures similar to those in the United States. In international cartel cases, however, discovery issues would inevitably arise in the context of leniency applications even in Japan, especially if such cartel cases are relevant to the United States.

The JFTC’s policy regarding discovery requests regarding leniency applications is that it will not disclose leniency applications (including any attached evidence) in its possession in response to any requests from private plaintiffs or courts, either in Japan or in foreign jurisdictions.

However, if a leniency applicant has a copy of its written leniency application (including its written evidence), that copy, whether privileged or not, may be subject to discovery. This is because a voluntary submission of privileged documents to third parties, even to public authorities like the JFTC, may be deemed by the US courts as a waiver of privilege by the applicant.

To prevent a discovery issue (i.e., the involuntary disclosure of leniency documents from applicants to foreign plaintiffs, particularly US plaintiffs), the JFTC allows applicants to make oral leniency applications to a reasonable extent. More specifically, a substantial part of Form 2 (the follow-up report form to be used before a dawn raid) and Form 3 (the report
form to be used after a dawn raid) can be reported orally to the JFTC, and thereby no copies with detailed facts remain with the applicant. Consultation with, and confirmation by, the JFTC on eligibility to make an oral leniency application must precede any submission of a leniency form containing some blanks to be completed orally.

vi Conflict of interests issues
As the race for leniency, especially after a dawn raid, accelerates and extends to other related products, it is becoming widely accepted that the same counsel should not represent two or more leniency applicants in the same cartel case, because representation for one company may conflict with the interests of another.

Unlike the procedure in the United States, it is usual in Japan for the same counsel to represent both the company and its employees. This is partly because most cartel cases are subject only to administrative sanctions, none of which, including surcharge payment orders, are addressed to individual employees. For the same reason, no leniency programme is available in Japan for individuals.

vii Scope of the leniency effect
Under the Antimonopoly Act, the effect of the leniency programme extends only to administrative surcharges and not to criminal or civil sanctions.

According to the JFTC’s policy statement, however, it will never make a criminal accusation against the first applicant before a dawn raid, or its employees, as long as the employees cooperate with the JFTC’s investigations. As the Ministry of Justice also made an official statement in the Diet that it will honour the JFTC’s judgment of making no criminal accusation, this means, in practice, that the first leniency applicant before a dawn raid and its employees are effectively also exempt from criminal sanctions. It is at the JFTC’s discretion whether other leniency applicants are criminally sanctioned. In June 2012, the JFTC made a criminal accusation against three companies and seven individuals (employees of the three companies) in the Bearings cartel case. The first leniency applicant and its employees were not subject to this criminal accusation, and two of the three accused companies filed leniency applications after the dawn raid.

Regarding civil sanctions, private actions are not common in Japan. For further details, see Section VII.

V PENALTIES
Under the Antimonopoly Act, cartel violations are subject to administrative or criminal sanctions, or both, but in practice sanctions are typically administrative.

i Administrative sanctions
Administrative sanctions for violations typically consist of administrative surcharges and cease-and-desist orders.

The amount of an administrative surcharge is calculated by multiplying the number of sales of the relevant products during the entire period of the violation (for a maximum of three years) by 10 per cent. For a retailer, the 10 per cent multiplier is reduced to 3 per cent, and for a wholesaler, to 2 per cent. These multipliers are further reduced by about half for small companies. The amount of an administrative surcharge must be calculated strictly in accordance with the formula set out in the Antimonopoly Act. This means that, theoretically,
the JFTC cannot adjust the amount, either upwards or downwards, at its discretion. Unlike within the European Union, the extent of cooperation with the JFTC’s investigations is not supposed to affect the amount of administrative surcharge either upwards or downwards. In practice, however, the JFTC has some practical discretion to impose a charge on one product but not others, or to impose a charge on a violation during a certain period but not during another period, thereby effectively adjusting the amount of the administrative surcharge to some extent.

Regarding cease-and-desist orders, the alleged cartel participants are usually required by the order to explicitly abandon or confirm the abandonment of the relevant cartel violations by their board resolutions. Such board resolutions would seem to admit the fact that the participants did take part in the alleged cartel violations, thereby triggering civil litigation concerns. There is no settlement procedure available in Japan for cartel violations.

Individuals are not subject to any administrative sanctions (including administrative surcharges).

**Criminal sanctions**

Criminal sanctions are imposed only for very serious offences and thus not very often – generally no more than one case per year, if any.

Criminal prosecution is carried out by public prosecutors, not by the JFTC. In practice, a prosecution will not commence without a criminal accusation by the JFTC. According to the JFTC’s policy statement, it will make criminal accusations against serious cartels with a wide impact, or against repeat offenders, *inter alia*.

Individuals may be sentenced to imprisonment for up to five years or fined up to ¥5 million, or both. In practice, however, prison terms are generally between six and 18 months, unexceptionally with probation, which means that no individual has actually been sent to prison to date. Companies may be fined up to ¥500 million. There is no plea bargaining system in Japan.

Foreign companies, including their employees, have never been subject to criminal procedures for their cartel violations in Japan. It is widely accepted that the JFTC is unlikely to seek criminal sanctions against foreign companies even in the future, particularly if they have no physical presence in Japan. This view is inferred partly from the fact that in the criminal context, the government once submitted to a US court an *amicus curiae* brief opposing the extraterritorial application of the Sherman Act against a Japanese company on the grounds of international comity.

**VI ‘DAY ONE’ RESPONSE**

A dawn raid by the JFTC is generally carried out in the early morning on a weekday, and targets various sites of all the cartel participants (including their headquarters and branch offices) almost at the same time.

The departments that are mainly targeted by the JFTC are sales, marketing, accounting and legal. Executives’ private offices may also be targeted. Theoretically, it is possible for the JFTC to raid private residences, but in practice this rarely happens. In exceptional circumstances, the JFTC may conduct a second raid on a previously raided site.
A company facing a JFTC dawn raid should first check the summary of the alleged cartel violations as written in the notice of alleged violations. The notice is delivered by a JFTC official to the company at the beginning of the dawn raid. In particular, the scope of the relevant products, geographical area and customers should be checked.

The number of JFTC officials to visit each site will vary, depending mainly on how large the targeted site is. The JFTC officials have the authority to inspect desks, cabinets, laptops and any other items in the raided sites, but are not allowed to search individuals. The main purpose of the inspection is to seize relevant documents and materials, including electronic data. As these inspections are conducted without a judicial search warrant, the JFTC’s officials cannot use physical force to execute these administrative inspections. However, if a company refuses to allow the JFTC inspection to take place, the company may be fined up to ¥3 million, and any employee refusing to allow the inspection to take place may be sentenced to imprisonment for up to one year and fined up to ¥3 million.

After collecting relevant documents and materials, the JFTC issues a submission order to seize those documents and materials. Under Japanese law, there is no concept of privilege and thus a company cannot, in principle, refuse to submit documents and materials otherwise protected as privilege under US or EU law. The submission order, with a list attached of the documents and materials to be seized, is delivered to the company at the site, but the list is quite simple and contains only general descriptions of the documents and materials to be seized. Although the JFTC officials will seize the originals of any documents and materials, the JFTC generally allows the company to make copies of some of them, unless this unduly delays the inspection.

The JFTC officials may conduct interviews at the raid site with employees who they believe were involved in the relevant cartel violations, or even remove those employees to the JFTC’s offices for interview. Although these interviews are voluntary, the JFTC does not allow a lawyer to attend, neither does it provide any copies of the employees’ signed written statements. However, translators are usually allowed to attend.

Dawn raids and any following on-site inspections are generally completed on the same day, but may continue one additional day. If the company does not recognise the fact of the alleged cartel violations at the beginning of the raid, it is critically important to consider submitting a leniency application after the dawn raid (Form 3). As described in Section IV, most leniency seats become occupied on the same day as the dawn raid, or at the latest by the next day. This means that there is not enough time for a company considering a leniency application to wait for the JFTC’s on-site inspections to be completed. Thus, even during the on-site inspections, the company considering a leniency application must ask the JFTC to temporarily release key employees and documents in order for it to decide whether to submit Form 3. It is also essential to make as many copies of seized documents and materials at the raided site as practically possible, because these copies will be needed to complete Form 3 in a timely manner.

VII PRIVATE ENFORCEMENT

Parties that have suffered because of cartel violations may claim damages against the cartel participants at civil courts based on general civil tort law, the Antimonopoly Act, or both. Damages claims based on the Antimonopoly Act have two features: they can be made only after the JFTC’s cease-and-desist order or surcharge payment order has become final and non-appealable, and the defendants (i.e., the cartel participants) cannot argue that they had
no intention to commit the relevant cartel violation, or were negligent in doing so. Indirect purchasers are also eligible for both types of damages claim, although they may encounter some difficulties in proving the amount of their own damages.

Despite this legal framework, private actions (including derivative lawsuits) are not very common in Japan. This is partly because no US-style drivers for private actions (e.g., discovery procedures or punitive damages) are available in Japan. In other words, private actions that are self-sustained, without drivers, have the potential to be active. In fact, national and local governments have recently become quite active in claiming liquidated damages against bid rigging participants. In bid rigging cases, the number of victims is limited, and the amount of damages suffered by each victim is relatively large and easy to be proven by liquidated damages. This trend has extended particularly to private corporations that have suffered from cartels, such as those in the Auto Parts case.

VIII CURRENT DEVELOPMENTS

i New class action system
A new class action system was enacted in December 2013 and came into force on 1 October 2016. Before it was introduced, there was no special procedure through which a group of individual victims could collectively recover damages. As part of a series to facilitate the protection of consumers, the government enacted legislation to introduce a new class action system. This aims to enable consumers to recover damages in a simpler and more timely manner than under the previous system.

As the new class action system is being developed solely for protecting consumers, there are three notable limitations in the context of cartel violations: those who may file a class action are limited to specified consumer organisations; claims that can be brought under such a class action must be those related to consumer contracts (those concluded by and between consumers and companies), including a tort claim related to consumer contracts; and no judgment under such a class action will be binding on any consumers who do not participate in the procedure. These limitations are expected to make this new class action system considerably different from the US class action system. However, there is a possibility that the Japanese courts and legislators may partially remove these limitations or widen the scope of new class actions by broader interpretation or law amendments.

At any rate, the new class action system has increased the risk of private actions against cartel participants, and thus careful monitoring of developments in this area is needed.

ii JFTC hearing procedures abolished
After some obstacles and detours, the JFTC's hearing procedures (i.e., quasi-court procedures presided over by the JFTC) with respect to the JFTC's orders (including a cease-and-desist order and a surcharge payment order) was finally abolished on 1 April 2015. Thereafter, any cases with respect to such orders will be handled by the Tokyo District Court as the first instance.

Such abolishment aims to secure and improve the due process of the JFTC's antimonopoly enforcement, but its impact, in practice, has not been clear.
I ENFORCEMENT POLICIES AND GUIDANCE

The Monopoly Regulation and Fair Trade Act (MRFTA) is the primary Korean competition statute. It was enacted on 31 December 1980 and became effective on 1 April 1981. The MRFTA prohibits conduct that is generally prohibited in other countries, including cartel activities, abuse of dominance, and anticompetitive mergers and acquisitions. The Enforcement Decree of the MRFTA (the Enforcement Decree) is a presidential decree setting forth specific standards and procedures to enforce the MRFTA.

The Korea Fair Trade Commission (KFTC), established pursuant to Article 35 of the MRFTA, is the primary competition enforcement agency in Korea. The KFTC possesses quasi-judicial and investigative authority. As such, it investigates alleged violations of the MRFTA and imposes sanctions, including fines and corrective orders, on violators. The KFTC also exercises quasi-legislative authority by issuing notifications and guidelines. While the KFTC does not have the authority to impose criminal sanctions, it may refer cases to the Prosecutor’s Office for criminal proceedings.

Cartel enforcement has been one of the KFTC’s enforcement priorities since its establishment in 1981. Article 19 of the MRFTA prohibits improper concerted conduct (i.e., cartels). Specifically, Article 19(1) of the MRFTA prohibits businesses and individuals from agreeing with one another to unfairly restrain competition or from requiring others to engage in such collusion. Article 19(1) of the MRFTA expressly prohibits nine types of concerted conduct:

\[a\] price-fixing agreements;
\[b\] agreements on transaction conditions;
\[c\] output restriction agreements;
\[d\] market allocation agreements;
\[e\] agreements that restrain or interfere with the establishment of facilities or equipment used to produce goods or to provide services;
\[f\] agreements that restrict certain types or specifications of goods or services;
\[g\] the establishment of a company to carry out concerted sales practices;
\[h\] bid-rigging agreements; and
\[i\] other agreements that restrain or interfere with business practices.

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1 Sai Ree Yun is the managing partner, Cecil Saehoon Chung is a senior foreign counsel, and Kyoung Yeon Kim and Seung Hyuck Han are partners at Yulchon LLC. The authors wish to thank Tae Yong Kim, Jinhee Rhew, Hee Jin Yun and Geary Choe, associates at Yulchon, for their valuable assistance.
Among the notifications issued by the KFTC regarding concerted conduct, the most important are the Concerted Conduct Review Guidelines and the Notification on Implementation of a Leniency Programme. These two notifications establish the general principles and procedures concerning the evaluation of concerted conduct and the treatment of leniency applicants.

As the implementation of cartel activities has become more sophisticated in response to heightened cartel enforcement, it has likewise become increasingly difficult to prove the existence of an agreement — the most critical element of improper concerted conduct. Thus, in the absence of direct evidence, the KFTC at one point resorted to the Article 19(5) legal presumption to challenge parallel conduct. After suffering several setbacks in court, however, the KFTC has shied away from relying on this provision. Instead, it has been treating parallel conduct and exchange of sensitive information (i.e., price) as strong circumstantial evidence of collusion as part of its *prima facie* case, rather than relying on the Article 19(5) presumption.

More generally, the KFTC’s Concerted Conduct Review Guidelines state that the following non-exhaustive list of conduct constitutes circumstantial evidence that may be used to presume the existence of an agreement:

**a** evidence, whether direct or indirect, evincing an exchange of information or intent between businesses, including similar entries in business logs, parallel conduct subsequent to meetings or other communications between competitors, and the presence of competitors’ confidential information in a company’s internal reports;

**b** when certain conduct is beneficial to businesses only through concerted conduct or, if engaged in individually, can only be deemed to go against the benefit of the individual businesses, including cases in which prices are raised simultaneously despite the absence of an increase in raw material costs, excessive supply, reduced demand or an inventory build-up;

**c** when certain competitors’ parallel conduct cannot be explained by the market situation, such as when the degree of pricing change is the same for the competitors even when their respective demand or supply conditions, geographical locations and raw material costs are different, or when, without concerted conduct, prices cannot be raised to such a high level within a short period; and

**d** when suppliers engage in parallel conduct despite market circumstances that make it difficult for the suppliers to engage in parallel conduct, such as in markets with differentiated products, low transaction frequency and consumers with professional knowledge.

### II COOPERATION WITH OTHER JURISDICTIONS

Article 36-2 of the MRFTA provides the statutory basis of cooperation between Korea and other jurisdictions for competition enforcement. Under Article 36-2(1), the Korean government may enter into an agreement with the government of another jurisdiction for the purpose of enforcing the MRFTA, so long as the agreement does not contravene the laws or interests of Korea. Under Article 36-2(2), the KFTC may assist the counterparty government’s enforcement of its laws. Furthermore, Article 36-2(3) provides that, even in the absence of a formal agreement, the KFTC may, upon the request of a foreign government, assist that government in enforcing the latter’s laws, as long as it guarantees reciprocal assistance in identical or similar matters.

Moreover, the Korean government has made various efforts to enhance cooperation with the competition authorities of other jurisdictions. In recent years, the KFTC has held
bilateral conferences with the competition authorities of the United States, the European Union, Japan, Russia and China. Notably, in 2009, Korea entered into an agreement concerning cooperation on anticompetitive activities with the European Union, the first of its kind between Korea and a foreign jurisdiction. In September 2015, Korea entered into a memorandum of understanding (MOU) with the US Department of Justice and Federal Trade Commission, raising the total number of MOUs with foreign jurisdictions to 15.

The KFTC successfully cooperated with foreign competition authorities for the first time in 2006 in the international Air Cargo cartel case. In that case, 21 air cargo carriers from 16 countries colluded on air cargo rates on various routes, including outbound routes from Korea and inbound routes to Korea (from Japan, Hong Kong and Europe) between December 1999 and July 2007. The KFTC planned and conducted a dawn raid in coordination with the US Department of Justice and the European Commission. Since then, the KFTC has continued to conduct a number of dawn raids in close coordination with foreign competition authorities in such matters as the CRT cartel case in 2009 and the Automotive instrument panel clusters case in 2012.

In Korea, there is no mechanism that allows foreign competition authorities to request confidential information obtained by the KFTC through, for instance, its leniency programme, nor is there a US-style discovery system that provides access to other parties’ information. Indeed, Article 22-2(3) of the MRFTA prohibits disclosure of information obtained by the KFTC from leniency applicants or investigation targets cooperating with the KFTC, except where the initial information provider has consented to disclosure or the information is needed for the purposes of related litigation. Thus, Article 22-2(3) may be used by the KFTC as a statutory basis for refusing to comply with other jurisdictions’ requests for information.

On the other hand, Korean law provides for the extradition of criminal offenders either through individual treaties with foreign jurisdictions or through the Extradition Act. Where an extradition treaty with a foreign jurisdiction is in effect, that treaty supersedes the Extradition Act. In the absence of an applicable extradition treaty, the Extradition Act applies, irrespective of whether the Korean government is making an extradition request with a foreign government, or vice versa. However, this statute applies only where the underlying crime is punishable by imprisonment for more than one year under the laws of Korea and the other jurisdiction at issue. In addition, the statute provides for the extradition of only those offenders who have been found guilty, are under investigation or are on trial in the jurisdiction requesting extradition. The Ministry of Justice and the Prosecutor’s Office may request the Seoul High Court to review and approve extradition requests.

### III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Under Article 2-2 of the MRFTA, the Act applies to all conduct that has an effect on the Korean market. Thus, when a foreign entity’s conduct has an effect on the Korean market, the MRFTA applies even when the foreign entity has no presence in Korea or the conduct at issue did not take place in Korea.

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2 Under Article 66(1)(9) of the Monopoly Regulation and Fair Trade Act [MRFTA], participation in improper concerted conduct is punishable by a term of imprisonment not exceeding three years or a criminal fine not exceeding 200 million won, or both.
Even prior to the enactment of Article 2-2 in December 2004, the KFTC followed the international trend of extraterritorial application of competition law by finding in several cases that price-fixing conspiracies carried out by foreign entities outside Korea affected competition in the Korean market. Thus, the KFTC imposed corrective orders and administrative fines in the 2002 Graphite Electrodes cartel\(^3\) and the 2003 Vitamins cartel.\(^4\) On appeal, Korean courts upheld the KFTC's decisions in both cases.\(^5\)

A participant in an overseas cartel may advance an affirmative defence that the relevant overseas conduct did not have any effect on the Korean market. However, there is no Korean Supreme Court decision that provides a bright-line test for evaluating effects on the Korean market. An analysis of the KFTC's various international cartel cases reveals that an international cartel is deemed to have had an effect on the Korean market where there was a specific pricing agreement regarding the Korean market and the agreement was implemented by, for instance, selling the products or services at issue at the agreed price on the Korean market. In particular, the higher the dependence of Korean consumers on the imported products or services at issue, the greater will be the likelihood of an effect on the Korean market (e.g., the 2002 Graphite Electrodes case and the 2009 Marine Hose case). In the 2014 Air Cargo cartel decision, the Supreme Court narrowed the scope of the 'effect on the Korean market' under Article 2-2 to a 'direct, substantial and reasonably foreseeable effect' on the Korean market.\(^6\)

Under Article 19(2) of the MRFTA, certain types of anticompetitive concerted conduct are permitted if they promote economic or industrial policies, meet the special requirements set forth in the Enforcement Decree and are approved in advance by the KFTC at the parties' request.

Under Article 58 of the MRFTA, legitimate business activities conducted pursuant to laws or those conducted pursuant to orders issued pursuant to laws are exempt from sanctions otherwise provided for under the MRFTA. In response to some cartel participants' assertion that they simply followed a supervisory agency's administrative guidance, the KFTC grants exemptions only in those cases where the administrative guidance at issue is based on express statutory provisions. If the administrative guidance at issue is not based on express statutory provisions or is based on a comprehensive supervisory authority granted under Korean laws governing administrative organisation, the KFTC does not grant exemptions under Article 58. This interpretation of Article 58 tends to be supported by case law.

### IV LENIENCY PROGRAMMES

The Korean leniency programme has been in effect since April 1997. Its purported goal is to erode trust among cartel participants and to induce voluntary reporting by cartel participants by granting exemptions from or reductions in administrative fines. This goal has been codified into Article 22-2(1) of the MRFTA. Article 35(1) of the Enforcement

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\(^4\) KFTC Case No. 2003-098, decided 29 April 2003.

\(^5\) Korean Supreme Court Case No. 2004Du11275, decided 24 March 2006 (Graphite Electrodes case) and Seoul High Court Case No. 2003Nu9000, decided 24 November 2004 (Vitamins case). The appellants in the Vitamins case withdrew their appeal to the Korean Supreme Court after the Seoul High Court affirmed the KFTC's decision on all grounds.

\(^6\) Korean Supreme Court Case No. 2012Du13665, decided 16 May 2014 (Air Cargo case).
Decree provides the specific criteria governing exemptions from or reductions of sanctions. The KFTC has also issued a notification regarding its leniency programme (the Leniency Notification) to establish the specific procedures of the programme.

Under Article 35(1) of the Enforcement Decree, to benefit from the Leniency Notification, a leniency applicant must satisfy the following requirements: (1) at the time the applicant reports the cartel activity at issue, the KFTC has not received any information about the cartel activity or has not obtained sufficient evidence to prove it; (2) the applicant reports the cartel activity and fully cooperates with the KFTC by submitting relevant information throughout the investigation; and (3) the applicant has ceased its involvement in the cartel.

The applicant that reports its cartel activity before the commencement of the KFTC’s investigation and is the first to provide sufficient evidence of that cartel will be granted an exemption from administrative sanctions, such as corrective orders and administrative fines, and from a criminal referral to the Prosecutor’s Office. Even when the KFTC has already begun its investigation, the first applicant to present sufficient evidence of the cartel and fully cooperate with the KFTC’s investigation will be granted an exemption from administrative fines and referral to the Prosecutor’s Office, and exemption from corrective orders. The second-in-line applicant to present sufficient evidence of the cartel and fully cooperate with the KFTC will be granted a 50 per cent reduction of the administrative fine and exemption from a criminal referral.7 If a prior applicant withdraws its leniency application or if its provisional leniency applicant status is not finally recognised, then a later applicant will succeed the prior applicant in the order of acceptance, but only if the later applicant satisfies the requirements of the prior applicant’s leniency status.

However, the foregoing benefits are subject to the following restrictions under Article 35(1)(6) of the Enforcement Decree: (1) in a two-party cartel, while the first leniency applicant is still eligible for an exemption from sanctions, the second leniency applicant is not automatically eligible for any reduced sanctions; and (2) once two years have passed since a member of a cartel filed the first leniency application with the KFTC or began to cooperate with the KFTC as the first party providing cooperation with respect to the cartel, no other member of the cartel is eligible for reduced sanctions.8

Moreover, to prevent leniency applicants from abusing the Leniency Notification and to deter repeated violations, Article 22-2(2) was enacted on 29 March 2016 and came into effect on 30 September 2016. Under this provision, if a leniency applicant obtains an exemption from, or a reduction of, an administrative fine but subsequently engages in a new cartel activity, the applicant cannot receive any benefits from the Leniency Notification within five years of the date the exemption or reduction was granted.

The revised Leniency Notification of 15 April 2016 imposes on a leniency applicant a duty to cooperate in good faith, including an appearance of the applicant’s officers or employees at the KFTC hearing. Under this revised Leniency Notification, the KFTC considers the performance of the applicant’s duty to cooperate, such as the attendance of

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7 While only the first two leniency applicants regarding particular improper concerted conduct are eligible for exemption from or reduction of an administrative fine under the Leniency Notification, as the case may be, later applicants or non-applicant parties are each eligible for a maximum 20 per cent (reduced from 30 per cent in 2017) discretionary reduction of the administrative fine for cooperation with the KFTC under the KFTC’s Administrative Fine Notification.
8 As noted above, however, even late-filing applicants may receive discretionary cooperation credit in some situations.
the applicant’s officers or employees at the KFTC hearing, when deciding whether to grant benefits of the leniency programme. The Supreme Court recently held that, although the duty to cooperate in good faith is in principle triggered only upon the filing of a leniency application, if the applicant destroys any evidence of the cartel activity at issue before the leniency filing, as a result of which the applicant is deemed to have supplied insufficient evidence at the time of the filing, the filing as a whole may be deemed not to be in good faith and, therefore, may be deemed insufficient for the purposes of leniency credit.9

Furthermore, under the Leniency Notification, the applicant will not be eligible for leniency if the applicant, without the KFTC’s prior consent, discloses the fact of its application or its cartel activities to a third party before the completion of the KFTC’s review process in violation of its duty to cooperate. However, there are two exceptions to the non-disclosure obligation for a leniency applicant (1) whose disclosure of the fact is required under relevant laws or regulations or (2) who must inform a foreign government of its leniency application to the KFTC (e.g., when the applicant is also applying for leniency in a foreign country).

In addition, under the Korean amnesty plus programme under Article 35(1)(4) of the Enforcement Decree, if a party in one cartel qualifies as the first party to report another cartel to the KFTC or to cooperate with the KFTC’s investigation of the second cartel, and if the size of the second cartel (the cartel that was voluntarily reported through the amnesty plus programme) is equal to or smaller than the first cartel (the cartel already under KFTC investigation), then that party may be granted a mitigation of corrective order and an additional maximum 20 per cent reduction of the administrative fine for the first cartel activity in addition to any other credit it may be eligible for in connection with the first cartel. On the other hand, under Article 13 of the Leniency Notification, if the magnitude of the second cartel activity is greater than the first then, depending on how much larger the second cartel is, the party may be eligible for a 30, 50 or even 100 per cent reduction of the administrative fine for the first cartel.10 Regarding the amnesty plus programme, the revised Leniency Notification that took effect on 30 September 2016 provides that, in assessing the magnitude of the first cartel and the second cartel if there are multiple cartels within the first and second cartel, the aggregated magnitude of the multiple cartels shall be compared in deciding the level of reduction. The level of reduction will be applied uniformly to all the cartels. However, even if a party meets the requirements for the Leniency Notification and the amnesty plus programme, it will lose that status if it has forced another party to participate in, or prevented another party from discontinuing, the cartel activity, or if that other party has been a repeat offender of Article 19(1) of the MRFTA within the past five years.11

Under the original Leniency Notification, if a prior applicant withdraws its leniency application or the prior applicant’s leniency status is not recognised, a later applicant will succeed the prior applicant in the order of acceptance. However, to prevent a possible free ride by the later applicant who made no additional contribution to the exposure of collusion, the revised Leniency Notification provides that the later applicant’s succession will be recognised by the KFTC only if the later applicant satisfies the requirements of the prior applicant’s leniency status.

In 2002, the KFTC also introduced a whistle-blower programme that provides a monetary reward to the first informant who presents sufficient evidence of a cartel. It was

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10 The scale of the cartel activity is determined on the basis of the relevant turnover.
11 Article 35(1)(5) of the Enforcement Decree; Article 6-3 of the Leniency Notification.
introduced to encourage market participants, individuals employed by cartel participants and the general public to report cartels. On 6 November 2012, in an effort to further promote the whistle-blower programme, the KFTC increased the maximum monetary reward from 2 billion won to 3 billion won. Between 2002 and 2016, the KFTC awarded a total of approximately 2.54 billion won to whistle-blowers in 76 cases.

Under Article 7 of the Leniency Notification, in principle, a leniency application must be prepared and submitted by using the KFTC’s leniency application form. If the applicant needs a substantial period of time for collecting evidence, or if there are special circumstances preventing the applicant from submitting evidence at the same time as the application, the applicant may submit an informal application. Under Articles 7 and 10 of the revised Leniency Notification, in principle, a leniency application must be filed by visiting the Cartel Policy Division of the KFTC, or by fax or email dedicated exclusively for the submission of leniency applications. For oral submission of a leniency application, an order of acceptance is determined at the time of voice recording or video recording. However, the applicant must submit a revised application within 15 days of the submission of the informal application. At the request of the applicant demonstrating justifiable grounds for further extension, such as collection of evidence, the KFTC may extend the deadline for a revised application submission by up to 60 days under Article 8 of the Leniency Notification. The KFTC also has discretion to grant extensions of more than 60 days in exceptional cases, if the KFTC acknowledges the necessity for such extensions (e.g., in international cartel cases).

V PENALTIES

The MRFTA provides for corrective orders, administrative fines and criminal sanctions.

i Corrective orders

Under Article 21 of the MRFTA, the KFTC may order cartel participants to terminate their participation in the cartel at issue, to publish the order and to implement other necessary measures, including rescission of the illegal agreements and disqualification from future bidding. Pursuant to its Corrective Measure Guidelines, the KFTC may not only issue an order prohibiting certain conduct but may also issue an order to perform certain remedial actions, including modification or deletion of a contractual provision and rescission of agreement.

ii Administrative fines

The KFTC may impose an administrative fine not exceeding 10 per cent of the relevant sales turnover as determined pursuant to the Enforcement Decree. However, if no relevant sales turnover was generated, or if it is difficult to calculate it, the KFTC may issue an administrative fine not exceeding 2 billion won under Article 22 of the MRFTA. Under Article 9(1) of the Enforcement Decree, ‘relevant sales turnover’ refers to the number of sales that the offender generated in a certain transaction area by selling the relevant products or services during the cartel period; the purchase price of the products or services at issue, if the cartel activities were carried out in relation to the purchase of products or services; or the contract price in cases of bid rigging or similar conduct.

An administrative fine is calculated in two steps. First, the basic amount is determined by multiplying the relevant sales turnover by a multiplier that can be up to 10 per cent but varies depending on the gravity of the violation. Second, the basic amount is then
adjusted in consideration of various factors, including the duration and frequency of the violation, aggravating circumstances and mitigating circumstances. On 30 December 2016, the KFTC eliminated a number of aggravating and mitigating circumstances in its revised Notice on Administrative Fine Adjustment. The KFTC’s stated intention was to improve the predictability of administrative fine amounts by eliminating the factors that were difficult to define and apply in practice, and by preventing potential abuse of discretion. Thus, under the revised Notice on Administrative Fine Adjustment, the aggravating and mitigating factor lists are much shorter.

Aggravating circumstances now include just one factor: the entity at issue took retaliatory measures against another entity that did not participate in the cartel. Mitigating circumstances include the following:

- a non-performance of the cartel agreement;
- b full cooperation with the KFTC investigation into the cartel; and
- c remedial measures voluntarily undertaken.

Additionally, the KFTC may consider a discretionary reduction in the administrative fine if:

- a the respondent lacks the financial capacity to pay the administrative fine; and
- b the administrative fine is deemed to be unduly burdensome, given the effect of the violation on the market and the size of benefits resulting from the violation.

The KFTC’s further revised Notice on Administrative Fine Adjustment took effect on 20 November 2017. In relation to the ‘duration’ and ‘frequency’ of the violation, the new rules raised the maximum fine aggregation or enhancement for each of the two factors from 50 per cent to 80 per cent. The revised Notice also raised the cumulative cap for the two factors from 50 per cent to 100 per cent. Furthermore, the revised Notice increased the basic fine multiplier for the top two most serious offences from between 7 and 8 per cent to between 7 and 8.5 per cent and from between 8 and 10 per cent to between 8.5 and 10 per cent, respectively.

### iii Criminal sanctions

Under Article 66(1)(9) of the MRFTA, a cartel participant can be punished with imprisonment for up to three years or a criminal fine not exceeding 200 million won. Under Article 70 of the MRFTA, a criminal sanction may also be imposed on a representative, agent, employee or other member of the corporation that has participated in a cartel.

Under the amended MRFTA that came into effect on 17 January 2014, the KFTC is required to refer a matter to the Prosecutor’s Office when requested by the Chief Prosecutor, the Chair of the Board of Audit and Inspection, the Chair of the Public Procurement Service

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12 The revised Notice on Administrative Fine Adjustment eliminated the following factors.

Aggravating circumstances: (1) the entity at issue was the leader or instigator of the cartel; (2) the entity at issue or its employees obstructed or refused to cooperate with the KFTC investigation into the cartel; (3) a high-level executive of the entity at issue was involved in the cartel; and (4) the entity at issue participated in the cartel within three years of it being sanctioned by the KFTC for participation in another cartel.

Mitigating circumstances: (1) insignificant role in the cartel (e.g., participation in the cartel as a result of another's suggestion or deception); (2) full cooperation with the KFTC investigation into the cartel; and (3) entering into the cartel agreement through negligence in the ordinary course of business or notwithstanding substantial compliance efforts by the entity at issue.
or the Chair of the Small and Medium-Sized Business Administration. Since the MRFTA was amended, the KFTC has displayed a tendency to use the criminal referral authority more aggressively against individuals, and businesses, as the Chair of the Public Procurement Service and the Chair of the Small and Medium-Sized Business Administration have started to exercise their newly gained powers. In 2015, Japanese small bearing manufacturers and retailers agreed to fix prices for small bearings supplied to major Korean electronics companies and executed the agreement through their Korean branches. The KFTC referred both the Japanese head office and its Korean branch to the Prosecutor’s Office, which has indicted these offices. This was the first instance of the Prosecutor’s Office investigating and indicting a foreign corporation that had participated in an international cartel.

iv  Consent decrees

Although the MRFTA was amended in December 2011 to provide for consent decrees for certain types of competition law cases, they are not available for cartel activities. Hence, under the MRFTA, there are no early resolution and settlement procedures for cartel activities.

VI ‘DAY ONE’ RESPONSE

The KFTC frequently conducts dawn raids. Under Article 50(2) of the MRFTA, when the KFTC deems it necessary for the enforcement of the MRFTA, its officials may enter the office of a potential offender to inspect business and management conditions, and examine accounting books, documents, electronic data, voice recordings and images. The KFTC may also demand that an interested party or witness appear before it or make a statement. Moreover, under Article 50(3) of the MRFTA, the KFTC has the authority to demand submission of relevant materials during an on-site investigation, and to seize and take custody of materials during an on-site investigation.

In cartel investigations, the KFTC generally conducts dawn raids. During a dawn raid, it typically demands submission of materials, seizes materials and takes statements from officers and employees of the dawn raid target. If the target is unable to provide materials demanded by the KFTC during a dawn raid, it must provide an explanation of why it is unable to do so; in certain cases, the person in charge of the demanded materials may be required to prepare a statement. In some cases, a dawn raid may last several weeks.

On 21 October 2015, the KFTC announced a major overhaul of its enforcement process, aptly named the Enforcement Process 3.0 Reform Initiative, as befitting the digital age. To enhance the transparency of the KFTC’s investigative procedures and ensure due process for its investigations, the KFTC formulated and implemented its Rules on KFTC Investigation Procedures on 4 February 2016, as part of the Enforcement Process 3.0 Reform Initiative. The major provisions of those Rules are as follows:

a The requirement, aimed at avoiding fishing expeditions, to specify and explain (1) the purpose (i.e., investigator’s allegation and relevant provision regarding such allegation) and scope of the inquiry, (2) the name and place of the investigation target, and (3) the right to refuse to comply with an investigation exceeding the expressly stated scope of the inquiry, except in certain investigations, including cartel investigations.

b The right to request and have legal counsel present throughout the entire investigative process, including during dawn raids and witness examinations, except in urgent cartel investigations.
The right to receive a copy of an inventory of materials collected by the investigators during dawn raids, except in cases with obstruction concerns, such as destruction of evidence or disclosure of confidential information.

In addition, as of 4 February 2016, the Rules on the KFTC’s Committee Operations and Case Handling Procedures were amended and implemented. Under these Rules, for a cartel case, the KFTC investigator must prepare an examination report and either refer the case to the Committee or close it within 13 months (excluding the time spent on document submission) of initiation of the investigation. If unavoidable circumstances arise, then the investigator may set an extension period and obtain approval for it from the Secretary General.

Under Article 69-2(1)(7) of the MRFTA, obstruction or refusal to cooperate – whether through concealment or destruction of materials, refusal to allow access to materials, or forgery or falsification of materials – is punishable by an administrative fine not exceeding 200 million won. In addition, under Article 69-2(1)(7), any individual involved in any of the foregoing conduct may be punished by a fine not exceeding 50 million won. Further, under Article 66(1)(11) of the MRFTA, any individual who obstructs, avoids or refuses to cooperate with a dawn raid through verbal or physical abuse, or refuses to grant access to the premises, may be punished by imprisonment for up to three years or a criminal fine not exceeding 200 million won, or both.

If a document demanded by the KFTC contains confidential information, this should be indicated on the document and a copy, rather than the original document, should be submitted to the KFTC. After documents have been submitted to the KFTC, copies of the submitted documents and a list of them should be maintained by the dawn raid target. Strictly speaking, at present, Korean courts do not recognise attorney–client privilege (as that term is commonly understood).

The KFTC’s investigative authority only reaches the office or place of business, and designated places indicated on the KFTC’s request for appearance. However, although controversial, the KFTC maintains that automobiles used for business purposes and personal lockers within the premises of an office or place of business may be inspected. On the other hand, once the KFTC has referred a case to the Prosecutor’s Office for criminal proceedings, the Prosecutor’s Office may only inspect an individual’s private space under search and seizure warrants.

VII PRIVATE ENFORCEMENT

Under Article 56(1) of the MRFTA, a violator of the MRFTA is liable to the resulting victims. The MRFTA does not limit the scope of entities that are eligible to seek compensation. Thus, in principle, anyone injured by a cartel – including competitors, suppliers and consumers – may seek compensation.

Moreover, under Article 750 of the Korean Civil Code, a victim of a cartel may seek damages. When seeking damages under the Civil Code, the plaintiff is normally required to prove the intent or negligence of the defendant. Under the MRFTA, however, the onus is on the defendant in a private damages case to disprove intent or negligence. This shifting of the burden of proof to the defendant is a safeguard for victims of MRFTA violations and serves as an indirect deterrent to MRFTA violations.

Even so, the plaintiff still bears the burden of proof for causation, the existence of injury and the amount of damages. In practice, it is difficult to prove causation, but even
more difficult to calculate the precise amount of damages. Because of this difficulty, where the injury resulting from the defendant’s cartel activity has been proved but it is substantially difficult to prove the precise extent of the injury, the court may recognise a substantial amount of damages based on the facts under Article 57 of the MRFTA. In recent years, a number of improvements to the private enforcement regime have led to an increasing number of actions seeking damages for MRFTA violations. However, at present, there are no US-style treble damages for cartel violations.

Under the MRFTA, the completion of a public enforcement proceeding is not a prerequisite for bringing a damages claim against cartel participants. Furthermore, under the MRFTA, a victim of a cartel is not required to report the cartel to the KFTC before pursuing a damages claim.

In private damages cases, the courts are not bound by the KFTC’s factual findings. Korean courts have consistently held that ‘the facts found by the KFTC do not bind Korean courts in their decisions but are only taken to be presumptively true’.

VIII  CURRENT DEVELOPMENTS

The current version of the MRFTA is expected to undergo a major overhaul – comprehensive amendments to the statute were proposed in August 2018 and are expected to be enacted, with some modifications, some time in 2019. The proposed amendments, if enacted, will significantly affect the enforcement of the MRFTA across the board in many ways. For example, the maximum amount of the administrative fine permitted under the MRFTA will be doubled; as applied to cartels, the maximum administrative fine will be 20 per cent, rather than 10 per cent, of the relevant turnover. In addition, treble damages will be available to plaintiffs when pursuing antitrust damages actions, including those alleging injury from a cartel. Equally importantly, private parties may seek injunctive relief in court even before, or in the absence of, the KFTC’s investigations or formal enforcement actions.

With respect to cartel enforcement in particular, the proposed amendments will also strip the KFTC of its exclusive power to refer to the Prosecutor’s Office a participant in any of the ‘hard-core’ cartels, such as price-fixing and bid rigging, which account for approximately 90 per cent of all cartel cases in Korea to date. At present, the KFTC exercises exclusive, and virtually absolute, discretion in deciding whether to refer a respondent in a cartel case for criminal proceedings.

The proposed revocation of the KFTC’s exclusive criminal referral power has raised concerns that it might undermine the KFTC’s leniency programme and also expose cartel participants to duplicate investigations by the KFTC and the Prosecutor’s Office. In response, the proposed amendment includes a provision aimed at maintaining the integrity and success of the Leniency Notification. Under this provision, the first-in-line leniency applicant that satisfies all leniency requirements will receive a full exemption while the second-in-line applicant will be eligible for reduced sanctions at the KFTC’s discretion. Meanwhile, the Prosecutor’s Office is formulating an internal rule to resolve the issue of duplicate investigations and to mitigate the effects of its investigations on the Leniency Notification.

In 2017, the KFTC identified 69 cartels, imposed administrative fines totalling 229.4 billion won, and referred 27 cases to the Prosecutor’s Office for criminal investigation. The KFTC has also continued to be active in the enforcement of international cartels. Among the most notable public enforcement actions, in August 2017, the KFTC found that 10 international shipping companies had engaged in price-fixing between 2002 and 2012 –
including bid rigging – on contracts to ship automobiles manufactured by, *inter alia*, General Motors Company, Renault Samsung Motors Co Ltd and Toyota Motor Corporation, and had engaged in market allocation.13 Thus, the KFTC imposed corrective orders on all 10 companies, imposed total administrative fines of 43 billion won on nine and referred eight to the Prosecutor’s Office for criminal proceedings.14 Of the eight, Eukor and Nippon Yusen were the only ones indicted by the Prosecutor’s Office because the applicable statute of limitations for the other six companies had already run; the criminal cases against the two companies are continuing.

The KFTC also lost a number of cases in court. In particular, in two decisions, the Seoul High Court dealt a serious blow to the KFTC on the statute of limitations issue.15 Because of a law change in 2012, the KFTC’s investigation commencement date has become an extremely important factor in determining whether the applicable statute of limitations has elapsed. Until these two decisions, the KFTC had always successfully claimed that its investigation commencement date cannot be the date on which a leniency application has been filed or even some point during the period when it was conducting some preliminary inquiry or planning for a dawn raid. Instead, the KFTC asserted that its investigation commencement date against a non-leniency applicant is the first date on which the KFTC outwardly expressed its investigatory interest to such a company (e.g., the date of the KFTC’s dawn raid or the date of the KFTC’s issuance of a formal information request to such a company). Under the KFTC’s rationale, the KFTC could conduct its dawn raid or issue a formal information request several months or even as much as three years (as in the *Denso Compressor* case) after it has received relevant cartel leniency applications and could still claim that its investigation commenced several months or even three years after the leniency application dates. Rejecting the KFTC’s arguments, the Seoul High Court ruled for the first time that, depending on the facts of a leniency case, the KFTC’s investigation commencement date could be as early as the date on which an initial leniency application was filed.

The KFTC’s appeals in both cases are pending before the Supreme Court.

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13 Five of the companies are based in Japan (Nippon Yusen Kabushiki Kaisha, Mitsui OSK Lines, Kawasaki Kisen Kaisha, Nissan Motor Car Carrier Co Ltd and Eastern Car Liner), two in Norway (Wallenius Wilhelmsen Logistics and Höegh Autoliners), one in Chile (Compania Sudamericana de Vapores SA), one in Israel (Zim Integrated Shipping Services) and one in Korea (Eukor Car Carriers).

14 Höegh Autoliners was neither fined nor referred for criminal proceedings, but nevertheless filed an appeal against the KFTC’s corrective order, apparently as a result of the public backlash against its cartel activity; the case is now before the Korean Supreme Court.

15 Seoul High Court Case No. 2017Nu34034, decided 5 October 2018 (*Denso Compressor* case); Seoul High Court Case No. 2017Nu62381, decided 12 October 2018 (*Schaeffler Korea Automotive Bearing* case).
MEXICO

Omar Guerrero Rodríguez and Martín Michaus Fernández

I ENFORCEMENT POLICIES AND GUIDANCE

An unprecedented amendment made to Article 28 of Mexico’s Constitution in June 2013 resulted in competition acquiring a new status, and made revamping the entire competition landscape in Mexico a state priority.

Mexico was the first country to have a complete ban on monopolies added to its Constitution (in 1857). Notwithstanding, there was neither a competition policy nor any supplementary law to regulate such a ban. The current 1917 Constitution reiterated the ban on monopolies and added that ‘the law will punish severely and the authority will prosecute efficiently . . . any combination of [companies or individuals] that effectively cause consumers to pay exaggerated prices’. The wording of Article 28 of the 1917 Constitution authorised an aggressive approach to banning and punishing cartel behaviour. Despite such a strong mandate, the supplementary laws that regulated Article 28 of the Constitution dated 1926, 1931 and 1934 were rarely applied and failed to create an effective competition authority, a true state policy on competition and an efficient fight against cartels. Although the 1931 Federal Criminal Code provided for some crimes addressed to individuals and related to monopolistic matters (including cartels), in reality they were vaguely drafted, notably unconstitutional and have rarely been applied in practice, at least during the past 80 years.

In fact, Mexico has been slow to follow free-market principles on competition. By 1950, Mexico had enacted a post-Second World War law that entitled the executive branch (president) to determine maximum prices of certain products, which resulted in most basic products falling within such a price list. This reduced competition, created national private monopolies and gave rise a significant growth of state monopolies. As such, it was not uncommon for the executive branch to gather the views of competitors to determine a maximum price for essential products of the economy. In this context, fair competition meant that competitors were coordinated and sought the protection of the state to order the market and fight inflation. This state of mind of competitors had a pervasive effect since fair competition was identified with competition coordination and not with free market principles.

This business culture prevailed until the rules of the game changed dramatically with the enactment of the 1993 Federal Law of Economic Competition, which installed efficiency-oriented principles in the new legislation, thereby departing from government

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intervention in the Mexican economy and leaving business decisions to free markets. Cartel behaviour under the 1993 Federal Law of Economic Competition was heavily punished, but there were several drawbacks:

\begin{itemize}
  \item[a] Fines, although considerable, were not sufficiently dissuasive.
  \item[b] There were no leniency programmes available (they first appeared in 2006).
  \item[c] Class actions were not available (they first appeared in 2011).
  \item[d] Cartel behaviour – as set out in the competition statute – was not deemed properly criminal behaviour until express amendments to the Federal Criminal Code in 2011 and 2014.
\end{itemize}

The 2013 constitutional amendment brought about the following vital changes to the competition framework:

\begin{itemize}
  \item[a] the creation of two constitutional autonomous agencies for competition matters: the Federal Institute for Telecommunications (IFT), entrusted with competition matters in telecommunications, radio and broadcasting; and the Federal Economic Competition Commission (Cofece), entrusted with competition matters in all other sectors of the economy;
  \item[b] the separation of the investigator (the investigating authority) from the decision-making body (the Plenary of Cofece or the IFT);
  \item[c] the creation of specialised federal administrative district courts and collegiate circuit courts (that eventually were based only in Mexico City) devoted to hearing challenges against definitive and other decisions made by the competition authorities;
  \item[d] the elimination of an administrative challenge and confirmation that definitive decisions made by the competition authorities can only be challenged through indirect amparo or a constitutional challenge through a subsequent federal appeal before specialised collegiate circuit courts;
  \item[e] confirmation that there is no possibility of a suspension or stay of the proceedings during amparo proceedings, except in decisions relating to fines and divestitures of assets issued solely by Cofece;
  \item[f] the authority for Cofece and the IFT to issue decisions relating to determining essential facilities, eliminating barriers to entry and ordering divestitures of assets;
  \item[g] the order to Federal Congress to update the relevant statutes dealing with competition matters; and
  \item[h] the order to Federal Congress to punish severely (from the criminal standpoint) monopolistic practices (i.e., cartel behaviour).
\end{itemize}

As a consequence of the 2013 constitutional amendment, the Federal Congress passed new federal legislation, the Federal Economic Competition Law (FECL),\(^2\) which is applicable within the entire Mexican territory. Mexico has no state competition statutes. The FECL – built from its predecessor – regulates and sanctions cartels, horizontal agreements or collusive behaviour, referred to in the FECL as ‘absolute monopolistic practices’ \(^3\) or \textit{per se} rule violations.

\(^2\) The FECL was issued on 23 May 2014 and became effective on 7 July 2014.
Cartel behaviour comprises any horizontal agreements, understanding and covenants among competitors that have as their purpose or effect any of the following behaviours:

- **price-fixing**;
- **output restriction**;
- **market allocation**;
- **bid rigging**; or
- **information exchange** with any of the above purposes or effects.

Unlike in other jurisdictions (i.e., the United States and the European Union), there are no further behaviours that differ from those so established in the FECL. Therefore, the FECL lacks a catch-all provision since it could be considered unconstitutional for violating legal certainty principles enshrined in the constitution as affirmed by the Federal Supreme Court in the 2003 *Warner-Lambert* case.³

The enforcement of the FECL is entrusted to Cofece and the IFT in their respective jurisdictions. Each competition authority has a separate investigating body entrusted with investigating cases, and these bodies have significant powers, such as issuing requests for information, compelling the appearance of individuals and, more importantly, ordering dawn raids. In November 2013, Cofece and the IFT issued their own regulations of the FECL (the Regulations). These Regulations provide a legal framework to enable Cofece and the IFT to comply with their constitutional mandates.

As a formal requirement to commence an investigation relating to a cartel offence, the statutory framework provides that there must be an objective cause⁴ that justifies the opening of an investigation. That cause could comprise indications of the existence of a cartel offence.

Article 3 of the Regulations provides that there are at least four independent hypotheses or presumptions of conduct that indicate the existence of a cartel offence:

- **an invitation or recommendation** addressed to one or several competitors to coordinate prices, output or the conditions to produce, commercialise or distribute products or services in a market, or the exchange of information for such an objective or effect;
- **the sale price** offered within the national territory by two or more competitors of products or services that are the subject of international trading are considerably higher or lower than their international reference price, or the trend of their evolution for a specific period of time is considerably different from the trend of international prices within the same time period, except for those cases in which the difference arises from tax provisions or transportation or distribution expenses;
- **instructions, recommendations or adopted commercial standards** by business chambers, associations, professional associations or similar to coordinate prices, offer products or services or other conditions to produce, distribute or commercialise products or services in a market, or the exchange of information for such an objective or effect; and
- **two or more competitors** set the same minimum or maximum prices for a product or service, or adhere to a sale or purchase price of a product or a service that was issued by an association, business chamber or competitor.

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³ See *Amparo en Revisión 2617/1996*, Supreme Court of Justice of the Nation.

⁴ Article 73 of the FECL.
In addition, Cofece has issued documents (guidelines and technical criteria) that, although not legally binding, include formal guidance for the interpretation and application of the FECL when prosecuting and sanctioning cartels, as follows:

a. Guidelines to Initiate an Investigation against Offenders of Monopolistic Practices;
b. Technical Criteria to Request Dismissal of a Criminal Prosecution against a Cartel Offender;
c. Guidelines whereby the prosecuting authority sets forth the methodology to carry out its investigations against cartel offences;
d. Guidelines to Regulate Information Exchanges among Economic Agents that could trigger competition concerns, under which Cofece will use worldwide best practices on this topic; and
e. Technical Criteria related to Provisional Measures during investigation procedures.

Cofece has made the fight against cartels its main priority. For instance, Cofece’s 2014–2017 Strategic Plan states that the fight against monopolies and the eradication of conduct that might harm competition are its priority and constitutional mandate, and deems cartel offences to be the most harmful of all anticompetitive practices. Consequently, Cofece now has a strong message regarding its zero-tolerance policy (except for immunity applications) against cartel offences. The current Strategic Plan 2018–2021 (dated 30 November 2017) confirms prior objectives, namely (1) timely investigation of anticompetitive practices and (2) consolidation of the leniency programme.

II COOPERATION WITH OTHER JURISDICTIONS

The Inter-American Development Bank (IDB) has recognised that competition policy enforcement is no longer a national task. During the 2013 Regional Competition Agreements

5 Cofece intends to update its Guidelines to provide greater clarity on the procedural aspect of the leniency programme and applicants’ obligations when applying to the programme (as well as the requirements that must be fulfilled for the granting of leniency benefits). The new Guidelines will be submitted by the end of 2018 for public consultation, so that an improved set of guidelines is made available by 2019.

6 These technical criteria were the subject of a public consultation period that ended in November 2015. Cofece issued the final document on 16 December 2015. They were subsequently amended and republished on 28 November 2016.

7 These Guidelines were the subject of a public consultation period that ended in October 2015. Cofece issued the final document on 21 December 2015.

8 These Guidelines were the subject of a public consultation period that ended in October 2015. Cofece issued the final document on 17 December 2015.

9 Cofece basically referred to experience from the United States and the European Union.

10 These technical criteria were the subject of a public consultation period that ended in November 2015. Cofece issued the final document on 16 December 2015.

11 Available at https://cofece.mx/cofece/index.php/transparencia/planes-de-desempeno.


Many jurisdictions worldwide are seeking the consistent application of their competition policies as a result of the versatile international economy. Mexico is no exception, especially where the structural reforms in the finance, telecommunications, competition and energy sectors are concerned. Cofece has publicly recognised that an adequate competition policy reduces high market concentration and diminishes possibilities for collusion, and has indicated its strong commitment to eradicating cartel behaviour. Therefore, for a period of more than 20 years, Mexico has executed cooperation agreements with several authorities and countries around the world. In addition, Cofece has participated extensively with the International Competition Network to adopt the best international practices on cartels. For instance, Mexico has several bilateral cooperation agreements in place with the United States and Canada, under which these countries agree to fully collaborate with their local competition authorities. On the other hand, the World Economic Forum has recognised that the economic resilience of the Latin American region will depend on its capacity to strengthen the fundamentals of its economy by boosting its level of competitiveness.

17 For example, the United States Mexico Canada Agreement (USMCA) was signed on the 30 November 2018 but has yet to be ratified. The economic competition section of the new treaty will take on a much more prescriptive approach than that of its predecessor (NAFTA). For instance, Chapter 21 of the new treaty not only recognises the importance of cooperation and coordination, it also provides detailed requirements for the parties. Practitioners believe the increased requirements are beneficial for the region. Increased cooperation will enable the countries to accelerate and streamline the pace of investigations, thus benefiting businesses; and consumers will benefit from increased cooperation, resulting in more efficient international policing of cartel behaviour.

Many of the proscribed requirements set out in the USMCA are already common practice so it is unlikely that these new provisions will have a significant practical impact on competition enforcement. Nonetheless, many practitioners remain hopeful that the new treaty may pave the way for greater cooperation between Mexican, US and Canadian competition authorities. The USMCA still needs to be approved and ratified in 2019, and will therefore not become effective until 2020.

Other important agreements celebrated with United States are (1) the mutual legal assistance treaty, a Treaty on Mutual Legal Assistance in Criminal Matters, 1987, (2) Agreement regarding the application of competition laws, 2000 and (3) the Organisation for Economic Cooperation and Development’s ‘Revised recommendation of the Council Concerning Co-operation between Member countries on Anticompetitive Practices affecting International Trade’, 1995 (C(95)130/Final).
18 For example, the Agreement between the Government of Canada and the Government of the United Mexican States regarding the application of their competition laws’, 2001.
context, 2014 and 2015 have seen the consolidation of local competition policies in Latin America, since most of the jurisdictions in this region have reformed their local legislation to adopt and renew their local regimes.20

Hence, the Mexican competition authorities are open to supporting international cooperation, although the scope of their cooperation is limited to the legal boundaries of Mexico’s local legislation. This means, however, that the Mexican competition authorities are cooperating with other agencies worldwide to achieve an adequate and strong competition policy.

Although the Mexican competition authorities could conduct a coordinated investigation with other jurisdictions if an investigated cartel offence had also taken place in Mexico (or had effects in Mexico), neither Cofece nor the IFT has the capacity to cooperate with information requests or extraterritorial discovery from other authorities, as both require the intervention of the Mexican judiciary and a set of different international treaties.

Cooperation agreements executed by the Mexican authorities are limited to local legal boundaries and restrictions. Non-public information and evidence that the Mexican competition authorities obtain directly from cartel members during their prosecution cannot be shared with other authorities if the information or evidence is protected under local confidentiality laws or is obtained without gaining the consent of the investigated party (which is highly unlikely to occur).

A similar circumstance arises in the context of, for example, extradition cases.21 Although Mexico could eventually accede to extradition requests, as its local legislation and international treaties formally contemplate such a faculty,22 there are several hurdles, such as:

a. complying with the statutory formalities under the extradition principles and rules;23
b. the complexity of local procedures to endorse the extradition;
c. the inconsistency between international treaties and local and foreign legislation; and
d. the lack of formal, legally binding obligations between nations to force extradition.

These are only some of the factors that indicate that multi-jurisdictional cooperation is not enough.

Hence, interagency cooperation is limited as a form of enforcing a competition policy and the strategic measures that need to be adopted to prosecute anticompetitive practices worldwide. However, the Mexican competition authorities are under an obligation to act independently and autonomously from other authorities. The existence of several international cooperation agreements does not relegate any local obligations to which the Mexican competition authorities are subject.

20 Examples include Argentina, Brazil, Colombia and Uruguay.
21 Mexico has executed more than 36 bilateral and multilateral extradition treaties and has local criminal and extradition laws.
22 For example, the US and Mexico Extradition Treaty of 1978 includes and provides, subject to several complex provisions, the possibility of extraditing persons in respect to specific offences, including 'offenses against the laws relating to prohibition of monopoly or unfair restrictions' (Item 26). However, the Mexican Federal Criminal Code sanctions specific conducts, which eventually will generate a discussion regarding the lack of consistency between such statutes.
23 For example, double criminality, non bis in idem (double jeopardy), reciprocity, jurisdictionality, commutation and speciality.
III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

The FECL clearly outlines a general rule applicable for the sanctioning of a cartel (as previously mentioned, known as an absolute monopolistic practice).

Article 53 of the FECL states that any agreement or combination among competitors will be sanctioned if it has the purpose (objective) or the effect of any of the following:

a. price-fixing;

b. restraining output;

c. allocating markets;

d. bid rigging; or

e. exchanging information with such purposes or effects.

The general rule provided in Article 53 has no jurisdictional limitations for its enforcement, and it does not make a distinction as to whether the agreement or collusion should be performed by an economic agent that has a physical presence in Mexico, or whether it is related to Mexican markets. There are also no *de minimis* rules. It is immaterial whether the cartel offence was formally executed locally or abroad, or whether it has an impact that harms Mexican markets or consumers, or both; the offender could be considered to be liable in all the extensions of the law. Likewise, absolute monopolistic practices are considered by statute null and void, and no longer render any legal effect.

Moreover, Article 53 not only sanctions the tangible execution of an anticompetitive agreement or combination, but also the intention of executing the conduct even if it is never formally executed, and the effects that might arise from the anticompetitive conduct even if the offender did not have any such intention.\(^{24}\) Administrative liability is independent of civil and criminal consequences that might arise.

Contrary to what occurs in other jurisdictions, there are no exceptions to the application of competition law in Mexico; therefore, every person must abide by its content. However, liability in cartel prosecutions has been a hotly debated topic in Mexico, especially where the Mexican competition authorities render a final decision and resolve to make parent companies liable for actions executed by their subsidiaries, as neither the former Competition Act nor the current FECL fully regulate this controversial topic.

Owing to the lack of clarity in the statutory framework, the Mexican Supreme Court of Justice decided a relevant precedent in the matter. When resolving an appeal in 2007 of a cartel investigation against the Coca-Cola Export Corporation,\(^{25}\) the Supreme Court resolved that to prove the existence of an economic group through which parent companies should be held liable for the actions of their subsidiaries, at least two elements were required: a control element and a coordination element.

\(^{24}\) In fact, the intentionality factor might only be considered when calculating the fine assessment in accordance with Article 130 of the FECL.

The Supreme Court decided:

_In order to consider the existence of an economic group and that it might be considered as an economic agent in terms of the Federal Economic Competition Law, it should be analysed if the company, directly or indirectly, coordinates the activities of the group to operate in the market and, furthermore, it can exercise a decisive influence or control over the other company, either de jure or de facto._

In this regard, the Mexican liability attribution system is based on the fact that the authority has the obligation to prove, without doubt, the nexus of liability between the execution of the anticompetitive conduct and the actual intervention of the offender. Parent companies should not just be held liable for having an equity participation in their subsidiaries in the absence of their directions to the offender; rather, the authority has the obligation to evidence that the execution of anticompetitive conduct was a result of a parent company’s decisive intervention. This was illustrated in April 2018, when a specialised Mexican Federal Competition Court (Specialised Collegiate Circuit Court), in a landmark decision, clarified the rules concerning liability of a parent company for the cartel behaviour of its subsidiary. In short, the Federal Collegiate Circuit Court ruled that controlling the stock of a subsidiary does not imply the extension of liability for the unlawful behaviour of a subsidiary to its holding company. The ruling sends a clear signal to the Mexican competition authority that in order to find a holding company liable for offences committed by one of its subsidiaries, there must be evidence of illegal collaboration. Therefore, this judgment represents a significant move forwards and reinforces rules regarding the investigating authority’s burden of proof, which require it to provide evidence that a particular company participated in an offence and, in turn, confirming that parental liability implies complying with such a burden.

Furthermore, courts have recently issued a number of landmark decisions. For instance, a specialised federal court issued jurisprudence recognising that companies could be held responsible despite the fact that the individuals who executed the conduct on their behalf are not their formal or direct employees. Additionally, the Supreme Court decided at the end of 2015 that, in accordance with Article 28 of the Constitution, cartel offences will be sanctioned despite their lack of effect on competition or even when they do not provoke a price increase or the payment of exaggerated prices, despite the express wording of the constitutional provision.

IV LEIENCY PROGRAMMES

The FECL provides a leniency programme for cartel offences. The leniency programme provided in the FECL is similar to leniency or amnesty programmes in other jurisdictions. The Mexican programme grants immunity to those cartel offenders who appear before the authority to self-report a cartel violation.

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28 See Chapter IV of the FECL, and especially Article 103.
The leniency programme grants immunity to cartel offenders who request it by exempting them from criminal prosecution and disqualifications, and reducing the fine to its lowest possible amount. There is no exemption for damages in private or class actions. However, leniency protection is granted only if the following occurs:

- If there is already a first leniency applicant, the remaining cartel offenders can obtain other types of benefits, which include partial fine reductions and full criminal prosecution immunity when they provide additional evidence related to the conduct being investigated. The following table outlines what type of benefit applicants might receive.

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Reduction of fines</th>
<th>Disqualification sanction</th>
<th>Criminal prosecution</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>Maximum fine reduction*</td>
<td>Immunity</td>
<td>Immunity</td>
</tr>
<tr>
<td>Second</td>
<td>30% to 50% fine reduction</td>
<td>Immunity</td>
<td>Immunity</td>
</tr>
<tr>
<td>Third</td>
<td>20% to 30% fine reduction</td>
<td>Immunity</td>
<td>Immunity</td>
</tr>
<tr>
<td>Fourth and subsequent</td>
<td>Up to a 20% fine reduction</td>
<td>Immunity</td>
<td>Immunity</td>
</tr>
</tbody>
</table>

* The minimum applicable fine is equivalent to one UMA (the official unit for determining fines), which in 2018 was set at 80.60 pesos (approximately £3.08, according to the exchange rate as at 22 November 2018).

As in other jurisdictions, the marker system in Mexico is very relevant when applying to the leniency programme. Pursuant to the provisions set forth in the FECL and the Guide for Leniency Application Programmes issued by Cofece, a leniency applicant will obtain a marker after applying for the leniency programme. Nevertheless, it is common practice that, prior to formally requesting the leniency benefit, external counsel conducts an informal telephone call or meeting with the investigating authority or his or her director for cartel investigation, or both, to review whether there is a prior applicant in a specific market without having to disclose the identity of the cartel applicant. Likewise, when formally submitting the leniency application, the applicant does not need to provide relevant information related to the cartel, as it can provide this subsequently.

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29 The leniency protection can be extended to those individuals, subsidiaries and affiliates included in the leniency application.

30 To obtain leniency benefits, applicants must identify specific individuals that shall be beneficiaries of the leniency application (if leniency is requested by a company). The regulation has been updated to explicitly allow those who receive the immunity benefit to not be disqualified by Section X of Article 127 from acting as a board member, administrator, director, manager, officer, agent or representative.

31 Available at https://cofece.mx/cofece/index.php/normateca.

32 This can be requested via email or telephone at any time prior to the closing ruling of the investigative phase of a procedure.
According to Article 103 of the FECL, the investigating authority is under an obligation to preserve as confidential the identity of the leniency applicant at all times and without exceptions. Likewise, information provided by the leniency applicant will be classified as confidential, and no third party (including private practitioners or external counsel) should access this information.

Mexico’s leniency programme witnessed a remarkable rise in applications in 2015 and 2016, which has since trailed off.⁵³ In 2013 and 2014, Cofece received, respectively, four and six leniency applications. The numbers jumped to 18 in 2015 and 26 in 2016, before declining to 15 in 2017.⁵⁴ The decline is attributed to several concerns regarding the certainty of the immunity programme.

The International Competition Network’s best practice suggests that the success of any leniency programme depends on the certainty that it provides to those who want to resolve their criminal liability. To provide that certainty, the authority should be explicit in defining the leniency requirements. Additionally, if the corporation meets the leniency requirements, the agency shall have little to no discretion to deny the request.⁵⁵ For example, the US Antitrust Division attributes part of its success to its 20-year record of honouring leniency agreements, which provides comfort to potential applicants.⁶⁶

Mexican lawyers believe that Mexico’s deviation from this best practice has been problematic. Specifically, lawyers have cited the lack of certainty as a leading factor for the declining number of leniency applications. For instance, the attraction to leniency has decreased partly as a result of a couple of cases, in which Cofece withdrew the benefits of leniency to applicants for a failure to cooperate sufficiently, thus reducing certainty and predictability for would-be applicants. Additionally, ‘Mexico saw its first-ever private damages claim in 2016, followed by a widely publicised lawsuit in a New York federal court against banks for their participation in an alleged cartel that fixed the price of Mexican government bonds’.⁵⁷

Furthermore, concerns regarding new anticorruption laws have caused applicants to fear using the antitrust leniency regime because they could simultaneously implicate themselves criminally under the country’s new anticorruption laws.⁵⁸ These factors have contributed to

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⁵⁷ See footnote 34.

⁵⁸ Criminal immunity was not included in Mexico’s new anticorruption leniency provisions, whereas all leniency applicants under Mexican antitrust law are granted total immunity for criminal charges levied by Cofece. Therefore, the failure to provide criminal immunity under Mexico’s new anticorruption provisions could kill the country’s successful antitrust leniency programme. See ‘Mexican anticorruption leniency programme could threaten antitrust efforts’, at https://globalcompetitionreview.com/article/1170081/mexican-anticorruption-leniency-programme-could-threaten-antitrust-efforts.
an unwillingness to apply for the leniency programme. Nonetheless, Cofece, believes the diminishing number of applications can be directly attributed to a lack of awareness of the existence of the leniency programme.\(^{39}\)

Moreover, Mexico has adopted a noteworthy deviation in its leniency programme. Whereas in most jurisdictions a ringleader cannot be granted full immunity, this is not the case in Mexico. Unlike in other jurisdictions, the FECL makes no distinction. A benefit of the Mexican system is that cartel members are more likely to come forward when they do not have to worry about the uncertainty of who the ringleader is. Thus, international cartel applicants should note that although they may be ineligible for certain types of immunity in jurisdictions like the United States, they may still be eligible in Mexico.

V PENALTIES

As a result of the June 2013 constitutional amendment, the incentives for collusion have changed in Mexico. The amendment to Article 28 of the Mexican Constitution introduced a series of new and tougher penalties against cartel offences.

Pursuant to Article 127 of the FECL, any company or individual who actively participates in a cartel, or who contributes, induces or cooperates in cartel behaviour, can be held liable. Monetary sanctions may vary according to the degree of participation of the company or individual as follows:

<table>
<thead>
<tr>
<th>Type of intervention</th>
<th>Monetary sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Active participation in the conduct</td>
<td>Up to the equivalent of 10% of the income of the offender</td>
</tr>
<tr>
<td>Participation through contributing, inducing or propitiating the conduct</td>
<td>Up to the equivalent of 180,000 times the Units of Measure(^*)</td>
</tr>
</tbody>
</table>

\(^*\) Currently, this fine may be raised to 14.5 million pesos

Article 130 of the FECL provides that certain elements should be taken into consideration by the competition authority when calculating fines, including:

- \(a\) harm caused;
- \(b\) indications of intentionality;
- \(c\) market share;
- \(d\) market size;
- \(e\) duration of the conduct; and
- \(f\) the economic capacity of the offender.

Recidivism or a second offence entitles the competition authority either to double the fine (i.e., up to the equivalent of 20 per cent of the income of the offender) or to order the divestiture of assets, rights, equity participation or shares under the terms of Article 131 of the FECL.

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\(^{39}\) Cofece backs this claim, citing a recent study by McKinsey & Company, which found that only 10 per cent of executives interviewed by McKinsey were aware of the leniency programme. See 'Roundtable on challenges and co-ordination of leniency programmes' – Note by Mexico, page 58, available at https://www.cofece.mx/wp-content/uploads/2018/01/Estudio-labor-COFECCE-17.pdf.
Individuals who participate either directly or indirectly in the commission of a cartel offence as a representative of a company might be disqualified from acting as a board member, administrator, director, manager, officer, agent or representative for a period of up to five years, and might be subject to a fine that could be equivalent to 200,000 times the Unit of Measure. Cofece boasts that, in 2017, those who violated the FECL attracted some of the largest fines – Cofece issued the highest sanction imposed to date by the Commission, which totalled 1,100 million pesos. The case was related to collusive agreements conducted by financial institutions in retirement fund management services. Fines are not the only sanctions applicable against cartel offenders. In addition to the major constitutional reform and the issuance of the new FECL, the Federal Criminal Code has been modified to deter cartel behaviour.

Although the criminalisation of cartel offences is not entirely new to the Mexican competition system, the applicable sanctions have been toughened up, with imprisonment sanctions being modified to a minimum of five years and a maximum of 10 years. Under the current criminal rules, there is no possibility of commuting a prison sentence into another sanction. Therefore, a cartel offender in Mexico who is criminally prosecuted and sanctioned will necessarily serve time in jail.

Criminal prosecution can only be initiated by a formal request from the competition authority to the Federal Criminal Prosecutor. A major change is that Cofece or the IFT could give criminal notice to the Federal Attorney’s office once a statement of objections has been rendered, and not just at the time the competition decision has become res judicata. In fact, in February 2017, the first criminal prosecution request was filed by the Investigative Authority of Cofece before the Attorney General Office in a cartel investigation related to the pharmaceutical industry.

Both the FECL and the Federal Criminal Code grant the competition authorities discretionary powers to request a dismissal of the charges only when the offender requests it, the offender complies with all administrative sanctions, there is no legal action to challenge a Cofece or IFT decision and there is no recidivism by the offender.

There is no Mexican legal tool that allows settlement for cartel behaviour. However, corporate criminal liability is a new legal tool that entered into force in June 2016 and,

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40 Currently, the maximum amount of this fine is 16 million pesos.
41 See ‘La COFECE en números 2017’, reporting the following totals for monetary sanctions for violators of the FECL per year: 2017, 3,656 million pesos; 2016, 309.4 million pesos; 2015, 76.5 million pesos; 2014, 253 million pesos; 2013, 130.9 million pesos.
42 Currently equivalent to about US$48 million.
43 From ‘Sanciona COFECE a Afores por pactar convenios para reducir los traspasos de cuentas individuales’, 10 April 2018, from Cofece, at https://www.cofece.mx/sanciona-cofece-a-fores-por-pactar-convenios-para-reducir-los-traspasos-de-cuentas-individuales/.
44 See Article 254 bis of the Federal Criminal Code.
45 Criminal sanctions against specific cartel offences were introduced in Mexico in May 2011 as a result of a prior reform to the former Competition Act.
46 See the 2014 amendment to the Federal Criminal Code (Article 254 bis) dated 23 May 2014.
47 Procuraduría General de la República.
48 Under the Technical Criteria to Dismiss Criminal Prosecution, Cofece will also take into consideration any recidivism of the offender, the offender’s commitment to contribute with actions that encourage competition and the negative social impact of the cartel.
49 See Section 421 of the National Criminal Procedure Code published on 5 March 2014 in the Federal Official Gazette.
given the overhaul of the criminal justice system, will serve as a deterrent to cartel behaviour. To date, there is no corporate criminal liability for cartel behaviour crimes (Articles 11 bis and 254 bis of the Federal Criminal Code). Notwithstanding, in October 2017, a member of the Federal Mexican House of Representatives introduced a bill to amend – *inter alia* – the shortlist of crimes that could be the subject of corporate criminal liability and introduced that cartel behaviour could be prosecuted from the corporate criminal liability standpoint. If this bill is finally approved after all the legislative process, it would mean that cartel behaviour would not only be addressed and sanctioned to individuals (natural persons) but also to corporations and legal entities. The discussion on this issue will be vital because the current debate in specialised competition courts concerns the parent-liability to assert administrative liabilities and fines. Thus, the combination of corporate criminal liability and parent-subsidiary responsibility could not be discussed and implemented lightly. If this bill is passed, it will make companies reinforce their compliance and antitrust programmes.

VI ‘DAY ONE’ RESPONSE

The reinforcement of the investigating authority’s powers to obtain information during an investigative procedure is strong and somewhat disproportionate\(^{50}\) when considered in connection with certain legal vacuums (i.e., proper regulation about the protection of attorney–client privilege and confidential information).

The FECL provides a facility for issuing written requests for information without having the obligation to identify the party that is required to provide the information. A similar circumstance occurs when the investigating authority requires individuals to appear before the authority to testify.

Failure to provide information when these kinds of requests are issued or when an individual is required to testify before the authority (without even having the option of a proper defence through an attorney who can formally intervene during the declaration) will result in the imposition of heavy fines and will not excuse the required party from its obligation to provide information.

Likewise, dawn raids are executed with a certain amount of uncontrolled force, as the FECL and its regulatory provisions enable the investigating authority to issue a dawn raid warrant without an authorisation from the judiciary. Moreover, during a dawn raid, the authority can access any section, department, IT data or location that is part of the premises specified in the search warrant. In addition, neither the FECL nor its Regulations clearly delimit the extension of their dawn raids as none of the statutes regulates, for example, whether the investigating authority can perform a dawn raid in private domiciles, how to manage attorney–client privilege and confidential information, or whether the prosecuting authority can intervene in all types of information, are other legislative issues absent from our statutes.\(^{51}\) On 21 December 2017, the First Specialised Competition Collegiate Circuit

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\(^{50}\) The proposed amendment bill of October 2017 by a member of the House of Representatives seeks to punish certain obstruction of justice activities as federal crimes with terms of imprisonment of between five and 10 years: (1) declaring falsely before the authority (Cofece or IFT) and (2) delivering false information to Cofece or the IFT. These penalties are unprecedented under Mexican criminal law.

\(^{51}\) According to the FECL, dawn raids can last up to two months and can be extended for a similar period of time when the case justifies it. However, common practice shows that a dawn raid does not usually last more than a day.
Court handed lawyers a victory on the recognition and protection of attorney–client privilege on antitrust matters. The judgment describes the scope of the protection granted over attorney–client privilege by the court in the following way:

Antitrust audit reports performed by external counsel to their clients relating to the investigated conduct and extracted during the relevant dawn raid by the competition authority are protected by such privilege, as long as the communication complies the following conditions: 1) the exchange of information must arise between external counsel and the client (a lawyer who is not bound by an employment relationship with the client); 2) the exchange of information must be related to the client’s right to a proper defence. Additionally, if the enforcer comes across information that is protected by the above-mentioned privilege, it should adopt the necessary measures to preserve the secrecy of the relevant documents and exclude them from its investigation.

Moreover, dawn raids can be executed with such excessive force because of the fact that, with the recent amendments, the Federal Criminal Code has introduced a new misdemeanour of obstructing, altering or destroying information and impeding the proper execution of a dawn raid, which is penalised with imprisonment for between one and three years. These recent amendments have empowered Cofece to easily conduct dawn raids; Cofece reports the execution of 16 dawn raids between 2015 and 2017.

Therefore, an immediate response against the investigative powers of the prosecuting authority is highly recommended and should include a well-trained response team and advice from external specialised counsel because of the increased sophistication of the investigating authority.

VII PRIVATE ENFORCEMENT

Private enforcement and class actions against cartel offences have not had the same degree of force in Mexico as they have in other jurisdictions. The prosecution and sanctioning of cartel offences can only be executed by the competition authorities. This means that, as a result of the new reformed competition regime, only the constitutionally autonomous bodies, Cofece and the IFT, have a relevant role, as no private enforcement can commence without a prior decision by the competition authorities.

On the other hand, local civil legislation has always made it possible to claim damages that arise from an antitrust violation, and since 2011 it is possible to initiate class actions. However, there are still several hurdles to jump before such legal actions can occur.

Article 134 of the FECL provides that a damages claim will only proceed when the decision rendered by the competition authority is definitive. Furthermore, the Supreme Court of Justice has issued case law on the matter, recognising that for a damages claim

52 The judgment describes the scope of the protection granted over attorney–client privilege by the court in the following way:

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53 See Article 254 bis 1 of the Federal Criminal Code.

54 Data collected and calculated internally by Cofece’s staff report the following numbers of dawn raids per year: 2017, 4; 2016, 5; 2015, 7.
to proceed, the specialist authority should have proven the existence of the administrative
offence. 55 The cases available regarding this subject have been favourable to respondents,
although they have dealt with vertical restrictions and not cartel behaviour.

In addition, the Federal Code of Civil Proceedings governs class actions that require
a res judicata decision from the competition authority, clearly evidencing the existence of a
cartel offence. Therefore, although there has been a collective effort during the past few years
to encourage class actions and damages claims against cartel offences, there are certain rules
that make implementation difficult (i.e., the need to prove individual damage in ancillary
proceedings). 56 This is an area in which changes are likely; for instance, the Organisation
for Economic Co-operation and Development and Mexico’s Secretary of the Economy has
released a study detailing the problems currently being faced in private enforcement and
proposes future policy changes. 57

VIII  CURRENT  DEVELOPMENTS

A great deal of legal development – including revamped legislation and newly created
authorities – has occurred in Mexico in recent years, sending out a clear message to deter
cartels in the markets. Cofece is very active in the enforcement of local policy as constant
investigations against cartel behaviour have taken place during the past few years. Industries
such as pharmaceutical, poultry, ground and maritime transport, pension funds and auto
parts have been under constant scrutiny.

The revamped legislation and newly created authorities seek to send a clear message to
deter cartels in the markets. This zero-tolerance enforcement policy will have to be tempered
by future legislation on cartel settlements to avoid the burden of a full administrative
proceeding. Likewise, specialised courts have had a very active role in setting boundaries and
limits on what the competition authorities can do when asserting cartel behaviour.

One example is a case in which, for the first time in 10 years, Cofece revoked leniency
benefits during the course of a cartel investigation. Mitsubishi Heavy Industry (MHI) and
Denso Corporation (Denso) were sanctioned for price-fixing and unlawful information
exchanges, with fines equivalent to 72 million pesos. 58 Based on the merits of the case, MHI
and Denso colluded over a private tender regarding the acquisition of air-conditioning
compressors.

In 2013, one of the impeached parties applied for leniency benefits, a circumstance that
triggered the initiation of the investigation. However, Cofece’s Plenary revoked such benefits
when rendering the final resolution as a result of not ‘fully cooperating’ in the procedural

55 See ‘Propiedad Industrial. Es necesaria una previa declaración por parte del instituto el instituto mexicano de
la propiedad industrial, sobre la existencia de infracciones en la materia para la procedencia de la acción de
indemnización por daños y perjuicios. Jurisprudencia (Civil). Primera Sala. Registro: 181491’. Available at
Semanario=0.

56 Notwithstanding, a June 2017 judgment by the First Chamber of the Supreme Court of Justice seems to
have relaxed such a strict rule in the decision Amparo Directo 49/2014 (class action commenced by Profeco
against Telefónica Movistar).

para México’, at www.oecd.org/daf/competition/ES-WEB-private-enforcement-competition-law-
mexico-2018.pdf.

58 Docket IO-001-2013, Federal Economic Competition Commission.
phase of the investigation.59 This was a strong message from the principal body of Cofece; the main objective of eradicating cartel behaviour was addressed along with the fact that, when leniency has been requested, the competition authority expects full cooperation at all times. The case is currently under judicial review by the Collegiate Circuit Specialised Court, whereby a first decision has been rendered by the specialist district judge reverting Cofece’s decision and setting a ‘precedent in the sense that despite applying to leniency benefits, legal defence rights cannot be limited by Cofece as a tool to secure the leniency effectiveness’.60

The Mexican competition policy still needs to shape a settlement procedure for cartels to provide a means of exit to offenders without the need to incur the burden of a full procedure that converts a dilemma into an all-or-nothing situation. This is the case even if no leniency benefits were granted, as the current mechanism contemplated by the FECL obliges the parties to face complex and time-consuming procedures despite admitting guilt.

Moreover, another relevant recent case refers to a civil action relating to a cartel investigation. The case concerned a bid-rigging cartel by certain laboratories against the Mexican Institute of Social Security, which was sanctioned by Cofece in 2010. The case, which was later confirmed by the Supreme Court, led the social security institute to file a civil action against all impeached laboratories, claiming a total cumulative award of 192 million pesos.

The case – the first of its kind in Mexico – has been admitted by one of the specialist district judges and is awaiting a decision.61 This case is expected to open the door for new legal actions against cartel offenders (of which there had been none in Mexico until 2016) and thus strengthening local private enforcement.


60 A similar scenario is being faced in the Pension Fund case, in which certain amnesty applicants had leniency benefits withdrawn as individuals and companies for the perceived lack of full and total cooperation at all times and specifically for raising defences during the proceedings. This case is also under current court review by the specialised district courts in competition and telecommunications matters but that decision would interpret and clarify the extent of cooperation during the proceedings.

61 See Docket 4/2017.70 First Specialised Administrative District Courts in Economic Competition.
I ENFORCEMENT POLICIES AND GUIDANCE

The primary statutory framework in Norway concerning cartels is the Norwegian Competition Act of 5 March 2004 No. 12 (the Act), Chapter 3, Section 10. Pursuant to Section 10 of the Act, cartels are prohibited. The main aim of the Act is to further competition for the benefit of consumers and to regulate anticompetitive behaviour. New amendments to the Act came into force on 1 January 2014.

Norway is part of the European Economic Area (EEA). Through the EEA Competition Act, Norway is entitled and obliged, if trade between Norway and other EEA Member States is affected, to apply Article 53 of the EEA Agreement. Norway is not an EU Member State. However, Section 10 of the Act corresponds with Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) and Article 53 of the EEA Agreement. The wording in Section 10 of the Act is largely a verbatim reproduction of these Articles.

Pursuant to the preparatory work of the Act, Section 10 shall be interpreted and applied in accordance with the case law of the Court of Justice of the European Communities, the Court of Justice of the European Free Trade Association (EFTA) States and the administrative practice of the European Commission and the EFTA Surveillance Authority (ESA). The Norwegian Competition Authority (NCA) relies heavily on the EU Commission’s notes and guidelines and its own guidelines are to a large extent equal to these documents. Although there are some differences between Norwegian competition law and EU competition law, these mainly relate to provisions concerning procedural questions.

The cartel prohibition applies to ‘undertakings’ as defined in Section 2 of the Act and encompasses all entities that practise commercial trade within either the private or the government sector, including both corporations and self-employed persons. The definition of an undertaking also encompasses infringements of the Act performed by persons acting on behalf of their employer or contributing to a company’s infringement. The cartel prohibition applies to cooperation between two or more independent undertakings. Thus, cooperation within the same economic unit is not within the scope of Section 10.

The cartel provision prohibits agreements or resolutions between two or more undertakings that have as their object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, unless the conditions for exemption are satisfied. The prohibition applies regardless of the form of the agreement and it does not

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2 See www.konkurransetilsynet.no.
have to be a legally binding agreement. The prohibition encompasses both written and oral agreements and applies to cooperation between undertakings in either horizontal or vertical relation to one another.

Agreements or resolutions that are prohibited pursuant to Section 10 will be declared null and void between the parties.

The NCA enforces competition legislation and is responsible for investigating cases of cartel conduct. It is a subordinated entity of the Ministry of Trade, Industry and Fisheries (the Ministry). All decisions about merger control and cartel matters made by the NCA can be appealed to the Competition Appeal Board, which was established in 2017. The Appeal Board and the NCA are both located in Bergen. In September 2018, the first appeal regarding collusive tendering (El Proffen) was decided. The final procedural rules for the Appeal Board are expected to be adopted during 2019. The Appeal Board is an administrative body; however, its decisions can be directly appealed to the Gulating Court of Appeal and thereafter to the Supreme Court.

The authority to reverse decisions by the NCA and the Ministry (namely, cases involving questions of principle or interests of major significance to society) can also be brought before the Appeal Board. However, such questions will very rarely apply to standard cartel cases.

Sanctioning a cartel agreement is subject to a dual-track system: either an administrative or civil law track, or a criminal law track. Hence, civil sanctions pursuant to Section 12 entail (1) orders to bring an infringement to an end, (2) structural measures, (3) interim measures or (4) the imposition of administrative fines, pursuant to Section 29. The criminal sanctions (fines or imprisonment) are pursuant to Section 32. Following the amendments of 1 January 2014, criminal sanctions apply only to individuals and not to undertakings. Therefore, undertakings will only be subject to administrative fines and civil procedures. If the NCA reports an individual for criminal prosecution, the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim) will investigate possible infringements in accordance with the Criminal Procedure Act.

II COOPERATION WITH OTHER JURISDICTIONS

Pursuant to Section 7 of the Act, and in accordance with Norway’s agreements with certain foreign states and international organisations, the NCA is obliged to provide those states and organisations with any information necessary to enforce the competition rules of either Norway or the state or organisation concerned, in order to meet the obligations undertaken by Norway in such agreements. Thus, the NCA, upon application by an authority in a state with which Norway has entered into an agreement on legal assistance in competition law matters, may order an undertaking to provide information, documents and other materials.

The Nordic countries have a long history of cooperation in competition matters. An agreement was established in 2003 for the notification of information concerning cases of interest, and the exchange of both non-confidential and confidential information between the national authorities. On 8 September 2017, Norway, Sweden, Denmark, Finland, Greenland and the Faroe Islands entered into a new and extended cooperation agreement. By virtue of the new agreement, the national competition authorities can request information and carry out dawn raids in their own territory on behalf of each other.

3 Prior to 2013, the Ministry of Education and Church Affairs.
4 Act of 22 May 1981 No. 25.
The ESA may perform investigations and request information when applying Articles 53 and 54 of the EEA Agreement. According to Article 3 of the EEA Competition Act, the ESA may request the assistance of the NCA during information requests, or searches or dawn raids performed by the ESA. A number of these raids have been conducted.

The EFTA states have not been included in the European Competition Network (ECN). However, the ESA and the competent authorities of the EFTA States do participate in ECN meetings, with a view to ensuring effective enforcement of the EEA competition rules and their uniform interpretation and application across the EEA. Hereby, the NCA participates in ECN meetings from time to time.

Denmark, Iceland, Sweden and Norway have entered into a Nordic agreement on cooperation in competition matters. The main object of this agreement is to provide for notification of information concerning cases of interest and to exchange both confidential and non-confidential information regarding mergers, cartels and abuse of dominant position. If confidential information is exchanged, the agreement provides for an obligation of secrecy on the part of the receiving authority, and restrictions on use and further distribution.

The NCA also participates in events held by international organisations, such as the International Competition Network and the Organisation for Economic Co-operation Development, and in legal developments concerning competition policy.

The Extradition of Criminal Offenders Act prohibits the extradition of Norwegian nationals. Under Norwegian law, extradition requires an offence punishable under the law of both countries (dual criminality) that is of a certain degree of seriousness (punishable by a minimum of one year's imprisonment). Specific regulations apply between the Scandinavian countries.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Jurisdictional limitations

When determining the scope of the Act, it is of vital importance whether an agreement has actual or potential effects in Norway. Thus, the Act does not contain any territorial limitation. As a consequence, there is no general condition that one or all of the participating undertakings are seated within the Norwegian borders or are Norwegian nationals or companies. Furthermore, it is not necessary that the anticompetitive conduct occurs within the Norwegian borders, as long as the conduct is liable to have effects within Norway (including Svalbard).

The conduct of a subsidiary may be imputed to its parent company, either by joint and several liability or sole responsibility. The NCA is of the opinion that the Act fully incorporates EU practice, under which there is a rebuttable presumption that parent companies direct the actions of wholly owned subsidiaries in this regard. In a court case decided at the end of November 2015 (NCC Roads AS), the Court of Appeal found that if, and to the extent to which, a subsidiary is liable, EU precedence is directly relevant.

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5 Act of 5 March 2004 No. 11.
7 Act of 20 January 2012 No. 4.
ii Affirmative defences

If anticompetitive conduct leads to increased efficiency and increased consumer welfare that, in total, is sufficient to outweigh the restrictive practice, Section 10(3) provides for an exemption from the general cartel prohibition. The exemption is given under the justification that if the effect of anticompetitive conduct will be to the benefit of the consumer and thereby the positive effect outweighs the negative effects, the conduct will not be prohibited.

The responsibility for assessing whether certain anticompetitive conduct is exempt lies with each participating undertaking. The NCA cannot grant a dispensation from the general cartel prohibition. Further, the burden of proving that the conditions in Section 10(3) are met lies with the participating undertaking.

In order for affirmative defences to apply to anticompetitive agreements or cooperation between undertakings, the conduct in question has to:

a contribute to the improvement of production or allocation of products or the furtherance of technology or economic development. Hereby, only socioeconomic efficiency that leads to cost savings is emphasised; and

b ensure a fair share of the resulting benefit for consumers, including business customers.

The joint effect of the consumer benefit is based on an assessment involving only the relevant market.

Furthermore, cooperation between undertakings must not:

a impose on the undertakings involved any restrictions that are not indispensable to the attainment of these objectives (set out under point (a), above). One must assess whether the restriction is necessary to achieve the efficiency gains, that is, whether it is possible to achieve the same efficiency gains through other conduct that is less restrictive on the competition; and

b afford the possibility of eliminating competition for the undertakings involved in respect of a substantial part of the products in question. This entails a minimum requirement regarding the level of competition, which cannot be derogated from even if the cooperation results in substantial efficiency gains.

Pursuant to Section 10(4), the King of Norway may, according to regulations, determine the rules applicable to certain groups that shall be exempted under Section 10(3) (block exemptions). Individual regulations equal to those of the European Union have been adopted, which include regulations applicable to coordinated conduct concerning motor vehicles, research work, agreements concerning research and development, and specialisation agreements.

iii Exemptions

Pursuant to Section 3(1), the Act does not apply to terms and conditions relating to work or employment.

Section 3(2) states that the King may determine exemptions relating to certain markets or industries. Through regulations applicable as of November 2014, there are three sector-specific exemptions comprising:

a cooperation within the agricultural and fishing industry;

b certain categories of agreement relating to the sale of books; and

c certain categories of agreement within the private sector of health and care services.
The Penal Code provides that cooperation may be considered as a mitigating circumstance when a criminal matter is adjudicated. In 2016, Norway implemented a cartel settlement procedure modelled on EU rules. Under these rules, the NCA can settle cases without reaching a formal decision (similar to ‘Article 9 decisions’ from the European Commission). The settling procedure equates to that of the European Union and is implemented in Section 29a of the Act. After a settlement meeting with the NCA, an undertaking will have 15 business days to accept the settlement, which may result in a 10 per cent reduction of the fee. Outside these rules, there are no specific provisions concerning plea bargaining in the Act. While in practice, plea bargaining may occur both in administrative and criminal cartel investigations, the circumstances and details surrounding such bargaining seldom become publicly known.

The conditions for obtaining leniency, which until 2014 were governed by the Leniency Regulation, are now included in new Sections 30 and 31 of the Act and cover, respectively, complete leniency and partial leniency.

The competence to grant leniency lies with the NCA. Only undertakings can be beneficiaries of the leniency programme, and therefore leniency will not encompass individuals who are subject to criminal prosecution. In practice, the NCA has previously issued statements to individuals that it will abstain from prosecution. The scope of the leniency provisions is further defined through the regulation on the calculation of and leniency from administrative fines.8

i  Immunity

To attain full leniency, an undertaking must be the first to submit information and evidence about a cartel that would otherwise be unknown to the NCA. The informant must cease its cartel activities and must cooperate completely with the NCA. Also, the undertaking must not have sought to coerce other undertakings into participating in the infringement. The information must either enable the NCA to secure evidence or carry out dawn raids according to Section 25, or provide the NCA with evidence sufficient to prove an infringement of Section 10 of the Act.

ii  Partial leniency

Partial leniency can be attained whether the information is given to the NCA before or after the initiation of proceedings. However, it is a condition that the undertaking provides the NCA with evidence that considerably increases the possibility of proving an infringement of Section 10 of the Act. Furthermore, the informant must cease its activities no later than from the time the evidence is provided. The undertaking must cooperate fully, and the cooperation must last throughout the entire procedure.

The first undertaking to meet the conditions in Section 31 of the Act will be granted a reduction of its fine of between 30 and 50 per cent. The second will be granted a reduction of 20 to 30 per cent and all others will be given a reduction of up to 20 per cent. Hence, there is no limit to the number of undertakings that can be granted partial leniency.

8 Regulation of 11 December 2013 No. 1465.
The leniency application

There are no specific formal requirements for an application for leniency. However, the applicant must present the NCA with the necessary proof, including both documents and allegations, and therefore the application is most likely to be in writing. Accordingly, the NCA will provide the undertaking with a written acknowledgement of receipt. If the applicant meets the conditions set out in either Section 30 or 31, the NCA will grant leniency by a formal decision.

An undertaking can be deprived of the right to leniency if the NCA later discovers that it has not put forward all the evidence that is known to the undertaking, or it complicates or hinders the NCA’s investigation.

Marker system

The new Section 30(2c) adopted in 2014 introduces a marker system intended to closely mirror the European Commission’s practice. The marker constitutes the only material change to the leniency conditions as previously defined under the Leniency Regulation.

The main scope of this system provides that, where justified, an application can be accepted on the basis of limited information. The applicant is then granted time to elaborate on the information and evidence to qualify for immunity. Thus, the ‘marked applicant’ is urged to furnish proof of cartel activity, which can lead to immunity.

V PENALTIES

Civil or criminal offence

In the event of an undertaking, or someone acting on its behalf, whether it is intentionally or by negligence violating Section 10 of the Act, the conduct can be sanctioned under Section 29 with fines or under Section 32 of the Act with fines or imprisonment (Section 32 being applicable only to individuals). The severity of the violation must be assessed in each case, but participation in a ‘hardcore’ cartel is illegal per se and can be considered both a civil (or administrative) offence and a criminal offence.

Pursuant to Section 29(2), the fine is determined by the NCA and is based upon an overall assessment, considering the undertaking’s annual turnover, the severity and durability of the infringement, and leniency. The Regulation on the calculation of administrative fines and leniency elaborates the calculation of fines, the rules being based on the European Commission’s 2006 Guidelines. In practice, the calculation of administrative fines for cartel activity has been of a rather modest size in Norway compared to, for example, the European Union. However, recent developments show that the NCA has significantly raised the level of imposed fines (see Section VIII), which is also in accordance with the preparatory works of the Act.

In its more recent decisions, the NCA has frequently included references to its considerable ‘discretionary powers’ and the need to measure out ‘sufficient’ fines. Further, it is stated that, accordingly, no undertaking shall be able to pre-calculate a reaction.9 As the

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most recent fines have been calculated based on a general verbatim reiteration of the law, it is difficult to assess how and to what extent future fines will deviate from the level prescribed by the EU Commission.

The NCA can press criminal charges against any individual indulging in infringements of Section 10 of the Act. Prosecution of individuals will only take place if the NCA presses charges or in cases of ‘material public importance’ (under Section 33 of the Act). Cases are handled by Økokrim, which can be granted case-specific surveillance powers by a court order during investigations against individuals. Depending on the results of an Økokrim investigation, the defendant will have the matter adjudicated by the court. Once convicted, misconduct may be punished with fines or imprisonment for up to three years, although cooperation from those convicted can affect the extent of the punishment. Under severely aggravated circumstances of cartel conduct, the punishment may be imprisonment for up to six years.

Since Norway adopted the EU Regulations in 2004, only companies have been prosecuted. This has been an accepted strategy by the NCA and the police. Under the previous regime, there were instances in which individuals received fines on the basis of involvement in cartel activity, but there are no examples of imprisonment. From the preparatory work for the newest amendments to the Act, it is clear that the Ministry intends criminal sanctions to be used to a greater extent than is reflected in today’s practice. This has been met with reluctance by the NCA and certain scholars, as they fear that a more active approach in this respect will undermine the effect of the leniency regime. The NCA has issued guidelines on when and how to press charges against individuals. Under these guidelines, the NCA will, as a rule, press charges against the participants in a cartel. However, the NCA may, for example, issue a statement that no charges will be pursued against individuals who report cartel activity and fully cooperate with the NCA during the ‘investigation and the following legal procedure’. Individuals can, by themselves or through counsel, apply for an ‘immunity statement’.

For individuals under investigation for anticompetitive conduct that is subject to criminal prosecution, the general principle of protection against self-incrimination is in accordance with the Norwegian Criminal Act. However, it is debatable at what point in the investigation this protection applies and to what extent. Hence, pursuant to Section 24 of the Competition Act, individuals are required to provide information or data at the request of the NCA. If they do not, they will find themselves in breach of this duty, which can result in both administrative and criminal sanctions. However, pursuant to the European Convention on Human Rights (ECHR), an individual has the right not to be punished twice for the same offence.

The protection against self-incrimination under the ECHR and its application to Section 24 of the Competition Act was touched upon during the latest revision of the Act. The Ministry indicated that as the NCA now has the legal competence to request the prosecution of individuals, any information gathering by the NCA that ‘is intended to obtain data regarding the actions of an individual’ will result in that individual being protected by Article 6 of the ECHR. However, circumstances whereby an individual falls within the scope of the ECHR, thus expunging the obligation to answer questions put to them by the NCA, were not included in the revised Act.

11 Act of 22 May 1902 No. 10.
VI ‘DAY ONE’ RESPONSE

The NCA is afforded extensive investigative powers by the Act, which are broadly similar to those of the European Commission. There are some differences, but as a result of the latest amendments to the Act, the legal position of any undertaking that is subject to investigation is strengthened, and the system is now more in line with EU rules. The investigations are subject to civil procedures, although the sanctions that such investigations might lead to are considered a criminal sanction under the ECHR. However, if the NCA connects Økokrim to an investigation, criminal proceedings might be instigated instead.

To secure evidence, a search of premises is most likely to be carried out pursuant to Section 25 and is further detailed through the regulation regarding investigation and dawn raids. The search is executed by employees of the NCA, consisting of a mixture of specialist investigators, lawyers, economists and occasionally forensic information technology specialists. When necessary, the NCA may require police assistance. The search is carried out unannounced (dawn raid) and may be a search of both business and residential premises.

To instigate a search of premises, the NCA must have an order of the court. To search business premises, it is sufficient that the NCA can provide evidence for a real suspicion that there is an infringement of the Act. The threshold for searching, for example, a private house, is more qualified and requires a particular reason to assume that evidence is being kept there. The court order must describe the scope of the search, entailing a description of the dawn raid’s purpose, what types of infringements the NCA is investigating and the markets the NCA is looking into. A court order to search premises can also be given, if necessary, for the NCA to meet Norway’s obligations under agreements with foreign states or international organisations.

When carrying out a dawn raid, the NCA is empowered to search premises, land, means of transport and other places that may be found relevant, and to confiscate items, such as documents and electronic storage media, that may be significant as evidence. Electronic devices, such as laptops and smartphones, are regularly confiscated and copied during a dawn raid. Furthermore, the NCA has the right to secure premises overnight, order the production of specific documents or information, and carry out compulsory interviews with individuals. The NCA also has the right to demand extradition of documents. Before the latest amendments to the Act entered into force, the NCA usually confiscated original documents; now the NCA mainly takes copies of the relevant documents. Original documents will only be confiscated if they have a particular evidential value that may not be visible on a copy or have the same effect. In such cases, the undertaking will normally be provided with a copy.

Pursuant to Section 24 of the Act, both in general and during a dawn raid, anyone has a duty to provide the NCA with the information they might require for the Authority to perform its tasks. The right to demand such information also applies if it is necessary to enable the NCA to meet Norway’s obligations under the agreements with foreign states or international organisations.

The instigation of a search is normally not subject to complaints or appeal by those affected by the search. However, if the investigation results in the confiscation of evidence, the legality of the confiscation can be tried before the court.

In accordance with Norwegian public administration law, any party is entitled to be represented by a legal counsel. Whether the undertaking is represented by an external or an

12 Regulation of 11 December 2013 No. 1491.
in-house lawyer, the legal privilege pursuant to the Criminal Procedure Act applies. If the undertaking invokes that certain information is legally privileged, the relevant document or hard drive will be sealed, and the dispute will be held before the court. The undertaking is also entitled to be represented by legal counsel during a dawn raid. The NCA is not obligated to delay the search but will normally wait approximately 30 minutes for the undertaking’s legal counsel to reach the premises.

Pursuant to Section 27 of the Act, employees of the NCA have a legal obligation to maintain secrecy in regard to the identity of the undertaking and its representatives and those who may have provided the NCA with information about a possible infringement.

VII PRIVATE ENFORCEMENT

In regard to private enforcement, one can pursue a claim for damages in accordance with the general principles of the law of damages. The liability lies with the undertaking causing the damage through its anticompetitive behaviour and, in cases where cartel activities have been established, it will not be difficult to establish a legal basis for a claim. However, it is not sufficient to establish anticompetitive behaviour; a claimant also has to prove an economic loss caused by the anticompetitive behaviour. Finally, there has to be a causal link between the liability and the incurred economic loss. The calculation of damages is based upon the proven economic loss.

The burden of proof lies with the claimant. A decision made by the NCA or the ESA establishing an infringement of the Act does not automatically establish a right for damages. However, needless to say, an established infringement will be an important consideration in the court’s assessment.

Anyone with a legitimate legal interest can demand access to the NCA’s files in closed cartel cases to facilitate follow-on damages actions, in accordance with Section 27a of the Act. However, this right does not apply to information about leniency applications and other related documents, such as corporate statements.

In accordance with the rules of limitation, a claim for damages must be brought before the court no later than three years from the time the injured party acquired knowledge of the damage and the undertakings causing the damage.

In addition, Section 34 of the Act warrants a special provision to pursue a claim for damages as a consequence of an infringement of the Act, within one year of a decision made by the NCA or a final and enforceable judgment.

Although there have been relatively few cases of private enforcement of antitrust law to date, the numbers of both Section 10 cases and Section 11 cases (abuse of dominance) seem to be increasing. Among others, a few high-profile cases of private litigation came as follow-up to two infringement decisions by the ESA. One of these (Posten Norge/Schenker) was settled for an undisclosed amount in 2015. The Act does not contain specific provisions on damages actions for breach of the competition rules, although the preparatory work makes it clear that infringements shall give rise to liability for damages.

In the absence of relevant case law, it is currently not possible to establish principles as to the relevance of, for example, the passing-on defence. We presume that Norwegian courts will address this on a case-by-case basis. The burden of proof for passing on will be on the offender. Specific provisions concerning class actions are provided for in the Civil Procedure

13 Case No. 59120 Color Line and Case No. 34250 Posten Norge.
Act. Infringements of competition law are referred to as an area particularly suitable for the application of the provisions concerning class actions. However, bringing a claim under these provisions still requires that one or a few parties assume the risk involved with litigation, as the provisions do not provide for the risk to be borne by law firms, for example.

VIII CURRENT DEVELOPMENTS

Recent years have indicated that the NCA wants to be more active in general, and especially against more concentrated markets.

On 21 June 2018, the NCA issued its first decision under the abuse of dominance provision in more than a decade with the largest fine it has ever imposed against Norway’s leading telecommunications provider (Telenor) for abusing its dominant position to hinder the establishment of a third mobile network operator in Norway.

The decision stems from an investigation started in December 2012 when the NCA and the ESA carried out a joint dawn raid at the premises of Telenor in Norway. The ESA has already issued a statement of objections covering a potential margin squeeze but has not yet adopted a decision. The NCA decision relates to another aspect as it concluded that Telenor abused its dominant position when it replaced a linear usage fee structure with a two-part tariff, under which a competitor (Network Norway) lost any incentives to expand its own third network. Telenor has stated that the decision and the fine of 788 million krone will be appealed to the Appeal Board.

In April 2018, the NCA carried out dawn raids at the premises of several grocery chain operators in Norway on the basis of a suspected exchange of price information between the different chains. The Norwegian grocery market is highly concentrated, on both the retailer side and the supplier side.

A collective boycott aimed at a rival distributor of books to the mass market was considered as a by-object infringement by the NCA in its 2017 *Bladcentralen* decision. The publishers were shareholders of Bladcentralen, a mass-market distributor, with Interpress being the only other competitor. Interpress was owned by Reitan, a Norwegian conglomerate that operates supermarkets and convenience stores. The NCA imposed fines totalling 32 million krone for collusion. The decision was appealed by three of the publishers to the Oslo District Court. In its judgment of 21 June 2018, the City Court upheld the NCA decision in substance, finding that the publishers’ acts amounted to a restriction of competition by object. However, the level of the fines was reduced. In particular, the Court considered that the NCA’s method for setting the fines did not correctly reflect each of the appealing parties’ blameworthiness. As a result, the fines imposed on the three appealing participants were reduced, respectively, from 9.1 million krone to 5 million krone, from 9.6 million krone to 3.5 million krone and from 7.8 million krone to 5 million krone. Two of the publishers have appealed the NCA decision to the Appeal Court.

Joint tendering also continues to be an area of interest. This matter was at the heart of the decision to fine six members of El Proffen, a chain of electricians owned by its members. Five of the undertakings were electrical firms in and around Oslo while the sixth was a joint venture owned by the members. Noting that each of the electrical firms had both the ability and the capacity to submit an individual tender, the NCA held in its 2017 decision that they must be considered as competitors. Citing the judgment in *Ski Follo Taxi*, the ensuing...
coordination of prices was considered to be a ‘by-object restriction’. The open nature of the cooperation and the fact that it allowed the firms to provide a higher combined capacity did not affect the NCA decision. *El Proffen* was appealed and the Appellate Board rendered its decision in September 2018. The NCA decision was upheld in essence; however, the level of the fines was substantially reduced – from 18 million krone to 4.7 million krone. In particular, the Appellate Board considered that the NCA’s method for setting the fines did not correctly reflect the appealing parties’ blameworthiness within an open cooperation.

Both the *El Proffen* and the *Bladcentralen* cases are interesting in the sense that while the appeal bodies often agree with the NCA in substance, the level of fines imposed are scrutinised.

The *El Proffen* case is also the first application of the ‘facilitator’ doctrine by the NCA. However, the application of this doctrine is in line with EU practice, and is therefore not unexpected.

In its decision of September 2018, the Appeal Board mirrored the rationale from the *Ski Follo Taxi* decision. The ruling in *El Proffen* is in line with *Ski Follo Taxi* case and the NCAs guidelines on joint tendering, which all take a rather strict stand on such cooperation. Although not stated in the rulings themselves, the results may indicate that joint tendering will be subject to more intense scrutiny in Norway than in the rest of Europe. The decisions also leave some questions unanswered, particularly in regard to tenders where in which the parties, when considering capacity, risk or strategy, have a need to cooperate with one or more competitors. In the Norwegian market, where players are relatively small but getting bigger (especially civil construction contracts), some scope for joint bidding, where in which both undertakings could potentially submit an individual bid, should be granted. Enterprises entering into joint bidding arrangements in Norway should seek legal advice and ensure a careful assessment and documentation of whether or not the cooperation in effect leads to otherwise non-achievable efficiencies.

15 See, e.g., CJEU Case C-179/16 *E Hoffmann-La Roche Ltd and Others.*
I ENFORCEMENT POLICIES AND GUIDANCE

1 Key policies and guidance

Since his appointment in May 2016, Marek Niechciał, the president of the Office for Competition and Consumer Protection (OCCP) (the Polish competition authority), has referred in a number of public speeches to four pillars of the OCCP’s enforcement: competition protection, consumer protection, monitoring of state aid and market surveillance exercised along with trade inspection. He explained that the OCCP will not focus solely on one pillar but that resources should be allocated equally between all four pillars.

Mr Niechciał’s approach seemed to be in line with the direction that competition law enforcement is following in Poland, which was outlined in the Policy for Protection of Competition and Consumers published in July 2015 (the Policy). With a view to improving the detection of cartels, the OCCP announced the development of investigative techniques and market screening methods. It also announced a more economics-based approach, resulting in decisions based on economic evidence. The appointment in November 2016 of Wojciech Dorabialski – an economist and former deputy director of the Department of Market Analysis – as a deputy director and then director in the Department of Competition Protection, which deals with antitrust cases, confirmed this approach.

At the end of 2016, Mr Niechciał announced an important change to the OCCP’s operating strategy; that the OCCP plans to shift from the current soft approach to more decisive action, which indicates the imposition of higher financial penalties for competition law infringements. Mr Niechciał concluded that the initial rates of the imposed fines were clearly too low and the guidelines on the method of setting fines needed to be revised. Mr Niechciał also announced that the OCCP will introduce a programme to enhance cooperation with whistle-blowers.

Despite this announcement, the new strategy has not yet brought any significant changes to the OCCP’s practice.

1 Małgorzata Szwaj is a partner and Wojciech Podlasin is a senior associate at Linklaters C Wiśniewski i Wspólnicy.

2 The Office for Competition and Consumer Protection (OCCP) is responsible for the protection of the health and life of consumers and carries out proceedings concerning general product safety. It also monitors the market surveillance system, the aim of which is to ensure that only safe products, which meet the essential requirements set forth in Polish regulations implementing the New Approach Directives, are available on the market. The OCCP is also responsible for managing the fuel quality monitoring and scrutinising system.

In the first 10 months of 2018, the OCCP imposed fines for restrictive agreements, which amounted to 1 million zlotys, whereas the total amount of fines imposed in 2017 was 136.9 million zlotys. The majority of the latter figure was made up of a fine imposed on the manufacturers of wood-based products for their alleged participation in a cartel – all the other remaining fines amounted to just 900,000 zlotys. However, the OCCP emphasises that the number of penalties imposed during part of a year often does not adequately reflect what the total for the whole year will be.

The OCCP continued its increased level of scrutiny of the behaviour of undertakings. In the whole of 2017, it conducted nine unannounced inspections on undertakings’ premises whereas in the first 10 months of 2018, based on publicly available sources, there were six inspections.

ii Statutory framework

Article 6, Paragraph 1 of the Act on Competition and Consumer Protection (ACCP) prohibits agreements between undertakings, concerted practices, and resolutions or other acts of associations of undertakings that have as their object or effect the elimination, restriction or other infringement of competition. The wording of this provision is based on Article 101 of the Treaty on the Functioning of the European Union (TFEU); however, besides the infringements listed in Article 101 of the TFEU, Article 6 of the ACCP also provides examples of other prohibited arrangements (e.g., restricting access to the market, eliminating from the market undertakings that are not parties to an agreement, and bid rigging). Should an alleged arrangement affect trade between EU Member States, the OCCP is empowered to apply Article 101 of the TFEU. A wilful or unintentional violation of Article 6 of the ACCP or Article 101 of the TFEU can be punishable with a fine of up to 10 per cent of the infringing undertaking’s turnover in the year preceding the year of the OCCP’s decision. In addition, the 2015 amendments to the ACCP introduced the direct liability of managing persons for deliberately allowing an undertaking, through their actions or omissions, to conclude a prohibited restrictive agreement. A managing person is understood to be a person in charge of an undertaking (i.e., a member of a management body, a person performing a managerial function or a person who, although he or she does not formally have a managerial function, does have a decisive influence on the undertaking’s conduct). Such persons can be subject to financial penalties of up to 2 million zlotys. Although penalties under the ACCP are of an administrative nature, bid rigging with regard to public tenders also constitutes a criminal offence sanctioned under the Polish Penal Code by up to three years’ imprisonment.\(^5\)

The Policy also sets out the need to create a network of various state agencies, non-government organisations, and investigative and prosecuting authorities as well as undertakings and their associations for competition and consumer protection. The OCCP has entered into agreements on cooperation with the general prosecutor and the president of the Internal Security Agency. On the basis of these agreements, parties will exchange information and coordinate actions aimed at identifying, preventing and combating law infringements. Time will tell how this rather grey area regarding cooperation between state agencies in Polish competition law develops, both concerning the decisional practice of the OCCP and legislative changes. With regard to the former, in October 2017, the OCCP issued a decision on the proceedings that were instigated on the basis of evidence gathered previously in the

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\(^4\) As per information published by the OCCP as at 28 November 2018.

\(^5\) Article 305 of the Polish Penal Code.
criminal proceedings. The relevant pieces of evidence were also included in the OCCP’s case file. With regard legislative changes, the process of discussing a bill aimed at enhancing the information-sharing mechanism between the OCCP and other public authorities was launched in October 2018. The bill obliges public authorities to share information with the OCCP that is relevant to the implementation of the OCCP’s statutory objectives. There is an emphasis in the bill on the OCCP’s cooperation with the Polish Financial Supervision Authority as both authorities will be permitted to share with each other information that is covered by statutory immunity, such as banking secrecy.

II COOPERATION WITH OTHER JURISDICTIONS

The OCCP regularly cooperates with the European Commission and national competition authorities of the other Member States through the European Competition Network (ECN). OCCP officials participate in the activities of many working groups within the ECN, including the cartel group. In 2017, the OCCP prepared answers to 41 requests for information (RFI) made by other competition authorities. It also made five RFIs.

The OCCP is a member of the International Competition Network (ICN), a platform of cooperation of more than 130 competition authorities from all over the world. Within the ICN, OCCP officials have participated in, inter alia, the cartel working group. Officials have also been involved in an update of information about legislation currently in force with regard to combating cartels.

The OCCP is active in the OECD, one of the most important international forums for discussing competition policy and law.

i Extraterritorial discovery

In principle, information gathered by the OCCP during antitrust proceedings cannot be used in other proceedings conducted on the basis of provisions other than the ACCP; however, there are exceptions to that rule, including regarding exchanges of information with the European Commission and the competition authorities of Member States on the basis of Regulations (EC) No. 1/2003 and No. 2006/2004. In accordance with Article 70 of the ACCP, information obtained by the OCCP in relation to a settlement procedure or as a result of a leniency application cannot be disclosed to, inter alia, other competition authorities unless the undertaking concerned grants its written consent to such disclosure. The exemption relates to disclosure within the ECN based on Regulations No. 1/2003 and No. 2006/2004, and is subject to specific provisions and safeguards provided in the Commission’s notices and guidelines.

ii Extradition

Article 55, Paragraph 1 of the Constitution of the Republic of Poland prohibits the extradition of Polish nationals, with exceptions set forth in Article 55, Paragraph 2 of the Constitution.

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9 See Article 73, Paragraph 2, Points (3) and (4) of the Act on Competition and Consumer Protection (ACCP).
Paragraph 2 provides that individuals may be extradited only if (1) the possibility arises from an international agreement ratified by Poland or a national act implementing a legal act of international organisation, (2) the offence was conducted outside Poland and (3) the offence constitutes a crime under Polish law. Considering that antitrust violations, with the exception of bid rigging, are not criminalised in Poland, potential extradition would be possible only if a Polish individual participated in bid rigging outside Poland.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

i Extraterritoriality
In accordance with established court rulings and Polish jurisprudence inspired by the rulings of the Court of Justice of the European Union, the application of Polish competition law depends on where the anticompetitive effect takes place and not where the agreement was concluded. Thus, Polish law applies to agreements or concerted practices having an impact on competition in Poland irrespective of whether the conduct occurred in Poland or abroad. Consequently, the OCCP may impose fines on foreign undertakings and individuals who have infringed competition law outside Poland if the infringement affects competition within the Polish territory.

ii Undertakings concerned
Fines for breaches of the Polish antitrust rules are capped at 10 per cent of the turnover of the undertakings concerned. The basis for the calculation of the cap is the turnover of the infringing undertaking and not that of the whole capital group to which it belongs. Thus, the parent company is not liable for the actions of its subsidiaries as long as it is not involved in the prohibited conduct. If the fined undertaking did not generate any turnover in the year preceding the year of the decision or its turnover was below €100,000, the OCCP takes into account the average turnover generated in the past three years. If no turnover was generated in the past three years, or the average turnover was below €100,000, the maximum amount of the fine cannot exceed €10,000.

iii Affirmative defences and exemptions
Although exemptions are available for infringements of the prohibitions set forth in Article 6, Paragraph 1 of the ACCP (Article 8, Paragraph 1 of the ACCP constituting the equivalent of Article 101(3) of the TFEU), it is highly unlikely that such exemptions could be effectively applied to cartel arrangements.

IV LENIENCY PROGRAMMES
A leniency programme was introduced in Poland in 2004. However, the current version was implemented in 2015 through an amendment to the ACCP. In the past, the leniency programme did not achieve the expected number of admissions of breaches of competition law, in exchange for immunity from or reductions of fines, which would have triggered the instigation of cartel proceedings. Between 2005 and 2015, there were only 63 leniency applications. The amendments to the ACCP that came into force in January 2015 were aimed at, inter alia, making the leniency programme more attractive
to undertakings and managers through the introduction of a new leniency plus procedure, leniency for natural persons and advantageous modifications to the rules on reducing fines for companies that cannot obtain full immunity.

The regulation seemed not to have achieved the intended effects because it did not lead to a significant increase in the number of leniency applications. Only three applications were made in 2016 and just nine in 2017. The OCCP therefore took further steps in the fight against cartels and introduced a new pilot programme in April 2017, enabling individuals to report restrictive practices anonymously. The programme was modelled on the whistle-blower tool that is already being used by competition authorities in some European countries and was recently introduced by the European Commission. According to the OCCP, the implementation of this system should help to improve the effectiveness of detecting restrictive agreements, which constitutes one of the most important roles of the OCCP. The OCCP has reported a significant number of notifications received from whistle-blowers and pledges its continued reliance on this source.

The absence of sufficient protection for whistle-blowers constitutes a principal weakness in the Polish pilot programme, as has been raised by competition lawyers. Unlike whistle-blower systems in other countries, the Polish programme does not put a substantial emphasis on the protection of a whistle-blower’s identity. Therefore, the current form of the programme could be a reason why individuals are not notifying the OCCP of antitrust violations. Being aware of these concerns, the OCCP has announced its intention to address them by introducing legislative changes designed to ensure that the concept of a whistle-blower is incorporated into the ACCP. It is as yet uncertain whether whistle-blowers will be granted awards to encourage them to use the tools available against restrictive agreements.

In 2017, the OCCP updated its guidelines on the leniency programme. The guidelines had been created in 2009 to increase the transparency of provisions of both the ACCP and Regulation of the Council of Ministers concerning the mode of proceeding with applications by undertakings for immunity from fines, or a reduction, and to present uniform procedures applied under the leniency programme.

The current version of the guidelines includes new sections concerning the institutions incorporated into the ACCP in 2015 (i.e., leniency for individuals and leniency plus). Moreover, the guidelines provide practical tips on what to include in the description of a restrictive agreement, define all types of evidence determined in the ACCP and describe in more detail leniency applicants’ obligations. The document also provides a number of examples that illustrate the ACCP provisions, and is accompanied by leniency application templates.

As regards basic assumptions regarding the Polish leniency programme, immunity from fines and a reduction in the amount of fines can be granted not only to the participants in cartels (i.e., competitors) but also to members of other restrictive agreements. The main rule provides that only the undertaking that is first to submit a leniency application can apply for complete immunity from a fine. For full immunity, besides being the ‘first in the queue’ of those applying for leniency, the applicant:

- must submit evidence sufficient for the OCCP to instigate an antitrust proceeding or information allowing the OCCP to obtain such evidence; or, if the application was filed after the instigation of an antitrust proceeding, evidence that substantially contributes to issuing a decision, or information allowing the OCCP to obtain such evidence;
- may not be an undertaking that has induced others to enter into a prohibited arrangement (the initiator may benefit from full immunity);
- may not disclose information about the leniency application;
d is obliged to cease participation in the prohibited arrangement no later than immediately after filing the notification; and

e is obliged to fully cooperate with the OCCP, in particular to provide on its own initiative or at the request of the authority all information and evidence regarding the prohibited arrangement that is or may be at its disposal, not create obstacles for its employees or managers in relation to them, providing explanations, not destroy, falsify or hide evidence or information relating to the case, and not inform anyone about the filing of the leniency application without the authority’s consent.

Undertakings that do not cumulatively fulfil the conditions listed under points (a) and (b) can count on their fine being reduced, the amount of which is related to the fine that would actually be imposed on it. The second applicant can therefore receive a reduction of up to 50 per cent, the third up to 30 per cent, and the remaining applicants up to 20 per cent of the fine established on the basis of the guidelines on the method of setting fines for anticompetitive practices (the Fines Guidelines). The Fines Guidelines help companies make a preliminary estimate of the possible amount by which their fine will be reduced if they apply for leniency.

i Leniency plus

An undertaking that has submitted a leniency application but has not obtained full immunity may obtain an additional fine reduction of 30 per cent with regard to the first agreement in question on the condition that it provides the OCCP with information about any other restrictive agreements to which it is a party. In such a case, the undertaking can be granted full immunity with regard to another agreement about which it provided information.

ii Leniency for individuals

Under the ACCP, fines for participation in a cartel can be imposed on managing persons. To encourage these persons to provide information about forbidden agreements, the ACCP provides for a leniency programme also being available to persons who would be liable for the above-mentioned infringements. To that end, the leniency application submitted by the undertaking is also submitted on behalf of all managing persons that would be the subject of the OCCP proceeding in that matter. Individuals who fully cooperate with the OCCP may be granted full immunity or a reduction of the fine, even if the undertaking itself does not fulfil the conditions for lenient treatment.

iii Markers

An undertaking that wishes to admit that it is participating in an illegal agreement and enter into cooperation with the authority can submit an abridged application (or marker). This application need not contain all the required information, and the undertaking can submit it before it obtains all the information or evidence required to submit a ‘full’ application, which can often be time-consuming. Submitting a marker enables the undertaking to ‘occupy a place in the queue’ of those applying for leniency. A precondition for taking advantage of the programme is that an application must be completed within the time frame specified by the OCCP.

The ACCP also provides the option of filing a simplified application, the purpose of which is to secure a ‘place in the queue’ for an undertaking that is simultaneously applying to the European Commission for leniency. An undertaking can submit a simplified application
when the unlawful agreement affects competition in Poland. In such a situation, a simplified application will be treated in the same way as an abridged application (i.e., it must be completed within a time frame specified by the authority). In the simplified application, the applicant must inform the authority about leniency applications already filed or that it intends to file with the European Commission or competition authorities of other Member States.

Information obtained by the OCCP as a result of a leniency application cannot be disclosed to private litigants, if it pertains to cartel restrictions.

The amendments to the leniency programme do not seem to have been effective. In 2016, the OCCP received one leniency plus application and two ‘regular’ leniency applications. Given the relatively low rate of cartel detection in Poland so far, the OCCP is considering alternative ways to encourage whistle-blowers, mostly through employees of undertakings, to report on potential competition law infringements. In particular, the OCCP is considering introducing a whistle-blowers’ platform for those individuals anonymously providing the OCCP with information about potential anticompetitive arrangements, as described above.

V PENALTIES

The main sanction that may be imposed for a breach of Article 6 of the ACCP or Article 101 of the TFEU is a fine of up to 10 per cent of the infringing undertaking’s worldwide turnover in the preceding year.

i Guidelines

In the past, the OCCP has been criticised for a lack of transparency in its method of setting fines, and the Fines Guidelines were issued to increase transparency. The amount of a fine is calculated using a three-step approach:

\( a \) First, the OCCP calculates the basic amount based on such factors as the nature of the infringement and the specifics of the relevant market and activity of the undertakings. The basic amount of the fine that may be imposed for hard-core restrictions, such as cartels, varies from 1 to 3 per cent of an undertaking’s turnover. Depending on the impact of the infringement on the market and the undertaking’s conduct, that amount may be increased or decreased by up to 80 per cent.

\( b \) Next, the OCCP takes into account the duration of the infringement. Long-term cartels (i.e., those lasting longer than one year) may result in an increase of the basic amount of up to 200 per cent.

\( c \) Finally, the OCCP takes into account any aggravating and mitigating factors that may result in an increase or decrease of the fine calculated in accordance with point (a) of up to 50 per cent.

The maximum amount of the fine cannot exceed 10 per cent of the undertaking’s turnover. If the fine ultimately calculated in accordance with the above steps exceeds the maximum amount permitted by law, it will be adjusted to the maximum permitted amount. The OCCP is authorised to impose a fine that is particularly low if, in its view, a smaller fine will fulfil its requirements.
ii Sanctions applying to individuals
A fine of up to 2 million zlotys may be imposed on managing persons for deliberately allowing an undertaking, through their actions or omissions, to conclude a restrictive agreement. Both current and former employees of an undertaking are liable under the same conditions. The liability of a managing person is of secondary importance to the liability of an undertaking, meaning that liability can only be pronounced in the decision imposing a fine on an undertaking. Furthermore, double liability for the same infringement has been excluded where the managing person and the undertaking act simultaneously.

In June 2018, the OCCP announced that it has instigated its very first case against six managers who allegedly were involved in a restrictive agreement concerning the boycotting of certain employee benefit providers by fitness clubs. Employee benefit providers organise schemes that permit the employees to attend, among others, fitness clubs without additional charges.

iii Settlement procedure
Prior to January 2015, there was no procedure for the settlement of cartel cases in Poland. The ACCP currently provides for the option of initiating a settlement procedure (i.e., the procedure for voluntary submission to a fine). The primary objective of a settlement procedure is to speed up the process of adopting a cartel decision and to limit the number of appeals against such decisions to the Court of Competition and Consumer Protection (CCCP). The guidelines on settlements clarify this procedure and increase the transparency of the OCCP’s approach in this respect. A settlement procedure may be instigated at the sole discretion of the OCCP, either ex officio or upon receipt of an application from the undertaking being investigated. In the latter case, the OCCP must approve or decline the application within 14 days of its submission. The OCCP may withdraw from a settlement procedure at any stage of the proceedings. For this purpose, the OCCP takes into account the complexity of the case measured by the type of infringement, the number of parties to the proceedings, the scope of the facts and the legal assessments that are questioned by the parties. The OCCP is not released from an obligation to comprehensively gather and analyse evidence. The undertaking participating in the settlement procedure should be provided with the preliminary findings of the OCCP, a legal assessment of the alleged infringement, evidence supporting the authority’s conclusions and its estimate of the fine. A successful voluntary submission to a fine results in a 10 per cent reduction of the fine that would have been imposed. Exercising a settlement procedure does not deprive the undertaking of the option of lodging an appeal against the OCCP’s decision with the CCCP; however, lodging such an appeal results in the loss of the fine reduction. So far no settlement procedure has been applied.

VI ‘DAY ONE’ RESPONSE
OCCP officials are authorised to carry out an unannounced inspection and, subject to a decision obtained from the CCCP, a search (dawn raid) for the purpose of finding evidence of antitrust infringements.

During the inspection, the officials are authorised to:

a enter the premises and means of transport of the inspected undertaking;

b request access to and examine files, books, all kinds of documents and data carriers;

(c) make notes and request copies of originals of books and other records, including information collected on data carriers;
require on-the-spot oral explanations concerning the subject of the inspection; and
e) request persons to render other available evidence.

The CCCP may also issue a non-appealable decision allowing a search of private premises and means of transport by the police if there are justified grounds to suspect that relevant evidence is kept there.

When discussing the scope of officials’ powers, the CCCP has indicated that it is unlawful to inspect electronic evidence during a dawn raid outside a company’s premises and without the presence of a company representative.10 A company being subject to a dawn raid complained about the behaviour of OCCP officials in making full copies of hard drives of computers belonging to several key employees of the company and taking them to the OCCP’s premises, although this was the OCCP’s usual practice at that time. The CCCP concluded, however, that the OCCP’s officials are allowed to copy only those documents that fall within the subject of the investigation, and the selection of evidence may only be conducted in the premises of the controlled company in the presence of its representative. The above-mentioned ruling introduces an important protection for controlled undertakings.

Obstruction of an inspection or a search (including its initiation) is sanctioned with a financial penalty of up to €50 million. In addition, managers who obstruct the initiation of a search or the conducting of an inspection or a search may be fined up to 50 times the average monthly remuneration in Poland (currently up to approximately 250,000 zlotys).11 The same level of fine may be imposed on other individuals for providing untrue or misleading information or obstructing an inspection or search.

In April 2016, the Supreme Court reversed judgments of the courts of first (CCCP) and second (Appellate Court) instance that annulled a fine imposed by the OCCP on a manufacturer of domestic detergents for the absence of cooperation with the OCCP during a dawn raid.12 The Supreme Court sided with the OCCP and concluded that the removal of an electronic document from its original file and its transfer to a ‘bin’ file after the beginning of a dawn raid may be regarded as absence of cooperation with the competition authority and, as a result, may be subject to a monetary fine. The Supreme Court stated that to assess whether there had been an absence of cooperation with the OCCP, it is irrelevant whether a given file was permanently deleted or only moved to a different location. The Supreme Court clarified that absence of cooperation with the OCCP occurs when employees of dawn-raided undertakings do not assist the OCCP in the dawn raid (within the scope of the obligations imposed by the ACCP) and that they do not cooperate in fulfilling the objective of a given dawn raid. The case was sent back by the Supreme Court to the CCCP, which, in its judgment of June 2017, confirmed the infringement by the company and upheld the imposed fine in the full amount, concluding that the company’s behaviour was intentional and the lack of cooperation was blatant.13 The Appellate Court upheld this judgment, which is now final.14

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11 Based on data for November 2018.
13 Ruling of the CCCP of 5 September 2017, No. XVII AmA 54/16.
14 Ruling of the Appellate Court of 4 October 2018, No. VII AGa 1205/18.
In 2010 and 2011, the OCCP issued two controversial decisions imposing abnormally high fines on two leading Polish mobile telephony operators, PTC (currently T-Mobile)\textsuperscript{15} and Polkomtel,\textsuperscript{16} for obstructing a search. The fines amounted to 123.246 million zlotys\textsuperscript{17} for PTC and 130.689 million zlotys\textsuperscript{18} for Polkomtel. However, as a result of appeals by the two operators, the fines were subsequently reduced by the CCCP to 1.232 million zlotys\textsuperscript{19} and 3.96 million zlotys\textsuperscript{20} respectively. The threat of potentially significant fines implies the necessity for undertakings to develop internal guidelines that should encompass measures aimed at reducing the risk of being found to have obstructed a search, and ensuring the protection of the undertakings’ interests during a dawn raid. In particular, these should cover the following:

\begin{itemize}
\item[a] ensuring that the commencement of a dawn raid is not unduly delayed;
\item[b] instructing relevant employees that they should collaborate during the investigation (i.e., not prevent or impede the initiation or conduct of the inspection and search, nor fail to realise other obligations imposed on the undertaking pursuant to the ACCP);
\item[c] a careful review of the documents authorising the inspection and search, with a particular focus on verifying the scope and purpose of the investigation;
\item[d] ensuring that each of the officials is shadowed by an employee or lawyer;
\item[e] delegating employees to copy documents requested by the officials, and recording the officials’ questions and the answers provided; and
\item[f] ensuring that the officials do not review or copy documents that are outside the scope of the investigation or that are protected by legal privilege.
\end{itemize}

It is advisable that, during the investigation, an undertaking’s employees and in-house counsel should be supported by external competition lawyers.

Considering the potential amount of the fines that may be imposed for an infringement of Article 6 of the ACCP or Article 101 of the TFEU, depending on the circumstances and potential discoveries the officials may make during the dawn raid, it may become necessary to consider an application for leniency during or soon after a dawn raid. Given that the priority of leniency applications is to decide on immunity or the level of fine reduction, a decision in this respect should be taken as early as possible.

\textsuperscript{17} Equivalent to €30 million on the day of the decision.
\textsuperscript{18} Equivalent to €33 million on the day of the decision.
\textsuperscript{19} Ruling of the CCCP of 20 March 2015, No. XVII AmA 136/11, confirmed by the ruling of the Appellate Court of 1 March 2017, No. VI ACa 1076/15. The reduced fine is equivalent to €300,000 (on the day of the judgment).
\textsuperscript{20} Ruling of the CCCP of 18 June 2014, No. XVII AmA 145/11. The ruling was quashed by the Appellate Court, which returned the case to the Court for reassessment in the ruling of the Appellate Court of 20 October 2015, No. VI ACa 1478/14. The reduced fine is equivalent to €1 million (on the day of the judgment).
VII PRIVATE ENFORCEMENT

The Act on Actions for Damages for Infringements of Competition Law (the Act), which transposes Directive 2014/104/EU (the Damages Directive) into Polish law, entered into force in June 2017. The aim of the Act is to facilitate the recovery of loss incurred as the result of collusion, abuse of a dominant position or other competition law infringements.

i Applicability of the Act
The Act is applicable to all damaging actions for breach of competition law regardless of whether they affect trade between Member States (i.e., regardless of whether the breach has a European or national dimension).

ii Statutory definitions
The Act introduced the definitions of such terms as cartel, direct/indirect buyer, leniency programme, settlement submission and overcharge, which previously were not defined under Polish law.

iii Presumption of culpability
Following the Act, it shall be presumed that the infringer is at fault. This provision is seen as the main improvement for harmed entities seeking compensation because the burden of proof has been shifted onto the alleged infringer.

iv Pass-on presumption
The Act introduced a rebuttable presumption of the passing on of an overcharge to an indirect purchaser. Therefore, the purchase of products or services covered by a breach of competition law is presumed to entail the overcharge of a direct purchaser.

v Joint liability
The Act provides a limitation of joint and several liability of infringers being small and medium-sized enterprises. Their liability is limited to direct or indirect suppliers when, during the infringement, their market share is lower than 5 per cent or when the limitless joint liability would result in irreversible consequences for the economic viability of the business and impairment of value thereof.

vi Presumption of harm
Based on the provisions of the Act and contrary to general tort law principles, it is presumed that the competition law infringement causes harm. The scope of this presumption is wider than in the Damages Directive as it applies not only to infringements caused by cartels but to every infringement of competition law, including prohibited vertical agreements and abuse of a dominant position. However, the alleged presumption may be rebutted by the infringer if he or she provides evidence that the violation did not result in any damage.

vii Limitation periods
The Act indicates a limitation period for antitrust damages claims. Under its provisions, the claim has to be pursued within five years of the day the infringement came to an end. It is an extension of the normal three-year limitation period for bringing an action for damages.
stemming from the Polish Civil Code. However, this limitation period shall be suspended if the OCCP initiates explanatory or antimonopoly proceedings regarding an infringement of competition law constituting a basis for a compensation claim, or such infringement proceedings will be commenced by the European Commission.

viii  Court competence

Cases concerning antitrust damages claims fall within the competence of regional (i.e., higher instance) courts regardless of the value of the claim because of the complexity of competition cases.

ix  Leniency

According to the provisions of the Act, statements and settlement proposals submitted during the course of the leniency procedure are exempt from disclosure if they concern horizontal restrictions.

x  Disclosure of evidence

The Act introduces a new institution, namely a request for disclosure of evidence. This tool gives the claimant a chance to request that the CCCP, upon some former commitments, orders the defendant or a third party to disclose any relevant evidence they possess.

The provisions of the Act apply fully only to competition law infringements that took place after 27 June 2017, that is after the Act entered into force. Therefore, the effects of the new regulation cannot be evaluated until a future date. It remains to be seen whether the Act will contribute to an increase in the number of antitrust damages actions and whether the civil courts will be able to render judgments regarding the compensation in competition cases.

VIII  CURRENT DEVELOPMENTS

There was a further development of Polish competition law during 2018 in the form of the bill enhancing information sharing between the OCCP and other public authorities in Poland, which is currently being debated. Moreover, the OCCP has continued to implement the pilot programme for whistle-blowers.

With regard to significant decisions by the OCCP, two worth noting in particular were issued in December 2017. They concerned price-fixing and information exchange, and customer allocation.

The OCCP imposed fines amounting to approximately 136 million zlotys on five manufacturers of wood-based products for participation in a horizontal restrictive agreement consisting of price-fixing and the exchange of confidential information about sales volume and intended price increases for fibre boards and particle boards between 2008 and 2011. One of the participants to the alleged agreement filed a leniency application that was approved as acceptable and was released from the full fine. It is the first fine imposed by the OCCP for horizontal price-fixing since 2013 and the third highest fine imposed by the OCCP for restrictive practices. The decision is under appeal before the CCCP.

The OCCP imposed a fine amounting to 460,000 zlotys on Istituto Italiano del Marchio di Qualita for price-fixing and customer allocation with Dekra Certification between

2004 and 2009. The practice concerned issuing ISO certificates for management systems and was based on the recommendation system between both undertakings that effectively resulted in excessive prices for customers. Within this mechanism, the undertakings also allocated customers between each other. Both participants to the agreement applied for leniency, and full immunity was granted to Dekra Certification, while Istituto Italiano del Marchio di Qualita received a 50 per cent reduction of its fine.

The OCCP had announced that it would be adopting a tougher stance on resale price maintenance agreements and will increase the level of enforcement, which has proved to be true. For instance, the OCCP announced in October 2018 that it is verifying the cooperation mechanism between Brother, the Japanese manufacturer of printers, and its distributors in Poland. The OCCP is expected to publish guidelines on vertical restraints; however, there is no indication as to when.

The OCCP has remained active in the field of enforcement of bid rigging. Since October 2017, the OCCP has issued five decisions concerning this restrictive practice. They concerned public transport (total fines amounting to 127,000 zlotys), construction services (total fines amounting to 16,000), supply of IT hardware (total fines amounting to 57,000 zlotys) and hosting services (total fines amounting to 1 million zlotys). In the fifth and most seminal recent case concerning a tender for software provision, the OCCP did not impose a fine. The OCCP considered that the undertakings participating in the public procurement procedure exchanged commercially sensitive information concerning the process. In the OCCP’s view, this behaviour constituted a concerted practice that was a restriction by object. However, the OCCP did not impose fines owing to the novelty of the issue in case law and jurisprudence.

Regarding case law, there is one judgment of the Polish Supreme Court and five judgments of the Appellate Court that are worth commenting on.

In October 2017, the Polish Supreme Court quashed the Appellate Court’s judgment sustaining the OCCP’s decision concerning interchange fees. The proceedings will be now the subject of a retrial before the Appellate Court pursuant to the guidelines provided by the Polish Supreme Court. The latter Court took the view that the agreement concerning the level of the interchange fee allegedly made by the payment schemes and Polish banks was not ‘by object’. Thus, the Appellate Court must have reviewed the economic context and actual effects of the alleged agreement on the market, in particular by considering the counter-factual scenario. The Appellate Court must consider in its review what benefits the merchants, as the consumers, could have obtained by a flat level of the interchange fee.

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22 As at 31 October 2018.
27 As per information published by the OCCP as of 30 November 2017.
28 Ruling of the Polish Supreme Court of 25 October 2017, No. III SK 38/16.
In March 2018, the Appellate Court reduced the fines for the participants in the Cement cartel to 69 million zlotys from 411 million zlotys, bringing to an end appellate proceedings that had lasted almost nine years. The OCCP issued the largest fine to date in this case in December 2009. The courts have reduced the fines for undertakings in several other cases, including Sfinks (to 50,000 zlotys in a case concerning resale price maintenance in the restaurant franchising system) and Royal Canin (by 20 per cent, to 1.7 million zlotys in a case concerning the restriction of form of sales, including online, of pet food).

There have also been three notable judicial developments in the sphere of procedural rights of undertakings. First, in October 2018, the Polish Supreme Court indicated in its judgment concerning the OCCP’s decision on interchange fees that the OCCP should change its practice on restricting access to evidence contained in a case file for parties to antimonopoly proceedings on the basis that these constitute business secrets. Under the ACCP, the OCCP may, to the extent necessary, limit the right of access to specific pieces of evidence to protect business secrets of the undertakings – this would be made in the form of a resolution. The Polish Supreme Court found that the OCCP is using this right too often, effectively restricting undertakings’ right of defence and right to be heard. This is because they cannot review the full OCCP case file and comment on it while the OCCP may still rely on the pieces of evidence made confidential to the undertaking.

The issue of restricting access to files on the basis of business secrets has also been considered by the Appellate Court, which considered that the resolution concerning the treatment of data provided to the OCCP during proceedings being a business secret and restricting access to them to other parties to the proceedings is subject to a two-tier review by the Polish courts – by the CCCP in the first instance, which judgment is further subject to appeal reviewed by the Appellate Court.

In January 2017, the Appellate Court clarified that, in its decisions, an undertaking’s right of defence requires the OCCP to identify all parties to the agreement restricting competition as opposed to referring to them as a general group without further clarification, such as, for instance, distributors. A lack of proper identification violates the right of defence of the other parties to the agreement, considering that such an undertaking is not able to comment on the charges brought by the OCCP.

30 Ruling of 27 March 2018, No. VI ACa 1117/14.
33 Ruling of 30 August 2018, No. VII ACa 877/17.
34 Ruling of the Polish Supreme Court of 25 October 2017, No. III SK 38/16.
Chapter 20

PORTUGAL

Alberto Saavedra

I ENFORCEMENT POLICIES AND GUIDANCE

i Statutory framework

The Portuguese Competition Authority (PCA) ensures compliance with competition rules laid down in Law 19/2012 (the Competition Act). Article 9 of the Competition Act prohibits horizontal and vertical agreements, concerted practices and decisions by associations of undertakings. It has a similar wording to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), with the exception of the criterion relating to the effect on trade. The PCA is entitled to apply both national and EU laws against restrictive practices, and cartel practices in particular. The Competition Act lists some of the most frequent anticompetitive agreements, concerted practices or decisions by associations of undertakings as follows:

- Directly or indirectly fix purchase or selling prices or any other trading conditions.
- Limit or control production, markets, technological development or investment.
- Share markets or sources of supply.
- Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.
- Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that have no connection with the subject-matter of such contracts.

Prohibited agreements or decisions, as described above, are null and void, except when they are exempted under Article 10 of the Competition Act, which corresponds, in essence, to Article 101(3) of the TFEU.

1 Alberto Saavedra is a senior associate at the law firm Sérvulo & Associados. The author would like to thank Miguel Gorjão-Henriques and Guilherme Oliveira e Costa for their assistance in preparing this chapter.

2 See, respectively, Article 9 of the Competition Act and Article 101 (1) of the Treaty on the Functioning of the European Union (TFEU). As regards Article 101(1) of the TFEU, this legal provision is applied by the Portuguese Competition Authority (PCA) to agreements between two or more independent market operators that restrict competition, as long as they affect, or may affect, trade between European Union (EU) countries. Our analysis does not focus on a substantive examination of the EU rules; however, as a general rule, the national provisions apply mutatis mutandis to cases that have an EU dimension.
Decree-Law 125/2014 of 18 August (i.e., the PCA’s Statutes) are aligned with the most recent principles on creating European antitrust regulatory institutions. Key aspects include a substantial independence regarding the government and other public bodies, and the adherence to the principles of transparency, cooperation and responsibility in fulfilling its duties.

The PCA has adopted the following notices and guidelines in relation to antitrust enforcement:

\begin{itemize}
\item[a] Guidelines on the handling of antitrust proceedings.
\item[b] Guidelines regarding priorities in the use of sanctioning powers.
\item[c] Notice on immunity from fines and reduction of fines in cartel cases.
\item[d] Guidelines regarding the calculation of fines.
\end{itemize}

\section*{Priorities in competition policy for 2019}

The PCA ‘may define priorities in the handling of issues that it is called on to analyse’ (sometimes interpreted as the ‘principle of opportunity’). Although the Portuguese Constitution requires the administration to uphold the law, a strict reading of the ‘principle of legality’, whereby the PCA would be obliged to investigate any breach of competition law, is not foreseen in the Competition Act, which provides that the PCA is able to exercise some discretion in its sanctioning powers, case by case, whenever the public interest of pursuing and punishing infringements of competition rules determines the commencement of antitrust proceedings. For that purpose, inspired by the Automec case, the Competition Act provides that the PCA should take into account, in particular, the priorities in competition policy and the elements brought by the parties involved, as well as the seriousness of the alleged infringement, the likelihood of being able to prove its existence, and the extent of investigation that is required to achieve as far as is possible its mission to ensure compliance with the national and EU provisions that prohibit anticompetitive practices.

The annual priorities in competition policy are published on the PCA’s website and provide for a greater level of transparency for all stakeholders. However, these priorities tend to be general in nature, because they cannot make any reference to particular sectors.
or activities in which the PCA will pursue its investigation and sanctioning powers. The following competition policy priorities are some of those that have been singled out as requiring action in 2019:

- Detect and investigate anticompetitive practices, namely cartels.
- Increase ex officio detection of anti-competitive practices by way of, namely, cooperation agreements.
- Deepen understanding of the use, by companies, of algorithms or artificial intelligence in facilitating anti-competitive behaviour.
- Raise awareness of the Fighting Bid-Rigging in Public Procurement campaign as well as the Guide for Business Associations.
- Consolidate internal checks and balances.
- Reinforce the publication and searchability of PCA decisions and subsequent judicial decisions, studies, opinions and recommendations.\(^{11}\)

Note also that the PCA has declared that it will continue to reinforce its activity in detecting and pursuing anticompetitive practices, such as cartels. In 2017, the PCA undertook unannounced searches (i.e., dawn raids) at 35 sites in Portugal involving 44 entities — eight times as many as in the previous year. This intense activity led to the opening of 16 antitrust procedures in five sectors (driving instruction, tourist river cruises, retail distribution, insurance and railway maintenance services),\(^{12}\) which is similar to the scale of activity seen during the past 10 years.

iii  Cases in 2018

There follows a brief summary of the most relevant cases in 2018.

**Insurance services**

The PCA issued a statement of objections against five insurance companies and 14 directors and managers for a price-fixing and market-sharing cartel.\(^{13}\) The PCA's press release discloses that, allegedly, ‘the agreement lasted approximately seven years and had an impact in the cost of insurance acquired by large companies in the sub-sectors of occupational accidents, health and motor vehicles. Companies involved have a combined market share of circa 50% in each sub-sector’.\(^{14}\) The accusation in 2018 was the result of a leniency application that led to dawn raids in June and July 2017 at the companies’ premises, in the Lisbon region. The PCA imposed fines totalling €12 million on the insurance companies Fidelidade – Companhia de


\(^{14}\) ibid.
Seguros and Multicare – Seguros de Saúde under the settlement procedure.\textsuperscript{15} The antitrust investigation is continuing against the three remaining companies, and against nine of the 14 managers and directors of the companies.

\textbf{Railway maintenance services}

The PCA issued several statements of objections in 2018 against five companies and six directors and managers for cartel practices in the railway maintenance services sector.\textsuperscript{16} According to the PCA, the investigation exposed the manipulation of tender proposals in order to illegally define the winner of each tender and the level of the prices of maintenance services for equipment needed by the national railway network, such as gates, traffic lights, \textit{inter alia}, during the period 2015 to 2017. Under a settlement procedure, the PCA imposed fines totalling €365,400 on Sacyr Neopul SA, and its production manager, for participating in the referred cartel practices. The investigation ‘is still ongoing regarding the remaining four undertakings and their board members and managers’.\textsuperscript{17}

\textbf{Food retail}

The PCA issued a statement of objections against Super Bock (formerly Unicer), one of Portugal’s main producers and distributors of beverages, for fixing minimum resale prices of beverages in hotels, restaurants and cafés (on trade entities).\textsuperscript{18} Six members of the board and directors of Super Bock were also accused for being allegedly involved in the infringement. The PCA sheds some light on the case by stating that its ‘investigation concluded not only that the addressed undertaking allegedly fixed resale prices to its distributors, but also determined their trade margins, as well as other direct or indirect remunerations of its beverage brands in the HORECA channel – hotels, restaurants and cafés’.\textsuperscript{19} The provisional findings allegedly show that ‘the restrictive practice lasted for at least 12 years (from 2006 until 2017), and it has been continuously in place through the imposition, by the undertaking, of commercial conditions in the relationships established between its distributors and the latter’s clients, through the fixing of resale prices and the imposition of sanctions in case of non-compliance with the policy determined by the supplier’.\textsuperscript{20}

According to the PCA’s Activity Report, 20 of the 44 entities that were raided during 2017 were active in the food retail sector, which shows that the PCA allocated much of its

\begin{flushleft}
\footnotesize
\textsuperscript{19} ibid.
\textsuperscript{20} ibid.
\end{flushleft}
resources to ongoing antitrust cases. In November 2018, in three identical interlocutory decisions adopted by the Competition Court, some of the PCA’s information requests were annulled because they failed to inform the companies of the facts alleged against them.

**Telecommunications**

The PCA carried out dawn raids at the premises of four telecommunication companies (namely, Altice/Meo, Nos, Vodafone and Nowo), at five locations, ‘following suspicions of antitrust practices harmful to consumers’ freedom of choice’.

**Business associations**

Associations of undertakings were under the PCA’s investigatory spotlight in 2017 and 2018. First, the PCA published its Guidelines for Business Associations, providing guidance on how to conduct business in accordance with competition law. Business associations are exposed to violations of competition law as their members are normally competitors in a given sector.

The PCA imposed a fine of €400,000 on the Portuguese Association of Driving Schools for alleged price-fixing practices. Furthermore, the president of the association, who was allegedly directly responsible for the breach of competition law, was fined approximately €13,776.

The PCA has also confirmed that it carried out dawn raids on a bakery products undertaking, based on suspicions of a concerted practice of price-fixing, and on two advertising undertakings for concerted practices in procurement procedures launched by advertisers.

So far, the PCA has sanctioned nine associations of undertakings for anticompetitive practices and has accepted commitments in one case, with fines totalling more than €4 million.

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22 Judgments of the Competition Court in Cases Nos. 243/18.0YUSTR, 244/18.9YUSTR and 228/18.7YUSTR-A, both of 9 November 2018.
II COOPERATION WITH OTHER JURISDICTIONS

Pursuant to the decentralisation enacted by Council Regulation (EC) 1/2003, national competition authorities (including the PCA) and the European Commission have parallel competences in enforcing Articles 101 and 102 of the TFEU in close cooperation, within the framework of the European Competition Network (ECN). Portuguese courts also apply, simultaneously, Article 101 of the TFEU and the equivalent national rules within the Competition Act relating to anticompetitive practices.

The PCA is a member of the European Competition Authorities Association. It also cooperates bilaterally with European competition agencies and other international networks.

Within the ECN, the PCA exchanges information with the other national competition authorities (NCAs) on existing and continuing cases. Notwithstanding, any evidence used pursuant the Competition Act needs to be obtained in accordance with the rules under Portuguese law.

The European Commission assumes a leading role within the ECN and, in some situations envisaged in the ECN rules, the Commission may investigate cases that have an EU dimension, even if they specifically relate to Portugal.

Since cartels are considered administrative offences, rather than criminal, there are no legal grounds to substantiate a request to a foreign country to extradite someone to Portugal for antitrust infringements.

The EU Directive designed to empower the competition authorities in Member States to be more effective enforcers (known as the ECN+ Directive) is expected to represent a key development in several fields, such as cooperation between NCAs. Until now, despite the existence of Regulation 1/2003, these areas have been mainly handled through soft law instruments, such as the Commission Notice on Cooperation within the Network of Competition Authorities.

The full implementation of the ECN+ Directive will raise significant issues under constitutional law in Portugal and, if those prove to be surmountable through the principle of Portuguese law being open to EU law, it will eventually result in a competition authority that is more capable of coping with the challenges of globalisation, in particular by enabling the PCA to overcome its current limitations and to be able to seize and examine any documents, regardless of the medium on which they are stored, including personal laptops, mobile

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30 The main rules on the functioning of the European Competition Network are set out in the following documents: Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03, Official Journal C101 of 27 April 2004, pp. 43 to 53) and Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, of 10 December 2002.

31 The PCA hosted the International Competition Network Annual Conference in Portugal (Oporto) in 2017.

32 For instance, if the effects on competition are verified in more than three Member States (including Portugal), the Commission is particularly well placed to investigate and punish such practices. See ‘Commission Notice on cooperation within the Network of Competition Authorities’, cit., Section 14.

phones, other mobile devices and storage of information in the cloud. The PCA has already publicly demonstrated its will to implement such processes, as was the case with the Private Enforcement Directive.34

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

The Competition Act is applicable to all economic activities, be it in the private, public or cooperative sectors. It applies to cartel practices that occur in Portuguese territory or whenever these practices have or may have an effect in Portuguese territory.35 Even if the anticompetitive practice occurs in a foreign country, it will be punished in accordance with the Competition Act if its effects are verified in Portuguese territory. For instance, since it is not necessary to have a physical presence in Portugal, a company that distributes products in Portugal can potentially be investigated by the PCA.

Prohibited practices may be exempted under Article 10 of the Competition Act or Article 101(3) of the TFEU, or both. Since there are no industry-specific defences, these general rules apply. Under the decentralised regimen, the onus is on companies hoping to benefit from the exemption to self-assess their conduct and to come forward with evidence that demonstrates the fulfilment of all cumulative requirements.

In an abuse of dominance case, it was decided by the Lisbon Appeal Court that a parent company is not liable for competition law violations committed by a subsidiary, unless the parent company was itself engaged in the infringement.36 In our opinion, under Portuguese law, the same reasoning of cases of abuse of a dominant position could be applied, mutatis mutandis, to cartel infractions. However, the implications of the ECN+ Directive and its Article 13, Section 5, are yet to be determined, following the implementation period.

IV LENIENCY PROGRAMMES

i Statutory framework

The Competition Act provides for a leniency programme by establishing a special legal framework for conceding full or partial immunity from fines in proceedings for infringement of competition rules under national and EU law:

where such agreements or practices are aimed at coordinating their competitive behaviour on the market or influencing relevant parameters of competition, specifically through the fixing of purchase or selling price or other trading conditions, the allocation of production or sales quotas, the sharing of markets, including collusion in auctions and bid-rigging in public procurement, restrictions on imports or exports or anti-competitive actions against other competitors.37

35 Article 2(2) of the Competition Act.
36 Judgment of the Lisbon Appeal Court in Case No. 36/16.0YUSTR.L1, of 14 June 2017.
37 Article 75 of the Competition Act.
Besides the Competition Act, the leniency programme is comprehensively dealt with in a Leniency Regulation and in the PCA’s Explanatory Guidelines, which include both substantive and procedural rules.\(^{38}\)

Both undertakings and individuals\(^{39}\) may apply for leniency on fines imposed by the PCA. The natural persons to whom the leniency legislation applies include members of the board of directors or the supervisory board of legal persons and equivalent entities, as well as those responsible for the executive management or supervision of areas of activity where the cartel practice has occurred, the latter only since the Competition Act was enacted in 2012.

**ii Requirements to benefit from immunity or fine reductions**

Companies may either benefit from total immunity from fines or a fine reduction. In brief, before immunity or a reduction can be granted, the following obligations apply to undertakings:

\(a\) to fully and continuously cooperate with the PCA with the provision of all evidence and information available;

\(b\) to abstain from any conduct that may impede the success of the investigation;

\(c\) to avoid disclosing that it has applied for leniency;

\(d\) to end its participation in the infraction; and

\(e\) not forcing any other undertakings to participate in the cartel.

Immunity is granted to those that are the first to provide sufficient evidence and information to allow the PCA to either (1) support a request before the judiciary for a dawn raid in those cases where the PCA was not aware of the violation, or (2) identify a violation where the PCA did not have enough evidence of it. If a company or individual does not fulfil all the conditions required to achieve immunity, it is nevertheless possible to benefit from fine reductions of up to 50 per cent, depending on whether the information provided to the PCA has significant added value as compared with the evidence already in the PCA’s possession, and taking into consideration the time at which the company initiated its cooperation with the PCA.

The PCA has adopted a Leniency Regulation to set up a marker system for immunity applicants. A marker may be granted either on the PCA’s own initiative or in response to a immunity applicant’s request. The minimum information required in Portugal to activate the marker system is in line with the ECN model. The marker protects the applicant in terms of priority in the queue in providing evidence to the PCA.

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\(^{39}\) Individuals may apply for leniency individually or on behalf of the company.
iii Fining decisions triggered by leniency applications

To the best of our knowledge, there are five fining decisions that have been initiated by a leniency application.

a Catering cartel (2007): The investigation started with an individual leniency application submitted by a former director of one of the cartelists, who benefited from immunity from fines. Conversely, his former employer, the remaining cartel members and its directors were all convicted and fined a total of €14,720,283 (though this was later reduced by the Competition Court).

b Commercial Forms cartel (2012): Fines totalling €1,797,978 were imposed by the PCA on three of the four participating companies and their respective directors (later reduced substantially on appeal).

c Polyurethane Foam cartel (2013): Fines totalling €993,000 were imposed on two of the three companies involved and their respective directors.

d Pre-Fabricated Modules cartel (2015): Fines totalling €831,810 were imposed on four of the five companies who actively participated in the infringement. Reductions in the fines were granted as a result of the simultaneous application of both the leniency reductions and the settlement procedure.

e Office Consumables cartel (2016): A fine of €440,000 was imposed on one cartel participant who applied for leniency and settled; other cartelists were also fined.

iv Confidentiality of leniency applications

The Competition Act imposes upon the PCA a duty to treat as confidential both a leniency application and the related documents. Only co-defendants have access to the leniency application and to related information with the aim of preparing a reply to the statement of objections, but cannot obtain a copy of the referred documents. Access by third parties is almost impossible, as it needs the prior authorisation of the leniency applicant. The Portuguese law implementing the EU Private Enforcement Directive (namely Law 23/2018) determines that courts are not entitled to give access to leniency applications or settlement proposals. A special disclosure regime applies to court orders, allowing access to supporting documents and information provided with a leniency application.

V PENALTIES

i Calculation of the amount of the fine

Fines cannot exceed 10 per cent of the turnover of the year immediately preceding the final decision issued by the PCA for each of the companies concerned (or, in the case of associations of undertakings, the aggregate turnover of the associated companies). The Competition Court holds full jurisdiction to review fining decisions issued by the PCA, including the power to increase the level of fines (reformatio in pejus). As a rule, an appeal does not suspend a company’s requirement to pay the fine to the PCA.

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The Constitutional Court has already decided that the legal provision of the Competition Act that establishes the turnover of the defendant as a criterion for determining the maximum value of the applicable fine is not unconstitutional.⁴¹

As regards individuals, fines cannot surpass 10 per cent of their annual income, which is understood to include not only standard earnings but also all other forms of income, such as gratuities, commissions, holdings, subsidies or bonuses. The PCA’s Guidelines on the Calculation of Fines make it clear that the relevant turnover for determining a fine is the turnover that is directly related to the infringement of competition law.⁴²

Many factors are taken into account by the PCA when setting the amount of the penalty, in particular:

a) the seriousness of the infringement in terms of its effect on competition in the domestic market;

b) the nature and size of the market affected;

c) the duration of the infringement;

d) the degree of involvement in the infringement;

e) the advantages gained as a result of the infringement;

f) the behaviour of the party in terms of eliminating the prohibited practices and repairing the harm caused to competition;

g) the economic situation of the party concerned in the case;

h) previous offences relating to competition rules; and

i) the assistance given to the PCA throughout the proceedings.

ii) Other sanctions, fine reductions and appeals

In addition to the penalties already discussed, the PCA may impose ancillary sanctions: (1) publication in the Official Gazette and in a national newspaper of a summary of the court’s decision, or (2) a ban on participating in procurement proceedings if the violation happened in the context of a public tender (see Section VIII for more information), or both. The PCA may also impose behavioural or structural commitments to end the illegal conduct or its related effects.

Furthermore, the PCA may apply a periodic penalty for payments of up to 5 per cent of the average daily turnover of the company for each day of delay in cases of non-compliance with a court decision.

Anticompetitive agreements are null and void and injured parties may seek compensation in national courts (see Section VII for further discussion on this).

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According to its own statistical records, the PCA won 89 per cent of all court cases in 2017 and 100 per cent on the material substance of cases.\textsuperscript{43} The following table provides a summary of the outcome reached by applicants and plaintiffs between March 2012 and January 2018:\textsuperscript{44}

<table>
<thead>
<tr>
<th>Type of proceeding</th>
<th>Outcome</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeals against intermediate decisions</td>
<td>Totally unfounded</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>Totally well-founded</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>Partially well-founded</td>
<td>4</td>
</tr>
<tr>
<td>Appeals against final decisions finding a violation</td>
<td>Totally unfounded</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Totally well-founded</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>Partially well-founded</td>
<td>5</td>
</tr>
</tbody>
</table>

For the same period, most decisions reached by the Competition Court were confirmed by higher courts:\textsuperscript{45}

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Annulled</td>
<td>4</td>
</tr>
<tr>
<td>Overturned</td>
<td>3</td>
</tr>
<tr>
<td>Partially overturned</td>
<td>2</td>
</tr>
<tr>
<td>Confirmed</td>
<td>12</td>
</tr>
</tbody>
</table>

It is possible to cumulate fine reductions under the leniency programme and the settlement procedure, but as regards the latter, the Competition Act does not specify the amount by which the applicable fine will be reduced. The settlement procedure enables the issuing of a swift and less detailed decision because the confessed facts cannot be discussed in any potential appeal against the PCA’s decision. The settlement mechanism was used in the Office Consumables cartel (2016), in the Pre-Fabricated Modules cartel (2015) and in the Polyurethane Foam cartel (2013).

\textbf{VI ‘DAY ONE’ RESPONSE}

The PCA enjoys wide-ranging investigative powers, such as carrying out dawn raids both at the involved companies’ premises and at private homes,\textsuperscript{46} hearings held for both companies and individuals, requests for information, searches and seizures of documents at lawyers’...
and doctors’ offices, sealing premises for as long as is necessary to carry out an inspection, among others. However, cartel enforcement is not a criminal matter and the monitoring of telephone and internet conversations by covert means (i.e., wiretapping) is not allowed.

Companies and individuals being investigated by the PCA enjoy several rights, including the right:

- to have an attorney during the time the inspection is conducted;
- of access to files;
- to a hearing;
- to have the legal standing of a defendant before the inspection commences; and
- to appeal against interlocutory and final decisions imposed by the PCA.

Considering the broad investigative powers of the PCA, it is prudent that companies and individuals seek specialised legal advice at an early stage of an investigation, in particular if a dawn raid is being undertaken by the PCA. For instance, a warrant from the competent judicial authority is required before a search can be carried out; it is still debatable whether the PCA may conduct dawn raids without conferring on the undertakings the legal standing of defendants (visados), and it is controversial whether the Competition Act allows for the seizing of emails (a possibility foreseen in the draft Competition Act but excluded from its final wording). Searches at private premises or at lawyers’ and doctors’ offices have stricter requirements, since documents covered by professional secrecy are protected. It is advisable, inter alia, that (1) each of the PCA’s officials is accompanied by both a lawyer and an employee of the company being searched, (2) employees are trained not to obstruct an inspection, (3) a record of documents copied or seized by the inspectors is kept, (4) any leaks to the press regarding the inspection are prevented, to preserve the company’s reputation. Finally, an adequate and timely strategy is necessary to consider the appropriateness of making a leniency application, and to mitigate the risks of being fined or being sued in court for damages, both in Portugal and in other jurisdictions.

VII PRIVATE ENFORCEMENT

To date most private enforcement cases have concerned abuse of a dominant position, stand-alone actions or actions that relate partially to an earlier PCA decision. Until recently, competition rules were used more as a shield than a sword. Competition law was generally invoked as a means of defence; for example, to raise the illegality of an agreement that contained vertical restraints.

Although private enforcement cases are already a reality in Portugal, it is our opinion that they will gain momentum with the Law on Private Enforcement, which implemented

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47 See, for example: NOS v. PT, a damages action in the telecommunications sector for an abuse of a dominant position in the wholesale and retail broadband access markets, which consisted in a margin squeeze and a discriminatory rebate policy; the SportTV case, in which the premium pay-TV sports channel allegedly imposed discriminatory conditions on operators; Taboada&Barros v. Apple, the alleged abuse of a dominant position by Apple for excluding its distributor Taboada&Barros from the market; IMS v. ANF, an arbitral decision was confirmed by the Lisbon Court of Appeals, which upheld an abuse of a dominant position in the health sector.

48 Violation of the competition rules implies the declaration of nullity of any agreement (Articles 280 and 294 of the Civil Code and Article 9(2) of the Competition Act).
the relevant EU Directive. In addition to this new Law, the legal framework in Portugal includes the substantive rules contained in the Competition Act, the general rules on civil liability provided for in the Civil Code (Article 483 et seq. regarding liability for illicit acts and Article 562 on the calculation of awards of damages) and the procedural rules of the Code of Civil Procedure.

Actions for damages can be brought either following the finding of an infringement by a public authority (i.e., a follow-on action) or by filing a civil claim independent of any public enforcement (i.e., a stand-alone action). In the case of follow-on actions, the competition law infringement on which the claim is based would have been previously declared by a competition authority (the PCA or any other), a court (national or in any other EU Member State) or by the Commission. It is expected that the binding evidentiary value on final decisions issued by any of the said public authorities or courts will contribute to an increase in follow-on damages actions, because there will be a non-rebutable presumption regarding the existence, nature, duration and material, personal and territorial scope of the antitrust violation. This statement holds true in particular as regards follow-on actions as a result of the intense antitrust activity of the PCA in recent times.

Another aim of the Law on Private Enforcement is to remove obstacles to a more efficient system of damages actions. It contemplates, inter alia:

- collective redress mechanisms;
- rules on disclosure of evidence held by the opposing party or by a third party ordered by a judge;
- passing-on of overcharges by the defendant;
- conferring a binding effect on final infringement decisions by national competition authorities or by a review court, which constitutes an irrefutable proof for the purposes of an action for damages;
- joint and several liability between co-infringers (e.g., co-cartelists);
- rules on fault;
- exclusive jurisdiction to the Portuguese Competition Court to judge actions for damages based exclusively on competition law infringements; and
- for non-contractual liability, the limitation period is five years, counting from the end of the infringement.

Since the implementation of the Private Enforcement Directive into national laws is recent in all Member States, some uncertainty is expected in relation to antitrust actions brought before those laws are fully enacted. It is to be hoped that the European Court of Justice will shed some light in that respect with the issuing of its first judgment on the Directive in Case C-637/17, which relates to a request for a preliminary ruling from the Judicial Court for the Lisbon Region lodged on 15 November 2017.

49 Law 23/2018, of 5 June, implemented the EU Directive on private enforcement.
50 Law 83/95, of 31 August, as amended (Lei de Acção Popular), which allows the commencement of collective actions against the offenders.
51 Moreover, a final decision by the competition authorities or courts of other Member States constitutes a rebuttable proof for the same purposes, which represents a step further in relation to the minimal requirements of the Directive (which only requires prima facie evidence).
52 See Cogeco Communications Inc v. Sport TV Portugal and Others. Among other questions, the Portuguese court asked the European Court of Justice: ‘May articles 9(1) and 10(2), (3) and (4) of Directive 2014/104/EU of 26 November 2014, as well as the remaining provisions of that directive or
VIII CURRENT DEVELOPMENTS

The most relevant developments are the transposition of the Private Enforcement Directive into national law (for further discussion, see Section VII) and the PCA’s priorities in the field of public procurement.

Following the entry into force of the new Portuguese Code of Public Contracts in 2018, the PCA now has direct and full access to all the information available on the public procurement portal (the BASE portal) and the Public Works Observatory. Public procurement procedures are processed on electronic platforms at every stage of the formation of a contract. The access granted to the PCA will, without doubt, simplify the finding of bid rigging in public procurement on an *ex officio* basis and increase the investigation of such practices. The PCA and the Institute for Public Procurement, Real Estate and Construction (IMPIC) signed a memorandum of understanding (MOU) whereby the analysis of the national public procurement database by the PCA will focus on the enforcement of the competition rules and complement examinations carried out by IMPIC in the context of its duties of monitoring and controlling public procurement. The data will be analysed using quantitative statistical and econometric methods, in particular through the application of screens with the aim of detecting behavioural patterns that signal collusion in public tenders.

Moreover, the PCA has been providing training for a large number of public entities that frequently launch or participate in public tenders. In 2017, the Fighting Bid Rigging campaign reached more than 1,300 participants at 14 in-house sessions. The PCA and several sectoral authorities have also signed MOUs that establish instruments for cooperation and exchanges of information.

All public entities have the duty to inform the PCA of facts they become aware of that might be construed as anticompetitive practices. This effective competition advocacy directed at public authorities, combined with the access to the electronic platform that governs public procurement contracts, may well contribute to a more vigorous enforcement of competition law in the near future. For example, the investigation of cartel practices in the railway maintenance services sector (see Section I.iii for a summary of the case) was initiated following a complaint submitted within the context of the Fighting Bid Rigging campaign.

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56 For example, a memorandum of understanding was signed between the PCA and the National Authority of Medicines and Health Products (Infarmed) – Joint press release PCA/Infarmed, of 21 September 2018.
57 Article 17(3), Competition Act.
Portugal

launched by the PCA. In 2018, five cases were investigated pursuant to complaints launched by public entities, which represents an increase of 50 per cent in the number of complaints of this type. The PCA’s activity within the public sector is summarised in the following table.

**PCA’s activity against bid-rigging in public tenders**

<table>
<thead>
<tr>
<th>Case</th>
<th>Sector</th>
<th>Number of companies</th>
<th>Origin of the case</th>
<th>Sanction (in €millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrial cleaning (2011)</td>
<td>Industrial cleaning</td>
<td>5</td>
<td><em>ex officio</em></td>
<td>0.3</td>
</tr>
<tr>
<td>Prefabricated dwellings (2015)</td>
<td>Construction</td>
<td>5</td>
<td>Leniency</td>
<td>0.8</td>
</tr>
<tr>
<td>Railway maintenance services (2018)</td>
<td>Railway</td>
<td>9</td>
<td>Fighting bid-rigging campaign</td>
<td>2018: 0.4 Ongoing against four remaining companies</td>
</tr>
</tbody>
</table>

In tandem with the application of fines to companies involved in collusion in auctions and bid rigging in public procurement, it has yet to be seen whether the PCA will also apply ancillary sanctions, in particular a ban on the right to take part in future public procurement procedures. This ancillary sanction may remain in force for a maximum of two years counting from the final ruling upholding the decision imposing the sanction, which is not subject to any appeal.

Contracting entities must exclude proposals to render services or goods in case the proposal violates competition law; for instance, if there is a cartel between two or more companies that are presenting proposals to provide services to the contracting entity. The Supreme Administrative Court has ruled that it is possible to exclude two identical proposals presented by two competitors that have the same shareholding structure and the same managers.

The PCA is developing a strong advocacy activity. Besides the aforementioned Fighting Bid Rigging campaign, there is another current campaign (entitled FairPlay Roadshow – with competition everybody wins), which is using engaging videos in which the basic competition rules are explained to the ordinary citizen. In parallel with the leniency programme, an online complaints portal and a dedicated telephone line have been created to enable anyone to anonymously report anticompetitive practices. Moreover, regular conferences for business associations and seminars for sector regulators are held by PCA officials.

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60 id., at page 20.
61 Article 71(1)(b), Competition Act.
62 Article 71(2), Competition Act.
63 Article 70(2)(g), Public Procurement Act.
64 Judgment of the Supreme Administrative Court of 1 March 2016 (Case No. 0202/16). We strongly disagree with this judgment, because agreements within the same economic unit cannot amount to an agreement or concerted practice between undertakings within the meaning of the Competition Act. Therefore, there was no violation of competition law and the proposals could not be refused in the context of the public tender.
As a member of the board of the PCA put it:

*We use every outreach initiative to also ‘sell’ our leniency programme, with a view to prompt the cultural change needed to break down more traditional ways of doing business and establish open communication channels with potential informants, notably, procurement officers. This field work has proved to be an important source of solid tip-offs on potential cartels that have been at the source of several of our investigations.*

Alongside its normal activity in traditional sectors, the PCA is paying close attention to new exclusionary practices in the digital economy. Interestingly, businesses that undertake such practices should not be exempted from liability for the use of algorithms or artificial intelligence likely to result in anticompetitive conduct. This means that the PCA is not afraid to act in the digital environment where the use of technology facilitates anticompetitive behaviour. According to public statements by members of the board of the PCA, there is an intention to release an issues paper on algorithms and big data.

The PCA has developed into a young adult having reached its 15th anniversary in 2018. The competition policy challenge is now the consolidation of its recent enforcement activity and the embracing of new challenges in disruptive sectors.

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66 Speech by Maria João Melícias, a member of the board of the PCA: ‘What’s hot under the Iberian sun’, Women@Competition Iberia, cit.

67 id. at page 4.
I ENFORCEMENT POLICIES AND GUIDANCE

Federal Law No. 135-FZ on Protection of Competition (the Competition Law), dated 26 July 2006, has undergone a series of amendments and is the main statute containing basic prohibitions applicable to cartels (largely similar to those that exist in many other jurisdictions). The Russian competition authority, the Federal Antimonopoly Service (FAS), and its regional offices are responsible for their enforcement. Specifically, the Competition Law provisions in the area of cartels cover anticompetitive agreements, concerted actions and coordination of business activities. Liabilities for violations of the relevant prohibitions are provided for in the Code on Administrative Offences and the Criminal Code.

The entry into force of the Fourth Antimonopoly Package and the results of its implementation are two of the key developments in recent years in terms of a strategic and practical impact on market players. The amendments have affected virtually all areas of antitrust regulation and have resulted in changes to the rules on cartel arrangements and leniency. The FAS has also issued guidelines summarising its outlook and practice on such matters as calculation of damages resulting from antitrust violations and proof of prohibited agreements (cartels) and concerted actions.

Notably, the definition of cartels has been amended to cover not only arrangements between undertakings selling in the same market but also buyers’ cartels (between undertakings purchasing in the same market).

The following arrangements are expressly prohibited by the Competition Law as agreements and concerted actions between competing market players or consequences of prohibited coordination:

a fixing or maintaining prices and tariffs, discounts, bonus payments or surcharges;
b increasing, reducing or maintaining prices during tenders (bid rigging);
c market sharing by territory, volume of sales or purchases, assortment of goods, works or services sold, or composition of sellers or purchasers (customers);
d reducing or terminating the production of goods, works or services; and
e refusing to enter into contracts with certain sellers or purchasers.

These provisions are considered to be hard-core restrictions that are anticompetitive; that is to say, the mere fact of implementing these arrangements is sufficient to establish the infringement (the FAS does not need to prove their negative effects).

1 Maxim Boulba is a partner and Maria Ermolaeva is an associate at CMS Russia.
As in past years, cartel enforcement is one of the major priorities for the FAS: 360 cases were initiated in 2017 (nine criminal cases were initiated by the law enforcement authorities in 2017); the overall number of cartel cases increased by 8 per cent. As suggested by the 2017 annual report prepared by the FAS, bid rigging remains the most common cartel offence, accounting for more than 85 per cent of cases (3 per cent more than in 2016). The following industries, according to the FAS, are particularly prone to cartels (bid rigging in particular): national defence and security, construction (in particular, road construction), food supply and life sciences (public procurement of medicines and medical devices). For instance, in December 2017, the authority uncovered a large bid rigging cartel in the medical products market that extended to 360 tenders. FAS officials believe that foreign companies are now more actively engaged in cartels. Also, cartel participants tend to resort to more advanced (digital) technologies to implement their arrangements.

For completeness, following the entry into force of the Fourth Antimonopoly Package, competitors need to obtain prior approval from the FAS for the conclusion of joint venture agreements (agreements on joint activities) if the following thresholds are exceeded by them (and their groups): (1) the aggregate worldwide value of assets of the groups involved exceeds 7 billion roubles; or (2) the aggregate worldwide revenue of such groups for the past year exceeds 10 billion roubles. The term ‘agreement on joint activities’ is rather broad so it may catch joint ventures and be extended to other commercial arrangements aimed at establishing cooperation. The prohibitions of the Competition Law therefore do not apply to joint venture agreements between competitors entered into with prior approval of the FAS (the same rules apply as with merger clearance). However, as supported by the FAS guidelines, any clauses that lead to cartels (see above) are inadmissible and will not be cleared by the FAS.

II COOPERATION WITH OTHER JURISDICTIONS

As suggested in its annual report for 2017, the FAS recognises the increasing importance of international cooperation in cartel cases and tends to emulate the best global practices. It cooperates with other jurisdictions, including the European Union and its Member States, based on bilateral and multilateral agreements. The FAS has signed more than 50 bilateral agreements and other documents with competition authorities of various countries. Although bilateral agreements entered into by the FAS in the past provide for more extended cooperation (consultations, information requests, consideration of mutual interests in the course of investigations), these are interagency agreements that are declarative rather than binding on a state level.

The FAS is a member of the International Competition Network and is expanding its cooperation with competition authorities in Brazil, Russia, India, China and South Africa, the Organisation of Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development. The nature of such interactions is mainly related to general policy matters, consultations, exchange of experience and practice. OECD recommendations in particular had a significant influence on competition policy and enforcement practice in Russia. FAS employees regularly take part in training and workshops organised by foreign competition authorities and international organisations.

The FAS is committed to investigating cartel cases with a foreign element but the extent of its cooperation with foreign competition authorities during investigations is rather insignificant. In a cartel case relating to container liner shipping companies (see below), the FAS officials noted that similar investigations were being conducted by the European
Commission and the South African competition authority. According to the FAS, however, in the absence of a legal framework, it is virtually impossible to establish a workable solution to the exchange of information between the authorities. Previous examples of cooperation with foreign competition authorities usually cited by the FAS are the cartel on the wholesale market of salmon and trout supply from Norway and the cartel on Vietnamese pangasius (a type of catfish) (nevertheless, the FAS findings were later overturned by the court). In both cases, the FAS cooperated with the competition authorities (of Norway and Vietnam, respectively), mostly in the form of consultations.

At present, Russian law does not provide for an appropriate comprehensive legal framework. Taking into account the fact that the extent of such cooperation is not defined, the issues associated with the exchange of confidential information and ensuring its protection remain a major hurdle. The existing agreements do not directly deal with this matter or provide mechanisms for the exchange of confidential information. While the parties’ waiver remains the most straightforward solution for the FAS to facilitate the exchange of confidential information in the area of merger control, this option is hardly applicable to cartel cases. Similarly, there are no established procedures for joint inspections, or inspections requested by a foreign authority, or enforcing fines imposed on foreign legal entities.

Special rules currently apply to cooperation within the Eurasian Economic Union, which includes Armenia, Belarus, Kazakhstan, Kyrgyzstan and Russia. Under the Treaty on the Eurasian Economic Union, the Eurasian Economic Commission, a permanent regulator, controls compliance with the common competition rules on cross-border markets.

The Treaty provides for the procedure on cooperation between the competition authorities of the Member States and with the Eurasian Economic Commission. Specifically, such interactions may extend to the exchange of confidential information, instructions to conduct certain procedural actions, and law enforcement at the request of a relevant competition authority. The obvious reasoning behind these provisions is to facilitate investigations in both cross-border and national markets. The practical implications of the above cooperation and its possible role in cartel investigations are yet to be assessed.

Criminal enforcement and extradition issues are mostly theoretical: such issues have never arisen in practice. The extradition of Russian nationals is not allowed in accordance with the Russian Constitution. In this light, it is highly unlikely that extradition requests will be made to pursue foreign citizens in cartel cases.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Article 3(2) of the Competition Law has an extraterritorial application and applies to agreements (practices and conduct) reached outside Russia between Russian and foreign undertakings if they affect competition in Russia. Therefore, the choice of foreign law or arguments relating to the absence of a direct effect on the Russian market would not serve as a defence.

The FAS is entitled to hold a foreign (non-Russian) company liable for violation of the Competition Law and impose fines on such an undertaking (even if it does not have any representative offices or subsidiaries in Russia). There are obvious difficulties that reduce the practical realisation of fines.

The competition authority may seek to enforce the fines in Russia should a foreign person have any assets in Russia, but currently there is no extensive practice in this area.
Although the FAS is trying to cooperate with foreign competition authorities in other countries to facilitate the enforcement of its decisions on penalties imposed on foreign companies in other jurisdictions (outside the Eurasian Economic Union), its powers remain very limited.

More importantly, the FAS has already initiated proceedings regarding the agreements and practices of foreign companies: the FAS’s intention demonstrates that the number of cases is likely to increase in the future.

A highly publicised case concerning the alleged anticompetitive agreements (cartels) and concerted practices of major (foreign) container liner shipping companies can serve as an obvious example.

The infringements uncovered by the FAS consisted in concerted practices of certain market players that resulted in fixing surcharges to their freight rates. The information was published on the website of one market player and, thereafter, the same rates were fixed by its competitors. The aggregate market share of the parties involved exceeded 20 per cent, with the individual market share being more than 8 per cent (thresholds for the application of prohibitions on concerted actions; other concerted actions are exempted). The companies, which were eventually found to be in violation of the Competition Law, are foreign legal entities incorporated abroad.

Russian law does not use a concept of parental liability with regard to antitrust matters. Only a company that committed a cartel offence can incur liability; parent (foreign or Russian) companies cannot be held liable for the anticompetitive actions of their subsidiaries. This approach is supported by the practice of the FAS.

Cartels are viewed as hard-core violations subject to *per se* prohibitions: the fundamental principle is that cartel arrangements are inadmissible and are treated as very serious offences. Essentially, there are no affirmative defences. Similarly, no specific industries are exempt from cartel enforcement. Exemptions are available in a limited number of cases.

First, the prohibitions of the Competition Law do not apply to certain intra-group arrangements between the entities in ‘control’ relations (except for situations in which certain types of activities cannot be conducted by one entity). Thus, agreements entered into by and between entities that are part of the same group, where one party controls the counterparty by holding more than 50 per cent of shares or both parties are controlled (directly or indirectly) by the same company by virtue of the shareholding exceeding 50 per cent, are viewed as agreements within the same undertaking having a single ‘commercial will’.

Further, agreements on granting or transferring intellectual property (IP) rights or equivalent means of individualisation of a company, products, works or services are supposed to be exempted from the application of the Competition Law. The FAS advocates the removal of these exemptions and seeks to exert control over contractual arrangements in the area of IP and look into the existing practices in terms of their compliance with the Competition Law. Most notably, a set of amendments to the Competition Law prepared by the FAS provides for the removal of this IP immunity.

**IV LENIENCY PROGRAMMES**

The leniency programme is provided for in administrative (for both legal entities (or a group) and individuals) and criminal (for individuals only) laws. Formally, these are two separate procedures. Leniency programmes do not preclude private enforcement.
Further to Article 14.32 of the Code on Administrative Offences, administrative leniency is available under the following conditions:

a. at the time of submission of the leniency application the competition authority did not have information concerning the violation;

b. the applicant stopped its involvement in the cartel arrangement; and

c. information and documents provided are sufficient to establish violation of the Competition Law.

Collective applications filed simultaneously by several cartel participants are not accepted. Full immunity is available only to the first applicant. Leniency is available only if the application is submitted to the FAS before the announcement of a decision in the antitrust case.

Changes to the Code on Administrative Offences brought by the Fourth Antimonopoly Package make it possible for the FAS to set a minimum amount for administrative fines against those who were the second or third to report a cartel arrangement voluntarily to the competition authority. The necessary prerequisites are essentially the same as in the case of the first applicant. The organiser of a cartel cannot benefit from this option to reduce fines.

Russian law does not expressly establish a procedure for obtaining markers. The basic recommendation is to submit a complete application in line with the FAS requirements. Alongside an application in writing, applicants provide all available evidence and plead guilty. The competition authority states that its focus continues to be the stimulation of voluntary reporting through the leniency programme. Still, in most instances, market players tend to resort to leniency in exceptional circumstances.

The criminal leniency programme is granted to individuals under Article 178 of the Criminal Code provided that (1) the offender was the first one to report, (2) the offender assisted with the investigation, (3) the offender compensated the damage and (4) the offender's actions do not constitute any other criminal offence (e.g., those relating to corruption). Applications for criminal leniency are handled by the law enforcement agencies and, ultimately, the courts. Owing to the fact that the number of criminal cases remains very insignificant (only nine cases in 2017), the criminal leniency programme is of limited practical application.

V PENALTIES

Violations of the Competition Law provisions relating to cartels may result in administrative (for individuals and legal entities) and criminal liability (for individuals only). For a discussion on civil liability issues, see Section VII.

The most common penalties imposed on legal entities being cartel participants are administrative fines of up to 15 per cent of the company's turnover in the market concerned for the preceding year. In any case, the amount of the fine cannot exceed 4 per cent of the total turnover of the offender for the preceding year and cannot be less than 100,000 roubles. Company officials may also be held liable and be fined up to 50,000 roubles or disqualified for up to three years. The FAS is entitled to impose administrative fines on offenders; disqualification (prohibition from holding certain posts or carrying out certain activities) can be applied only by the court.

The Code on Administrative Offences has been amended to introduce differentiated fines for conclusion of anticompetitive agreements or concerted actions depending on their nature: for example, in the case of agreements that lead to or may lead to an increase or
decrease in price or price-fixing at tenders, a fine of up to 50 per cent of the starting price of the subject of the tender; in the case of concerted actions, a fine of up to 3 per cent of the company’s turnover in the market concerned for the preceding year.

Both mitigating (e.g., the offender did not initiate a cartel or was required to follow the binding instructions, did not actually implement the arrangement, stopped the violation, contributed to the investigation, or took certain steps to remedy the violation) and aggravating (e.g., the offender initiated a cartel, forced other undertakings to participate, refused to stop the violation, or repeated the violation) circumstances stipulated in the Code on Administrative Offences are taken into account for the purposes of calculating fines and any possible reductions.

The Criminal Code establishes liability for individuals if a cartel agreement resulted either in significant damage (over 10 million roubles) to individuals, organisations or the government, or significant revenue for the parties to the agreement (over 50 million roubles). Legal entities cannot incur criminal liability under Russian law. Criminal proceedings against individuals involved may be initiated; the investigation is conducted by the law enforcement agencies. In the most extreme cases (where there are aggravating circumstances), the sanctions imposed by the court may include imprisonment for a term of up to seven years. These penalties are very rare in practice.

On a separate note, under the Competition Law, the FAS is authorised to issue orders aimed at putting an end to a violation. This is a binding instruction, further to which the undertaking may be obliged to terminate anticompetitive agreements (or modify their terms and conditions) or take other measures to restore competition. In the most extreme cases, the FAS has a right to invalidate agreements (or certain clauses thereof) through court proceedings.

The FAS is entitled to issue an order requiring the offenders to transfer to the state budget all revenue received as a result of an antitrust violation. It is expressly prohibited to resort to administrative liability if the offender complied with such an order and transferred the prescribed amount to the budget.

Settlement procedures are not available at the FAS review stage of the case. An amicable settlement agreement can be entered into with the FAS when a decision it has made is appealed in court. A settlement agreement must be approved by the court and is binding on the parties (the offender and the competition authority). As part of the settlement procedure, the offender is required to acknowledge the violation while the competition authority agrees to reduce the fine. Additional behavioural commitments may be imposed on the offender. From a practical perspective, such settlement agreements are often entered into in high-profile cases relating to the abuse of dominance but are also available for cartel offences (e.g., as in the case of foreign container liner shipping companies).

VI ‘DAY ONE’ RESPONSE

Generally, there are two types of FAS inspection: scheduled and unscheduled (dawn raids). Both may be conducted either on-site (field checks) or in the form of documentary reviews. It is during dawn raids that the competition authority attempts to uncover cartel arrangements and gather valuable evidence suggesting anticompetitive practices. Although most businesses are becoming increasingly aware of FAS dawn raids (e.g., through training or guidelines), in many instances it is challenging to take a well-structured and well-documented approach during these audits.
First, the officials must present FAS identification and a decree authorising an inspection. All information included in the decree (inspection dates, legal grounds and subject matter) is to be checked very carefully. The term of inspections cannot exceed one month from the date specified in the decree, but may be extended by two months.

The company representatives are allowed to be present during the inspection and provide clarification (as required) to the FAS. The competition authority is not under a legal obligation to wait for legal advisers to arrive. The FAS officials are entitled to interview all employees and ask questions relating to the subject matter of the dawn raid. The employees of an inspected company should address only the questions asked and, as far as possible, make notes of all questions and the answers given.

The inspection can extend to all business premises, cupboards, desks, safes, IT systems or persons: the FAS officials are allowed to access and inspect a legal entity’s premises, offices and documents. However, the FAS officials may not access, inspect or search persons, vehicles, private belongings or residential premises. Two independent witnesses should be present during the inspection. The FAS is authorised to engage experts and specialists to provide assistance in the course of dawn raids. Obstruction of the inspection, failure to provide documents and refusal to grant access to the FAS officials constitute an administrative offence. To this end, reasonable cooperation is expected from an inspected company.

Further, the officials have a right to request any documents and information; they may review original copies of all documents but can only retain duly certified copies. All documents provided should be listed on the transfer and acceptance deed. It is recommended to make a copy of all documents to be transferred to the competition authority. The FAS officials may copy documents and other materials, take photos and make video recordings during the inspection.

Documents must be provided to the officials even if they contain confidential information, or business or other secrets protected by law. If the officials want to inspect the privileged documents, it is advisable to mark documents appropriately (as trade secret, confidential, etc.) to ensure the proper handling of this information by the competition authority, to prevent further distribution and to be able to impose liability in the case of unauthorised dissemination of the information.

The officials are entitled to make electronic copies of information contained on company-owned computers, hard drives and servers, including internal and external email correspondence. Servers, computers and hard drives are to be left at the company. Again, to avoid any further controversy, an electronic copy should be made of all information that the officials have received.

In light of the above, while the competition authority has extensive powers to conduct inspections (dawn raids), the FAS officials cannot perform certain actions. By way of illustration, they cannot retain original copies or electronic equipment, raid private addresses or conduct surveillance. Only law enforcement agencies brought in by the FAS for such purposes are endowed with such powers (usually subject to a court order).

Following the inspection, the key recommendation is to review the protocol and inspection act and all information reflected therein, including a list of the documents copied and received by officials. An inspected company is entitled to make comments in the foregoing documents that reflect its agreement or disagreement with the inspection results. It is reasonable to sign the documents once they are accurate and confirm that a copy of the protocol and inspection act have been duly received.
A private right of action is available under Russian law. Further to Article 37(3) of the Competition Law, a private action may be initiated before the court by any person whose rights and interests have been violated by an antitrust infringement. Most notably, actual damages and lost profit can be claimed. General procedural rules apply to the review of private antitrust actions and their funding; legal costs (namely stamp duty and, within reasonable limits, legal fees) may be recovered from the defeated party.

While private proceedings are generally possible in all types of antitrust matters, court practice is primarily centred on abuse of dominance and unfair competition rather than cartels. Difficulties relating to the calculation of damages (in particular, lost profit) and associated high standards of proof traditionally adhered to by the Russian courts are two of the major problems preventing the development of private antitrust actions.

Currently, there is a clear preference for government enforcement by the FAS in cartel cases; market players are generally reluctant to opt for private enforcement. The competition authority is adamant about changing the existing situation. For example, its Presidium issued the Guidelines on Proof and Calculation of Damages Resulting from Antitrust Violations, which sheds some light on certain aspects of private litigation.

In line with court practice, the FAS emphasises that, to recover damages, the plaintiff is supposed to prove (1) a violation of the Competition Law, (2) the existence of damages (including the amount), and (3) the cause-and-effect relationship between the violation and the inflicted damages. The FAS decision establishing the violation is usually instrumental during the court proceedings but does not reduce the burden of proof imposed on the plaintiff (as to the amount of damages and the cause-and-effect relationship). The main effect of the FAS decision is that it serves as evidence and is not formally binding on the court. For this reason, the competition authority urges future plaintiffs to be more active in collecting and presenting evidence during the course of private antitrust proceedings.

Collective (class) actions are not available for antitrust matters. The FAS acknowledges this problem: some time ago a proposal to introduce such actions was elaborated but was not enacted. Major corporations were strongly opposed to this idea as its implementation would have opened the floodgates for multiple proceedings. In the meantime, a new draft law to this effect has been drawn up. The FAS is willing to get back to the introduction of collective antitrust actions in the near future; according to the publicly available declarations and comments of FAS officials, class actions could be included in further amendments to the Competition Law.

The Competition Law and the enforcement agenda of the FAS are constantly evolving; the FAS puts a particular emphasis on the fight against cartels, as well as its criminal and cross-border dimensions. The role of the Eurasian Economic Commission regarding the analysis of cross-border antitrust violations within the Eurasian Economic Union will increase in the near future.

Further amendments to the Competition Law (known as Fifth Antimonopoly Package) are to be expected and may cover such topics as correlation between IP and antitrust regulations (elimination of IP immunity), digital economics and implementation of antimonopoly compliance programmes by undertakings (the introduction of such measures could be viewed as a mitigating circumstance allowing for the reduction of administrative fines).
According to its annual report for 2017, the FAS has drawn up 11 draft laws aimed at dealing with cartels. Obviously, battling bid rigging is a top priority for the competition authority. The FAS has prepared several draft laws aimed at introducing further amendments to the Criminal Code and the Criminal Procedure Code (relating, among other things, to bid rigging), the Competition Law (giving the FAS additional rights during the course of cartel investigations, such as accessing databases of telecommunications services’ customers and the files of law enforcement agencies) and public procurement legislation (so that the companies involved in bid rigging can be blacklisted and prevented from participating in public procurement tenders).
Chapter 22

SINGAPORE

Daren Shiau, Elsa Chen and Scott Clements

I  ENFORCEMENT POLICIES AND GUIDANCE

The Competition Act, Chapter 50B of Singapore (the Competition Act) was enacted in 2004 and is the principal statute governing the competition law regime in Singapore. The Competition Act has the objective of promoting the efficient functioning of Singapore’s markets to enhance the competitiveness of the economy.

Cartel enforcement falls within the scope of Section 34 of the Competition Act, which prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that have, as their object or effect, the prevention, restriction or distortion of competition within Singapore unless excluded by the Third Schedule to the Competition Act or a block exemption (the Section 34 Prohibition).

Agreements caught under the Section 34 Prohibition can range from hard-core cartels to concerted practices in which no formal agreement or decision was reached, and include both legally enforceable and non-enforceable written and oral agreements, as well as ‘gentlemen’s agreements’. All that is required is that parties arrive at a consensus on the actions that each party will, or will not, take.

The Competition and Consumer Commission of Singapore (CCCS), formerly known as the Competition Commission of Singapore (CCS), is responsible for the administration and enforcement of the Competition Act. The CCS was renamed after taking on the additional function of administering the Consumer Protection (Fair Trading) Act (Chapter 52A) with effect from 1 April 2018.

Financial penalties imposed by the CCCS: 1 January 2006 to 30 November 2018

<table>
<thead>
<tr>
<th>Cartel case</th>
<th>Fines (S$ millions)</th>
<th>Cartel case</th>
<th>Fines (S$ millions)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fresh chicken distributors cartel</td>
<td>26.95</td>
<td>Modelling agencies cartel</td>
<td>0.36</td>
</tr>
<tr>
<td>Capacitor manufacturers cartel</td>
<td>19.55</td>
<td>Ferry operators cartel</td>
<td>0.29</td>
</tr>
<tr>
<td>Ball bearings cartel</td>
<td>9.31</td>
<td>Pest control operators cartel</td>
<td>0.26</td>
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<td>Freight forwarders cartel</td>
<td>7.15</td>
<td>Electric works cartel</td>
<td>0.19</td>
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<td>Financial advisers cartel</td>
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<td>Employment agencies cartel</td>
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<tr>
<td>Electrical services and asset tagging services cartel</td>
<td>0.63</td>
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</tr>
</tbody>
</table>

1 Daren Shiau, Elsa Chen and Scott Clements are partners at Allen & Gledhill LLP.
Between 1 January 2006, when the Section 34 Prohibition came into effect, and 30 November 2018, 13 cartel infringement decisions have been issued by the CCCS.

Pursuant to Section 61 of the Competition Act, the CCCS has published guidelines indicating the manner in which it will interpret and give effect to the provisions of the Competition Act. There have been two sets of guidelines to date of particular relevance to cartel enforcement, namely the CCCS Guidelines on the Section 34 Prohibition and the CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases (the Leniency Guidelines). Both sets of guidelines came into effect in 2006. The Leniency Guidelines 2006 were revised in 2009 (the Leniency Guidelines 2009) and both sets were revised in 2016 (the Section 34 Guidelines 2016 and the Leniency Guidelines 2016). These are applicable to all cases for which, as at 1 December 2016, the CCCS had yet to issue a proposed infringement decision (PID). The changes in the Leniency Guidelines 2016, which represent a distinct departure from the CCCS’s former leniency policy, include the following.

a Leniency applicants must unconditionally admit to the cartel conduct.

b Leniency applicants must grant an appropriate waiver of confidentiality to the CCCS in respect of any jurisdiction in which the applicant has also applied for leniency or any other regulatory authority for which it has informed of the conduct.

c An undertaking that has initiated or coerced another undertaking to take part in the cartel activity is now eligible for leniency for a reduction of up to 50 per cent of the financial penalty.

In addition to its revised Guidelines in 2016, the CCCS has introduced the ‘CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases’ (the fast-track procedure). Essentially, parties who admit liability for their infringement of the Competition Act will be eligible for a reduction of 10 per cent on the amount of financial penalty that would otherwise be imposed if not for the fast-track procedure. The procedure is distinct from the CCCS’s ability to accept commitments and its leniency policy. It can be initiated by the CCCS prior to, or after, a PID but not after an infringement decision has been issued. The CCCS envisages that, in general, the fast-track procedure will be initiated by the CCCS prior to a PID being issued. Parties under investigation may choose to proactively indicate to the CCCS their willingness to engage in a fast-track procedure discussion. The CCCS retains a broad margin of discretion in determining whether the case is suitable for the procedure.

The Competition (Amendment) Act came into effect on 16 May 2018. This follows a public consultation on the proposed changes to the Competition Act which was conducted by the CCCS between 21 December 2017 and 11 January 2018. The key aims of the amendments are to provide the CCCS with appropriate enforcement tools in line with international best practices and to streamline existing processes. Among others, Sections 60A and 60B of the Competition Act have been amended to allow the CCCS to accept binding and enforceable commitments for cases involving anticompetitive agreements.

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2 See CCCS, CCCS Guidelines, ‘CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases’.

II COOPERATION WITH OTHER JURISDICTIONS

The Competition Act provides a mechanism by which the CCCS may enter into arrangements with foreign competition bodies to, *inter alia*, provide assistance and furnish to each other information required by the other party for the purpose of performing its functions. The Competition Act also provides that the CCCS need not furnish any information to a foreign competition body pursuant to such arrangements unless it requires and obtains an undertaking in writing from that body that it will comply with the terms specified in the requirement.

The CCCS’s international and regional cooperation is also guided by the provisions in Singapore’s multilateral and bilateral free trade agreements relating to competition. These provisions commonly require the signatories to cooperate in the development of any new competition measures and exchange information.

The CCCS uses informal cooperation mechanisms to facilitate its work. In particular, it holds frequent dialogues with the Australian Competition and Consumer Commission and the New Zealand Competition Commission to facilitate general information sharing between the agencies. The CCCS is also a member of the ASEAN Experts Group on Competition (AEGC)\(^4\) and a regular participant at international conferences and workshops on cartel enforcement held by the Organisation for Economic Co-operation and Development, ASEAN, the International Competition Network and Brazil, Russia, India, China and South Africa.

Most importantly, on a case-by-case basis, the CCCS has engaged in both regional and international cooperation with other competition authorities when investigating international cartels with cross-jurisdictional elements. Such international cooperation includes, *inter alia*:

a. sharing information to coordinate dawn raids for evidence preservation; and

b. sharing general information such as theories of harm and general categories of information between the competition authorities. Information is shared to the extent that the information is not confidential, and where waivers have been granted to the CCCS to discuss the matter with other authorities and vice versa.

In sharing information, the CCCS takes into account information provided by leniency applicants, bearing in mind the possibility of private actions, discovery obligations that a leniency applicant could be subject to and the varying regimes that other potentially relevant jurisdictions operate (i.e., whether civil or criminal regimes are operated).

The CCCS has stated that ‘[t]he growing number of cross-border competition cases highlights the importance of cooperation among competition agencies and this is one aspect [the CCCS] hope[s] to work on moving forward’\(^5\).

A particular change in the Leniency Guidelines 2016, which is likely to facilitate further cooperation with other international agencies, is the appropriate waiver of confidentiality that the CCCS requires of leniency applicants in respect of any jurisdiction where the applicant has also applied for leniency or any other regulatory authority for which it has informed of the conduct.

\(^4\) The ASEAN Experts Group on Competition was established in August 2007 as a platform to look into competition policy and law issues in the Association of South East Asian Nations (ASEAN). The AEGC is an official body comprising representatives from the competition authorities and agencies responsible for competition policy and law in ASEAN Member States.

\(^5\) CCCS Chief Executive Toh Han Li, in the Singapore chapter of Global Competition Review’s *The Asia-Pacific Antitrust Review* 2015.
Our understanding of the CCCS’s current policy is that it would resist any discovery proceedings of documents in its possession, though this has not been tested in practice.

Of the 13 cartel infringement decisions issued by the CCCS to date, three involved international cartels.⁶ There has been, at least in one instance, a coordinated dawn raid conducted by the CCCS with other competition authorities in the case of international cartels.

On 22 June 2017, the CCCS concluded its first formalised cooperation agreement with a foreign competition authority by entering into a memorandum of cooperation with the Japan Fair Trade Commission. This was followed by the conclusion of a memorandum of understanding with Indonesia’s competition authority, the Commission for the Supervision of Business Competition, on 30 August 2018.⁷

The AEGC has also recently established the ASEAN Competition Enforcers’ Network (ACEN) to facilitate cooperation on competition cases in the ASEAN region and to serve as a platform to handle cross-border cases. The first meeting of the ACEN was held on 9 October 2018 on the sidelines of the 22nd AEGC Meeting, which was hosted by the CCCS from 8 to 10 October 2018. The aims of the ACEN are to enable mutual understanding of each other’s enforcement goals and objectives and to encourage information sharing between ASEAN competition authorities.⁸

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

The Section 34 Prohibition applies to agreements made outside Singapore, or where parties to the agreement are outside Singapore, so long as the agreement has the object or effect of preventing, restricting or distorting competition within Singapore.⁹ The CCCS recognises that where a single economic entity infringes competition law, liability for an infringement can be attributed to the single economic entity as a whole.¹⁰ In parent–subsidiary relationships, in which a parent company exerts decisive influence on a subsidiary company’s commercial conduct at the time of an infringement of Section 34 of the Competition Act, liability can be imputed to the parent company even if the parent does not participate directly in the infringement,¹¹ and the CCCS has found the parent entity and the legal entity to be jointly and severally liable for the infringement.¹²

The CCCS can issue directions to bring an infringement to an end, which includes modifying or terminating the relevant agreement for parties to cease the cartel conduct. Directions can also include requirements to report back periodically to the CCCS on certain matters, or even structural changes to an undertaking’s business. Directions may also

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⁶ See CCCS 700/002/11, Infringement of the Section 34 Prohibition in relation to the supply of ball and roller bearings, and CCCS 700/003/11, Infringement of the Section 34 Prohibition in relation to the provision of air freight forwarding services for shipments from Japan to Singapore.
be imposed on entities other than the infringing parties. For example, directions may be addressed to a parent company that, although not the actual instigator of the infringement, has a subsidiary that is the immediate party to the infringement.

The CCCS can apply to register a direction with a district court in accordance with the Rules of Court (Chapter 322, Rule 5). A district court shall have jurisdiction to enforce any direction, regardless of the monetary amount involved. Any person who fails to comply with a registered direction without reasonable excuse will be in contempt of court, where normal sanctions for contempt of court will apply (i.e., the court may impose a fine or imprisonment).

There are no specific industries that are exempt from cartel enforcement. The Minister for Trade and Industry, acting on a recommendation by the CCCS, may exempt, by order, categories of agreements from the Section 34 Prohibition. However, such agreements must contribute to improving production or distribution, or promoting technical or economic progress, to meet the criteria for a block exemption.

On 14 July 2006, the Minister for Trade and Industry issued the Competition (Block Exemption for Liner Shipping Agreements) Order, which exempted a category of liner shipping agreements from the Section 34 Prohibition until 31 December 2010. This was subsequently extended until 31 December 2020.

The Third Schedule to the Competition Act further sets out exclusions to the Section 34 Prohibition, including, but not limited to:

a an agreement made to comply with a legal requirement, which is any requirement imposed by or under any written law;
b specified activities within the supply of postal services, supply of public transport, cargo terminal operations, etc.;
c vertical agreements;
d agreements with net economic benefits; and
e agreements directly related and necessary to the implementation of mergers, including ancillary restrictions (e.g., non-compete clauses).

IV LENIENCY PROGRAMMES

The Competition Act does not contain express provisions in respect of a leniency policy. The details of the CCCS’s leniency programme are contained in the Leniency Guidelines, of which the latest version took effect on 1 December 2016. The CCCS’s leniency programme is available only for infringements of the Section 34 Prohibition.

Under the Competition Act, there is no personal liability for individuals (including an undertaking’s employees) for infringements of the Competition Act. However, there are general offences under the Competition Act for individuals, such as in relation to obstruction and the provision of false and misleading information, as set out in Section V of this chapter.

Where there is no conflict of interests, the counsel may represent and act on behalf of both the corporate entity and the individual.

i Total immunity from financial penalties

Full immunity from administrative penalties is available in Singapore. An applicant stands to benefit from total immunity from financial penalties if it is the first in line to provide the CCCS with evidence of the cartel activity before an investigation has commenced, provided
that the CCCS does not already have sufficient information to establish the existence of the alleged cartel activity, and the applicant has not initiated or coerced another undertaking to take part in the cartel activity.

All leniency applicants must satisfy the conditions set out below:

a  provide the CCCS immediately with all the information, documents and evidence available to it regarding the cartel activity. The information, documents and evidence must provide the CCCS with sufficient basis to commence an investigation;

b  grant an appropriate waiver of confidentiality to the CCCS in respect of any jurisdiction in which the applicant has also applied for leniency or any other regulatory authority that it has informed of the conduct;

c  unconditionally admit to the conduct for which leniency is sought and detail the extent to which this had an impact in Singapore by preventing, restricting or distorting competition within Singapore;

d  maintain continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation; and

e  refrain from further participation in the cartel activity to the CCCS (except as may be directed by the CCCS).

ii  Reduction of up to 100 per cent in the level of financial penalties

If an applicant does not qualify for total immunity because the CCCS has already commenced an investigation, it may still stand to benefit from a reduction in the financial penalty of up to 100 per cent if:

a  the applicant is still the first to provide the CCCS with evidence of the cartel activity;

b  the information is provided before the CCCS has sufficient information to issue a proposed infringement decision under Section 68(1) of the Competition Act;

c  the information adds significant value to the CCCS’s investigation;

d  the applicant has not initiated the cartel or coerced another undertaking to take part in the cartel activity; and

e  the applicant satisfies the general conditions for applicants set out in the Leniency Guidelines 2016.

iii  Reduction of up to 50 per cent in the level of financial penalties

If an applicant is not the first in, but provides useful evidence before the CCCS issues written notice under Section 68(1) of the Competition Act of its intention to make a decision that the Section 34 Prohibition has been infringed, or the applicant does not fulfil the criteria for total immunity or a reduction of up to 100 per cent of the financial penalties as it either initiated the cartel or has coerced other undertakings to take part in the cartel (but otherwise fulfils the general conditions for applicants as set out in the Leniency Guidelines 2016), it may still be granted a reduction of up to 50 per cent of the financial penalty.

Any reduction in the level of the financial penalty under these circumstances is discretionary and the CCCS will take into account (1) the stage at which the applicant came forward, (2) the evidence already in the CCCS’s possession and (3) the quality of the information provided.

iv  Marker system

The CCCS provides a marker system for ‘first-in’ leniency applications. If a first-in applicant is not able to provide the CCCS with all the evidence relating to the suspected infringement
available at the time of the application, the applicant may apply for a marker to secure its position in the leniency queue. The grant of a marker is discretionary. However, the granting of a marker is expected to be the norm rather than the exception.

In the Leniency Guidelines 2016, the CCCS now requires that an applicant is expected to define the market in which the cartel activity occurred and detail the impact of the conduct on the identified relevant markets in Singapore. Sufficient details of the cartel activity, including the parties to the cartel and the estimated duration of the cartel activity, must also be provided.

v Grant of conditional immunity or leniency
When the CCCS considers that the conditions for conditional immunity or leniency have been met, it will issue a letter to the applicant confirming the grant of conditional immunity or leniency. The letter will state the conditions and continuing obligations that the applicant has to meet to maintain its conditional immunity or leniency. Failure to abide by the conditions and obligations may lead to the CCCS revoking the grant of conditional immunity or leniency.

vi Leniency plus system
The CCCS has a ‘leniency plus’ programme to encourage cartel members cooperating with an investigation by the CCCS in one market (the first market) and to report their involvement (if any) in a completely separate cartel activity in another market (the second market).

vii Domestic submissions and domestic discovery
While information such as written submissions and supporting documents provided by any immunity or leniency applicant may also potentially be included in the CCCS’s inspection files to which defendants are granted access, it is understood that the CCCS does not grant access to files by third parties seeking damages.

There may be a possibility for a third-party claimant (pursuing a future claim against an undertaking or defendant based on rights of private action arising out of a CCCS infringement decision) to apply in the context of such civil proceedings for:

a discovery against one or more defendants to a CCCS infringement decision (that is, against the undertakings subject to an infringement decision by the CCCS, and who were granted access to inspection files by the CCCS) to require the defendants to furnish copies of documents taken or copied by these defendants from the CCCS’s inspection files; and

b third-party discovery against the CCCS to require the CCCS to disclose the documents in its inspection files, or any document withheld from the inspection files, though this has not been tested in practice.

To date, there have not been any claims in civil proceedings in Singapore courts under a private right of action by third parties arising from infringement decisions by the CCCS and, accordingly, the possibility of civil litigants applying for discovery against infringing undertakings or the CCCS (or both) remains untested.
V PENALTIES

Undertakings participating or that have participated in cartel activities are liable under Section 69 of the Competition Act to a financial penalty. Cartel activities are not criminal offences under the Competition Act.

A financial penalty not exceeding 10 per cent of the turnover of the business of an undertaking in Singapore for each year of infringement may be imposed for a maximum period of three years where there is an intentional or negligent infringement of the Section 34 Prohibition. The CCCS Guidelines on the Appropriate Amount to Penalty 2016 provide that the CCCS will calculate the financial penalty based on an undertaking's relevant turnover, which will be the turnover for the financial year preceding the date when an undertaking's participation in an infringement ends. The Guidelines also provide that the CCCS will adopt a six-step approach to determine the financial penalty amount, which will take into account factors such as adjustments for immunity, leniency reductions or fast-track procedure discounts.13

The CCCS's six-step methodology for setting the appropriate amount of the penalty is as follows.

a Step one: calculation of the base penalty, having regard to the seriousness of the infringement (expressed as a percentage rate) and the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographical markets affected by the infringement in the undertaking's last business year.

b Step two: adjustment for the duration of the infringement.

c Step three: adjustment for other relevant factors (e.g., deterrent value).

d Step four: adjustment for aggravating or mitigating factors.

e Step five: adjustment if the statutory maximum penalty under Section 69(4) of the Competition Act is exceeded.

f Step six: adjustment for immunity, leniency reductions or fast-track procedure discounts.

Under the Competition Act, there is no personal liability for individuals (including an undertaking's employees) for infringements of the Competition Act. However, individuals should be aware of the general offences under the Competition Act, which also apply to individuals and are punishable, on conviction, with a fine, imprisonment or both. They include:

a providing information that is false or misleading in a material particular knowingly or recklessly, either to the CCCS or to another person such as an employee or legal adviser, knowing that it will be used for the purpose of providing information to the CCCS;

b obstructing any agent of the CCCS by refusing to give access to, assaulting, hindering or delaying said agent;

c failing to comply with any requirement imposed under Sections 61A, 63, 64 and 65 of the Competition Act (which set out the CCCS's formal powers of investigation), including refusal to provide any required document or information, unless such compliance is reasonably not practicable or a reasonable excuse for failure to comply can be provided;

13 See CCCS, CCCS Guidelines, 'CCCS Guidelines on the Appropriate Amount to Penalty 2016'.

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intentionally or recklessly destroying or otherwise disposing of or falsifying or concealing a document of which production has been required under Sections 61A, 63, 64 and 65 of the Competition Act, or causing or permitting its destruction, disposal, falsification or concealment; and

e wilfully misstating or refusing, without lawful excuse, to give information or produce any document or copy thereof required by a CCCS officer or employee pursuant to Section 80(1) of the Competition Act or failing to comply with the lawful demand of a CCCS officer or employee in the discharge of his or her duties under the Competition Act.

VI ‘DAY ONE’ RESPONSE

The CCCS has the power to launch a surprise investigation on suspected anticompetitive practices and enter any premises in connection with such an investigation.

Under the Competition Act, the CCCS has powers to:

a require the production of specified documents or specified information;

b enter premises without a warrant;

c enter and search premises with a warrant; and

d orally examine any individual on the premises who appears to be acquainted with the facts and circumstances relevant to the investigation that is being carried out and require the individual to answer any question relating to the investigation.

The CCCS has the powers to raid domestic premises if they are used in connection with the affairs of an undertaking or documents relating to the affairs of an undertaking are kept there.

The investigating officer is not entitled to (1) use force against any person, (2) examine or copy documents that are not relevant to the purpose of the dawn raid or (3) examine or copy documents that are marked as legally privileged.

Compliance with the dawn raid

During a dawn raid, the in-house counsel department should send out an email informing employees of the raid and instructing employees to cooperate with the investigating officers.

The in-house counsel department should also emphasise to employees that there must be no deletion, destruction or concealment of documents or data and that employees should not inform any third parties about the dawn raid.

See Section V for offences that are punishable with a fine not exceeding S$10,000 or imprisonment for a term not exceeding 12 months, or both.

14 Refers to any officer of the CCCS who is authorised to exercise the power to enter premises for inspection without a warrant under Section 64(1) of the Competition Act.
VII PRIVATE ENFORCEMENT

The right of private action for infringements of the prohibitions in the Competition Act is enshrined in the Competition Act itself. Unlike jurisdictions such as the United States and Australia, the right of private action in Singapore exists by way of a follow-on claim, which precludes independent stand-alone action by claimants.

The quantum of damages that an individual aggrieved party seeks would affect the economic incentive to sue if the expected benefits are weighed against the costs of commencing a civil lawsuit. A collective redress mechanism thus seeks to address the misalignment of incentives by enabling aggrieved third parties to join claims with others to pursue damages for harm suffered through competition law infringements, if the cost of acting individually would have otherwise acted as a deterrent.

The class action regime does not exist in Singapore and the only process available for collective redress is through a representative action. The procedure for representative action is governed by Order 15, Rule 12 of the Rules of Court, which enables a representative party to bring a claim on behalf of all others having the ‘same interest’ in the proceedings.

In the context of loss arising from a competition law violation, the calculation of loss or damage suffered often involves a complex exercise in adducing economic evidence. The amount of quantitative loss largely depends on factors such as the price elasticity of the demand and the information available on observed movements in prices. As precise quantification is extremely difficult, this leaves an estimation of damages as the next best alternative.

Where economic evidence is crucial to proving the quantum of damages, evidence law in Singapore admits the opinion of an expert witness to assist the court in reaching a proper conclusion on a matter that requires the application of a special skill or knowledge.

Under Singapore’s civil procedure rules, Order 40A, Rule 6 of the Rules of Court provides for a concurrent expert evidence procedure that allows, with the mutual consent of the parties, for expert witnesses to appear as a panel, to give their views on other panel members’ evidence, to question other panel members and to be cross-examined as part of a panel.

Since the right of private action in Singapore exists by way of a follow-on claim, an admission of liability, a guilty verdict or other administrative findings during the CCCS’s investigation and appeal stages may encourage private action.

With limited exceptions, Singapore law currently restricts the funding of proceedings to the parties involved. In 2015, the Singapore High Court confirmed that litigation funding may, in the context of insolvency and under the appropriate circumstances, be permitted in Singapore. To date, there have been no precedents for follow-on claims or any private litigation funding in the context of antitrust in Singapore.

16 Rules of Court (Rev. Ed. 2014), Section 80 of the Supreme Court of Judicature Act, Chapter 322 of Singapore (Rules of Court).
17 This is illustrated by the Commission Staff Working Document, ‘Practical Guide on Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union’, C (2013) 3440.
18 Section 47 of the Evidence Act, Chapter 97 of Singapore.
**Limitation period**

A private claim for damages arising from an infringement of the Competition Act must be brought within two years of the time that the infringement decision or the determination of any such appeal, whichever is later.\(^{19}\)

**VIII CURRENT DEVELOPMENTS**

In 2018, the AEGC, under the CCCS’s chairmanship, initiated two studies looking into the state of competition in ASEAN. The first study will review the impact of policies and regulations on competition in the logistics sector in ASEAN, and the second study will assess the impact of state-owned enterprises on competition in the logistics sector in ASEAN.\(^{20}\) The decision to focus on the logistics sector was driven by its importance in terms of catalysing development and connectivity among the ASEAN Member States. It remains to be seen if the findings of these studies will have an impact on the CCCS’s enforcement policies and priorities in relation to the logistics sector in Singapore.

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19 See Section 86(6) of the Competition Act; Paragraph 5.3 of the ‘CCCS Guidelines on Enforcement 2016’.
I ENFORCEMENT POLICIES AND GUIDANCE

Cartel behaviour in South Africa is regulated by the South African Competition Act 89 of 1998 as amended (the Act), more particularly Section 4, which regulates prohibited restrictive horizontal practices. Section 4(1)(b), which governs what is known as cartel conduct, provides that the practices of price-fixing (whether it be in relation to a purchase or a selling price or a trading condition), market division (by allocating customers, suppliers, territories or specific types of goods or services) and collusive tendering are prohibited outright. Parties caught by this Section cannot raise any arguments or evidence in justification of the practice, although they may be able to argue that their practice should not be characterised as one that falls within the scope of this Section of the Act. A contravention of Section 4(1)(b) attracts a penalty for a first-time offence of up to 10 per cent of the offending entity’s turnover, including exports from South Africa. Pursuant to an amendment in 2016, individuals with management authority can now face criminal prosecution if they have engaged in or knowingly acquiesced to cartel conduct, with the prospect of a fine of up to 500,000 rand or imprisonment for a period of up to 10 years, or both a fine and imprisonment. A Competition Amendment Bill (the Amendment Bill) was introduced in December 2017 and, having been passed by Parliament, is expected to be signed into law by the President soon. The Amendment Bill aims, *inter alia*, to strengthen the penalty regime. It will do away with the ‘yellow card’ for less egregious offences and will significantly increase maximum penalties for contravention of the Act from 10 per cent to 25 per cent of a firm’s annual turnover should the said conduct constitute a repeat offence.

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2 This is in contrast with Section 4(1)(a), which governs restrictive horizontal practices in general and provides that ‘an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect. It can be seen that such conduct is assessed on a ‘rule of reason’ basis.

3 See the decision of the Supreme Court of Appeal in *American Natural Soda Ash Corporation and Another v. Competition Commission of South Africa* [2005] (Case No. 554/03) 1 CPLR.

4 Section 73A of the Act, introduced in May 2016.

5 Competition Amendment Bill, 2018.

6 Clause 33 of the Amendment Bill amending Section 59(2A) of the Act.
The Act establishes a hierarchy for the enforcement of competition law. The Competition Commission (the Commission) is the primary enforcement agency and is charged with the responsibility of investigating and prosecuting cartel behaviour. The agency has extensive investigative powers, including the right to summons witnesses, require the delivery of documents, and the power of search and seizure (commonly known as dawn raids). Once investigations are complete, the Commission can refer matters for adjudication to the Competition Tribunal (the Tribunal). The Tribunal is empowered to impose penalties on parties found to have contravened the provisions of the Act. These decisions may be taken on appeal to the Competition Appeal Court (CAC), which is a statutory court with the status of a High Court.

The competition authorities have stated on numerous occasions that cartel conduct is considered particularly egregious and needs to be severely punished. It is against this background that criminalisation has been introduced, although there is a concern that this has a chilling effect on whistle-blowers, who, in the past, have been a valuable aid to the Commission in its uncovering and prosecution of cartels. The Commission cannot offer immunity from prosecution to whistle-blowers, as this falls within the powers of the National Prosecuting Authority (NPA). The Commission can make a recommendation to the NPA that an individual is ‘deserving of leniency’, but the NPA is not bound by this, and therefore whistle-blowers may well be nervous about coming forward.

In addition, parties should beware of falling foul of the provisions of the Prevention and Combating of Corrupt Activities Act 12 of 2004. Under the terms of this Act, it is an offence to offer to, or accept from, any other person any gratification, which is broadly defined, and this legislation could catch parties to tenders who offer compensation to other tenderers in exchange for submitting a cover price, for example. This would fall within the powers of the NPA to prosecute through the criminal courts.

II COOPERATION WITH OTHER JURISDICTIONS

Both the Commission and the Tribunal regularly interact and collaborate with international competition enforcement agencies and competition regulatory authorities in other countries. South Africa was one of the founding member countries of the International Competition Network and remains an active participant. The Commission is also one of the steering members of the African Competition Forum, with Kenya, Senegal, Gambia, Tanzania, Morocco, Egypt and Zambia.

The Act clearly envisages cooperation between the Commission and other foreign competition agencies, since Section 82(4) of the Act allows the President of South Africa to assign to the Commission ‘any duty of the Republic, in terms of an international agreement relating to the purpose of this Act, to exchange information with a similar foreign agency’. The Commission has signed a number of memoranda of understanding (MOUs) with other competition authorities, most recently with Swaziland (eSwatini), following those of Kenya,
Russia, Mauritius, Brazil, India, China and the European Union in 2016. These MOUs provide, *inter alia*, for information sharing, joint research, investigations, enforcement and prosecution. South Africa further boasts strong bilateral relationships with the regional authority Common Market for Eastern and Southern Africa.

The Tribunal and the Commission have benefited from a number of formal and informal relationships with various international institutions and agencies, including the European Commission, the US Department of Justice and the Federal Trade Commission. They interact regularly, and cooperation with other regulators has extended in the past to conducting a dawn raid coordinated with its foreign counterparts as part of a cross-border cartel investigation.

### III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

#### i Extraterritoriality

The Act applies to ‘all economic activity within, or having an effect within the Republic’. The South African competition authorities may therefore prosecute parties engaging in cartel conduct occurring outside South Africa, if the conduct can be said to have an effect within South Africa. Indeed, the Commission has conducted and recently referred to the Tribunal an investigation into alleged cartel conduct relating to foreign exchange trading, where the trading involved the South African rand, despite the fact that the trading did not take place in South Africa. Jurisdiction is one of the issues raised by the respondents, but the case has not yet been heard and, therefore, we have no guidance in this regard as yet.

#### ii Parent company liability

A guideline issued by the Commission provides that it may impute liability for payment of the final administrative penalty to a holding company (parent company) if its subsidiary has been found to have contravened the Act, and the penalty will be calculated based on the turnover of the parent company rather than being limited to that of the offending subsidiary. In coming to such a decision, the Commission will consider, *inter alia*, whether the subsidiary is wholly owned, whether the parent company had direct control or material influence over the subsidiary, whether the parent company had knowledge of the subsidiary’s conduct, and whether the parent company derived substantial benefit from the activities of the subsidiary. The Amendment Bill specifically caters for parent company liability through the introduction of Section 59(3A), which enables the Tribunal to increase an administrative penalty by including the turnover of any firm that controls the contravening firm, if the controlling firm knew, or should reasonably have known, that the contravening firm was engaging

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8 Competition Commission Media Release: 5 October 2016.
10 Competition Commission Media Release: 1 December 2016.
13 Act 89 of 1998, Section 3.
iii Affirmative defences and exemptions

The only conduct that is specifically exempted from the provisions of the Act is collective bargaining as contemplated in Section 23 of the Constitution and in the Labour Relations Act 66 of 1995, and concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.16 Where conduct relates to an industry that is subject to specific sector legislation, there will be concurrent jurisdiction between the competition authorities and those regulating the sector in question.

There are no industry-specific defences or exemptions. The Act recognises that, in certain instances, anticompetitive conduct may be necessitated to achieve broader industrial and macroeconomic goals, and thus makes provision for an exemption mechanism.17 This Section allows parties to apply for exemption from prosecution in relation to what would otherwise be prohibited conduct, provided that the conduct is needed to attain, and meets, the following objectives: (1) it maintains or promotes exports; (2) it promotes the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive (note that there are proposed amendments to this provision);18 (3) it changes the productive capacity necessary to stop decline in an industry; or (4) it is needed to achieve the economic stability of an industry designated as such by the Minister of Economic Development, after he or she has consulted the relevant minister responsible for that industry. The grounds for exemption are extremely narrow, but the Amendment Bill seeks to enhance these somewhat in relation to the government’s goals to promote growth and transform the economy. It may also be possible to obtain exemptions if the conduct contributes to ‘competitiveness and efficiency gains that promote employment or industrial expansion’. It is also envisaged that the minister may issue regulations exempting a category of agreements or practices.19 While the process is time-consuming, the proposed amendments seek to introduce a requirement that the Commission either grant or refuse the exemption within one year of receipt of an application. Moreover, although it has been extensively used in some sectors, for example by airlines in relation to codeshare arrangements, of late the Commission has refused exemptions that had previously been granted. It is highly unlikely that a hard-core cartel agreement could qualify for exemption.

15 Clause 33 of the Amendment Bill amending Section 59(3A) of the Act.
16 See footnote 10.
17 Act 89 of 1998, Section 10.
18 An Amendment Bill has been published, in terms of which this wording will be amended to promote the ‘effective entry into, participation in and expansion within a market’ by such businesses. See Government Notice No. 1345 in Government Gazette No. 41294 of 1 December 2017.
19 Clause 7 of the Amendment Bill amending Section 10 of the Act.
IV LENIENCY PROGRAMMES

i Overview of the Leniency Programme

The Commission has adopted a Corporate Leniency Policy (CLP)\(^\text{20}\) that outlines a process through which the Commission will grant a cartel member, who is first to approach the Commission to confess to cartel conduct, immunity from prosecution for participation in cartel activity, provided the cartel member fulfils specific requirements and conditions. The CLP was introduced in 2004 but only gained traction when it was amended in 2008 to allow the ringleader of a cartel to apply for leniency.

Immunity granted by the Commission in this context means that the successful applicant would not be prosecuted before the Tribunal for its involvement in the cartel activity, and the Commission would not seek to have any fines imposed on the successful applicant. However, a successful immunity applicant is not shielded from any subsequent civil liability in relation to follow-on damages cases.

The CLP grants immunity only to corporations and is not applicable in respect of individuals. Section 73A thereof introduces the concept of individual leniency for persons who provide information or otherwise cooperate with the Commission’s investigation into cartel conduct. In terms of Section 73A, Paragraphs (4) and (5), the Commission may not seek the prosecution of, and may make submissions to the NPA in support of leniency for, any person certified by the Commission as being ‘deserving of leniency’.

Only a firm that is ‘first to the door’ to confess and provide information in accordance with the CLP to the Commission in respect of cartel activity would qualify for immunity under the CLP. Granting of immunity under the CLP is not based on the fact that the applicant is viewed as less of a cartelist than the other cartel members, but on the fact that the applicant is the first to approach the Commission with information and evidence regarding the cartel. The successful applicant receives conditional immunity, which becomes full immunity once the case is finalised and the leniency applicant has complied with all its obligations to qualify for immunity.

Only the successful applicant obtains immunity – there is no partial leniency programme for parties who seek leniency but are not first to the door. They may negotiate a settlement with the Commission that might involve reduction of a fine, depending on factors such as their level of cooperation with the Commission, the fact that they sought to settle early on rather than delaying the process, and the level of proactive disclosure of information to the Commission.

In terms of the Amendment Bill, the Commission is tasked with developing and publishing an updated policy on leniency that will regulate the types of leniency that may be granted, the criteria and procedures necessary in applying for leniency and any possible conditions that may be attached pursuant to the approval of leniency.\(^\text{21}\) The present leniency policy is to remain in effect until a new policy has been published.\(^\text{22}\)

In the Commission’s 2017–2018 Annual Report,\(^\text{23}\) the Commission notes that 10 applications for CLP were assessed during the course of the year, of which eight were


\(^{21}\) Clause 30 of the Amendment Bill amending Section 49E of the Act.

\(^{22}\) Clause 43 of the Amendment Bill amending Section 83 of the Act.

carried over from the previous year. If one compares these to the statistics contained in the Commission’s 2016–2017 Annual Report, it would seem that the number of applications for immunity has decreased since the introduction of criminal penalties for individuals engaged in cartel conduct.

ii Markers

In terms of Paragraph 12 of the CLP, a prospective leniency applicant may apply for a marker prior to making an application for immunity in terms of the CLP. The CLP also specifies that the application must be made in writing, and must make clear that a marker is being requested (providing the applicant’s name and address, the alleged cartel conduct and its participants), and must provide justification of the need for a marker. Thereafter the Commission may, at its discretion, grant a marker to protect the applicant’s place in the queue. In granting the marker, the Commission will determine on a case-by-case basis the amounts of time within which the applicant must provide the necessary information, evidence and documents needed to meet the conditions and requirements set out in the CLP. In practice, one may make an initial oral approach to the Commission on a no-names basis to ascertain whether a marker is available. Although the formal application must be in writing, the supporting information may be provided orally to cater for concerns that the information will become accessible to parties, such as claimants, in follow-on damages claims.

iii Duties of cooperation

In terms of Paragraph 10 of the CLP, an applicant for immunity must provide complete and truthful disclosure of all information relating to any cartel activity, and must be the first to provide sufficient information to enable the Commission to institute proceedings in relation to that cartel activity. The applicant must cooperate fully with the Commission until its investigations are finalised and, indeed, until the proceedings in the Tribunal or subsequent court have been completed. The applicant must immediately stop the cartel activity, unless directed otherwise by the Commission, and must not alert any other parties to the fact that it has applied for leniency. The applicant must also not destroy, falsify or conceal information and must not make misrepresentations regarding material facts or act dishonestly.

iv Access of private litigants to leniency materials

The Commission treats information and documents communicated to it under the CLP with caution. It has been confirmed that information provided by the applicant to the Commission is subject to litigation privilege. However, the Commission has waived such privilege in the past, albeit inadvertently. In the case of *Competition Commission v. ArcelorMittal South Africa Ltd* 24 parties prosecuted by the Commission pursuant to a leniency application by Scaw South Africa (Pty) Ltd sought access to documents provided to the Commission by Scaw. The Commission argued that the information was protected by legal privilege. The Supreme Court of Appeal (SCA) confirmed that the information did qualify for legal privilege but held that by referring to information from the application in its referral document, the Commission had waived privilege. In the case of *Continental Tyres South Africa (Pty) Ltd*
and Goodyear South Africa (Pty) Ltd v. Competition Commission and others;25 Continental Tyres and Goodyear appealed from the Tribunal to the CAC seeking the production of certain correspondence between the Commission and the complainant, transcripts of certain interrogations conducted by the Commission in the course of its investigation and certain correspondence between the Commission and the leniency applicant.26 The Commission resisted production on the basis of litigation privilege, but the CAC held that they had not established privilege, having failed to set out the necessary facts to support this contention. The Commission was accordingly ordered to produce the documents. Information may still be protected if it is confidential. Any party challenging confidentiality must make an application to the Tribunal. Confidential information is defined in the Act as ‘trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others’. Note that, pursuant to a recent judgment27 allowing a litigant access to the Commission’s records in terms of the Promotion of Access to Information Act 2000, there are proposed amendments to the Commission’s Rules enabling the Commission to resist production of its record at too early a stage.

V PENALTIES

Cartel conduct is per se prohibited and is considered most egregious, attracting the most prosecutions and fines. Although the Commission prosecutes cases against offending parties, the penalty is imposed by the Tribunal after an adjudication process. Firms found guilty of cartel conduct face an administrative penalty of up to 10 per cent of the company’s annual turnover in South Africa, including its exports from South Africa, during the company’s preceding financial year. As mentioned above, the Amendment Bill will significantly increase the maximum penalties for contravention of the Act from 10 per cent to 25 per cent of a firm’s annual turnover for repeat offenders. In addition, as mentioned above, pursuant to a 2016 amendment, individuals face criminal prosecution and may be liable for a fine not exceeding 500,000 rand or imprisonment not exceeding 10 years, or both.28 Furthermore, convicted individuals will be barred from holding directorships in terms of the Companies Act, as amended.29

It is possible to reach a settlement with the Commission rather than defending a case to finality, by concluding a consent order with the Commission that is subsequently made an order of the Tribunal. Importantly, a consent order does not stop a complainant from pursuing a civil claim for damages against a respondent unless the consent order already includes an award of damages to the respondent.

26 Continental sought only the transcripts, whereas Goodyear sought the production of all three classes of documents.
28 Sections 73A and 74 of the Competition Act.
29 Act 71 of 2008.
Factors taken into account when setting the penalty

In terms of the Act, the following factors must be taken into account by the Tribunal when setting the penalty:

- the nature, duration, gravity and extent of contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the respondent;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the respondent has cooperated with the Commission and the Tribunal; and
- whether the respondent has previously been found in contravention of the Competition Act.30

The Amendment Bill broadens the factor described in point (d) by including an evaluation on whether, and to what extent, the contravention has affected small and medium-sized businesses and firms owned or controlled by historically disadvantaged persons. The Amendment Bill further seeks to introduce an additional eighth factor when setting a penalty, namely whether the said conduct has previously been found to be a contravention of the Act or is substantially the same as conduct referred to in the Guidelines issued by the Commission on the Commission’s policy approach to matters within its jurisdiction.31

In addition, the Commission has published guidelines (the Penalty Guidelines)32 setting out the general methodology that it will follow in determining administrative penalties for the purposes of concluding consent orders and settlement agreements and recommending an administrative penalty in a complaint referral before the Tribunal.33 The Commission recognises that the determination of administrative penalties is not a precise science and, therefore, the Penalty Guidelines do not prevent the Commission from exercising its discretion case by case. Moreover, the Tribunal is not bound by the Commission’s approach and will draw its own conclusions, although it should be noted that, in drawing up its Penalty Guidelines, past Tribunal cases in which its methodology was explained were taken into account.

In terms of the Penalty Guidelines, the Commission will apply the following six-step methodology when determining an administrative penalty.

- Step 1: Determination of the affected turnover in the base year.
- Step 2: Calculation of the base amount, being that proportion of the affected turnover relied upon.
- Step 3: Multiplying the amount obtained in step 2 by the duration of the contravention.
- Step 4: Rounding off the figure obtained in step 3 if it exceeds the cap provided for by Section 59(2) of the Act.
- Step 5: Considering factors that might mitigate or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it.
- Step 6: Rounding off this amount if it exceeds the cap provided for in Section 59(2) of the Act.

30 Act 89 of 1998, Section 59(3).
31 Clause 33 of the Amendment Bill amending Section 59(3) of the Act.
33 Government Gazette Notice 323 of 2015.
Where appropriate, the amount calculated in terms of this methodology may be further adjusted either by application of settlement discounts or, in exceptional circumstances, a firm’s inability to pay.

In August 2016, the Tribunal imposed the largest penalty to date for conduct including cartel conduct, when it confirmed a settlement with ArcelorMittal that included a 1.5 billion rand penalty.\(^{34}\) Interestingly, in addition to the penalty, the final settlement with ArcelorMittal included a price cap on flat steel products, avoidance of retrenchments and 4.6 billion rand in new investments in capital expenditure to improve its dynamic competitiveness.\(^{35}\) This case is a clear indication of the Commission’s and the Tribunal’s willingness to depart from purely monetary penalties and to embrace more creative remedies, particularly where public interest concerns are applicable.

In the same vein, when in March 2016 Sime Darby Hudson Knight (Pty) Ltd concluded a consent order with the Commission in relation to alleged cartel conduct, the settlement included the following behavioural remedies, in addition to a penalty of 35 million rand. Sime Darby undertook to invest funds and build and commission a new packaging and warehousing facility to the tune of approximately 135 million rand, and to use the services of a Black Economic Empowerment distributor for some of its distribution requirements and assist it with becoming a viable business.

VI ‘DAY ONE’ RESPONSE

The Commission has extensive powers to investigate cartel behaviour.\(^{36}\) These powers include the right to conduct unannounced visits and to carry out search and seizure operations (dawn raids) with, or in limited circumstances without, a warrant, at the company’s business premises (and at private dwellings, to the extent that company documents or business operations are carried on there). The Commission may also summon individuals who it believes possess information or have documents under their control that could assist the Commission in its investigation.

The Commission may seek a warrant if it has reasonable grounds to believe that a prohibited practice has taken place, is currently taking place or is likely to take place, or if anything connected to an investigation is in the possession or control of a person at, specified premises. Unless extenuating circumstances exist, dawn raids may only be conducted during the day, and they are usually commenced in the early morning.

Dawn raids are also subject to, and must be executed in terms of, the Constitution, particularly insofar as it provides for a person’s right to dignity, freedom, security and privacy. The Act also upholds the constitutionally enshrined right against self-incrimination and no individual is required to answer any question put to him or her by an investigator that may be self-incriminating. However, it is an offence to knowingly provide false or misleading information. A firm that is the subject of a dawn raid is entitled to ask for its legal representatives to be present, and the Commission officials will often be willing to wait for a short period while the firm’s legal advisers are alerted and travel to the firm’s premises.

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36 Act 89 of 1998, in particular Sections 46 to 49.
One should inspect the warrant to ensure that all details on it warrant, such as the address, are correct and that it has not expired. Investigators are required to provide proof of identification, which should also be checked. They are authorised to search the premises and any person on the premises who is believed on reasonable grounds to be in possession of an article or document that has a bearing on the investigation; to examine, request information about, and take extracts from or make copies of any article or document on the premises having a bearing on the investigation; and to use any computer system on the premises, or require the assistance of any person on the premises to use that computer system, to search any data, reproduce any record and seize any output from that system. They can also attach and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.

It is important to ensure that each investigator has a ‘shadow’ to accompany him or her and record what they are reviewing and what they have seen, as well as what they have expressed an interest in. It is essential to put procedures in place in relation to privileged documents, including an agreed methodology to deal with documents where the investigators dispute that privilege exists. It is also vital to keep a complete copy of all documents copied or removed by the Commission, as well as a record of documents viewed by investigators. One should review these at the earliest opportunity to determine whether the Commission has a sustainable case to prosecute and, if necessary, to decide whether to apply for immunity.

Dawn raids have been used extensively in recent years as a tool to progress cartel investigations, with raids having been conducted in diverse industries, including furniture removal, glass, meat supply, fire control and protective systems, and fresh produce, although the Commission recently encountered a setback in the Pietermaritzburg High Court, where the court set aside a search warrant on the basis that the Commission had failed to make out a case for the issuing of that warrant, and ordered the Commission to return all materials seized from the relevant premises, and all copies or recording of those materials.37

VII PRIVATE ENFORCEMENT

In terms of Section 65 of the Act, any person who suffers loss or damage as a result of cartel conduct may bring a claim for civil damages. In order for such a claim to be brought, the aggrieved party is required to obtain a certificate issued by either the Tribunal or the CAC confirming that the conduct in question constitutes a contravention of the Act. Such a certificate serves as conclusive proof of contravention of the Act and is binding on civil courts. South Africa has only recently seen its first successful prosecutions of civil damages claims arising out of anticompetitive practices. In August 2016, Nationwide Airways relied on findings of abuse of dominance by the Tribunal and the CAC against South African Airways (SAA) to claim civil damages against SAA, its competitor, for loss of profits occasioned by SAA’s anticompetitive practices.38 In this instance, the award for civil damages amounted to 104,625 million rand; however, there is no upper limit on such awards provided that a link between the harm occasioned and the amount of damages sought is proven. Subsequently, on 15 February 2017, and based on the same anticompetitive conduct by SAA, Comair sought compensation for the profits it lost during the infringement period and for profits...
foregone after termination of the infringement. Comair was awarded damages in the amount of 544 million rand, plus interest on the amount at 15.5 per cent. The total damages plus interest in this case amounted to approximately 1.16 billion rand.

VIII CURRENT DEVELOPMENTS

A recent development is the introduction of the Amendment Bill, which is designed to encourage a greater spread of ownership in the South African economy. The Amendment Bill was published for public comment on 1 December 2017 and, after a period of public comment, it was tabled in the National Assembly in July 2018, where it was passed in October 2018. It has since been passed by the National Council of Provinces and has been sent to the President for assent. It is thus at the end of the legislative process, as mentioned above.

The Amendment Bill seeks among other things to address the issue of economic concentration and to drive transformation of the South African economy, and to strengthen the provisions of the Act relating to prohibited practices. The Amendment Bill introduces extensive changes to the law, including the provisions in relation to market enquiries, abuse of dominance and mergers, not least relating to foreign acquisitions that might have an effect on national security.

With reference to cartels, the Amendment Bill proposes an amendment to Section 4 of the Act (Section 2 of the Bill) to prohibited market division, among other things, ‘by allocating market shares, customers, territories’. The background note explains that this amendment seeks to reflect ‘the factual position that collusive agreements in concentrated markets are achieved and monitored through the allocation of market shares between cartel members. This amendment will enhance the prohibition of cartel activity in concentrated markets, which, in turn, creates opportunities for entry into and expansion in these markets. This will benefit small businesses . . . and firms controlled or owned by historically disadvantaged persons by presenting them with opportunities for entry into the market, with a deconcentrating effect’.

Whereas it was previously envisaged that the Commission should issue guidelines regarding the application of Section 4 of the Act, inter alia, the Amendment Bill now requires the Minister to provide regulations in this regard. This provision is likely to face legal challenges.

The Commission is also in the process of considering various draft guidelines on the exchange of information between competitors under the Competition Act to provide clear guidance on what constitutes acceptable and unacceptable exchanges of information. These guidelines also provide for the general approach to be followed by the Commission in determining whether their exchanges amount to cartel conduct. Perhaps most notably, the guidelines in their current form create the general rule that firms expressing their intentions regarding their future conduct, or what they expect regarding competitors’ future conduct, is anticompetitive as it facilitates the reaching of collusive understandings among firms. The Commission is presently considering public submissions.

ENFORCEMENT POLICIES AND GUIDANCE

The legislation regulating cartel conduct in Spain is the Competition Act. The Defence of Competition Regulation implements specific sections of the Competition Act, including, inter alia, procedural questions related to the leniency programme. Furthermore, Spanish competition authorities are entitled to apply Article 101 of the Treaty on the Functioning of the European Union (TFEU) in cases in which restrictive practices potentially affect trade between EU Member States.

Competition rules in Spain are enforced by the National Markets and Competition Commission (CNMC). Certain regions also have authority to enforce the Competition Act in their respective jurisdictions.

Article 1 of the Competition Act establishes a general prohibition against any kind of agreement, decision or concerted practice that has as its object, or that may produce, anticompetitive effects in the market. The Competition Act refers explicitly to price-fixing, allocation of clients and market sharing as examples of restrictive practices. Such agreements, decisions or concerted practices may nonetheless benefit from an exemption if they improve the production or distribution of goods or promote technical or economic progress, subject to specific requirements. Furthermore, the prohibitions under Article 1 of the Competition Act do not apply to agreements resulting from the application of a law.

1 Alfonso Gutiérrez is a partner and Ana Raquel Lapresta is an associate at Uría Menéndez.
3 Royal Decree 261/2008 of 22 February, approving the Defence of Competition Regulation.
4 Under Article 3 of Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of Articles 81 and 82 of the EC Treaty (currently Articles 101 and 102 TFEU).
5 Law 3/2013 provides for the creation of a single regulatory body in Spain, combining the functions of the former National Competition Commission (CNC) and the regulators of the energy, telecommunications, media, post, railway transport, air transport and gambling sectors.
6 Law 1/2002 of 21 February establishes the principles governing the allocation of antitrust authority between central and regional authorities. In particular, regional antitrust authorities may only exercise their enforcement powers in relation to infringements whose effects are limited to its specific jurisdiction.
7 These requirements are established in Article 1(3) of the Competition Act, specifically: they allow consumers a fair share of its benefits; they do not impose the concerned restrictions on the undertakings that are not indispensable to achieve 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. Agreements falling within the scope of a block exemption regulation approved by the European Commission are also exempted under Spanish law.
8 Article 4 of the Competition Act.
Agreements falling under the scope of Article 1 of the Competition Act that do not benefit from an exemption are illegal and void.

The Competition Act establishes the definition of a cartel as ‘any agreement or concerted practice between two or more competitors which aim to coordinate or influence competitive behaviour in terms of prices, quantities, allocation of customers or markets and in general any other practice against competitors’. The former National Competition Commission (CNC) considered cartels as mere exchanges of sensitive commercial information between competitors.

The CNMC has declared the ‘fight against cartels to be its number one priority in competition enforcement’. Since the adoption of the current Competition Act in 2007, more than 60 cartels have been discovered and sanctioned in Spain, with total fines above €1 billion. In 2018, the CNMC issued four decisions sanctioning cartels. The CNMC has intensified its efforts in the detection of big-rigging conduct by means of the recent creation of an intelligence unit dedicated to identifying indicia of bid-rigging conduct based on the analysis of the data regarding the offers submitted in public tenders.

Spain’s leniency programme was introduced in February 2008. Note that leniency is only available to practices falling within the scope of the definition of a ‘cartel’. The leniency programme has been applied in 23 cases since its entry into force in Spain in 2008.

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9 Fourth Additional Provision, recently amended by Royal Decree-Law 9/2017 of 26 May (RDL 9/2017), which transposes into Spanish law the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union (EU Damages Directive). RDL 9/2017 has eliminated the secrecy element previously required and broadened the practices included in this definition in line with the approach adopted at EU level.


11 See the press release published by the CNMC on 24 October 2017 regarding the conference about the 10 years of the adoption of the Spanish Competition Act.

12 CNMC decisions of 1 August 2018 in Case S/DC/565/15, IT Tenders; 19 July 2018 in Case S/DC/569/15, Recycled batteries; 7 May 2018 in Case S/DC/584/16, Media agencies; and 9 March 2018 in Case S/DC/578/16, Courier and packaging.

Furthermore, on 26 May 2017, the Spanish government enacted RDL 9/2017 implementing the EU Damages Directive. RDL 9/2017 introduces important amendments aimed at incentivising claimants to bring damages actions for antitrust infringements in Spain.

II COOPERATION WITH OTHER JURISDICTIONS

The CNMC cooperates with the European Commission and other national EU competition authorities throughout the European Competition Network (ECN).

The ECN was created as a forum for discussion and cooperation between European competition authorities in cases involving the application of Articles 101 and 102 of the TFEU. The ECN aims to ensure the efficient division of tasks and the effective and consistent application of EU competition rules. In particular, the ECN competition authorities cooperate by:

- the mutual exchange of information on new cases and expected enforcement decisions;
- coordinating investigations where necessary;
- mutual assistance on investigations;
- exchanging evidence and other information; and
- discussing issues of common interest.14

In November 2012, the ECN published a revised model leniency programme setting out the treatment for leniency applicants in all ECN jurisdictions, including Spain. It also includes a uniform type of short-form application that can be used by leniency applicants in cases of multiple leniency filings in different ECN jurisdictions to ensure the marker if an application of immunity was filed with the European Commission.

International cooperation with authorities in other jurisdictions is usually implemented through agreements executed by the European Commission. In addition, on 6 November 2017, the CNMC entered into a memorandum of understanding with the Ministry of Commerce of the People's Republic of China.

Since Spanish regulations do not provide for criminal sanctions for competition infringements,15 Spanish judges will be unlikely to accede to extradition requests from foreign jurisdictions.

Although RDL 9/2017 facilitates claimants’ access to relevant documents before substantiating the claim, this new mechanism should not be understood as creating a discovery system similar to that in Anglo-Saxon systems. Thus, no mechanisms for extraterritorial discovery are available.

14 The basic foundations of the functioning of the ECN are laid out in the Commission Notice on cooperation within the Network of Competition Authorities and the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities.

15 See footnote 30.
III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

No special rules exist regarding extraterritoriality. Spanish competition rules apply to actions whose object, result or potential result is the prevention, restriction or distortion of competition in all or part of the national market. The nationality of the undertaking is immaterial.

Regulation (EC) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 1215/2012) provides that persons domiciled in a Member State must, as a rule, be sued in the courts of that Member State. Nevertheless, it is relevant to take into account that when there are several defendants, a person may also be sued in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings in different Member States. This provision may be applicable in cartel cases in which the infringers may have their domicile in different Member States, allowing the claimant to initiate actions against several defendants in Spain if any of them is domiciled there.

Moreover, Article 7.2 of Regulation 1215/2012 sets forth an exception to that general rule in matters relating to tort, allowing the claimant to sue a person domiciled in one Member State in the courts of another Member State for the place where the harmful event occurred. The case law of the European Courts has clarified that victims of cartel infringements have the alternative option of bringing an action for damages against several companies that have participated in the infringement, either before the courts of the place where the cartel itself was concluded, or one specific agreement that implied the existence of the cartel, or before the courts of the place where the loss arose. That place is identifiable only for each alleged victim taken individually and is located, in general, at that victim’s registered office. Therefore, a claimant who is domiciled in Spain would be allowed to initiate actions before the Spanish courts.

Foreign companies are subject to sanctions under Spanish competition provisions for antitrust infringements committed by their subsidiaries. In particular, under Article 61(2) of the Competition Act, the actions of an undertaking are also attributable to the undertakings or natural persons that control it, unless its economic behaviour is not directed by any such persons. It is nevertheless important to take into consideration the fact that, according to well-settled European case law, if a company is wholly owned by its parent company, there

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16 Article 8.1 of Regulation 1215/2012.
17 Judgment of the European Court of Justice of 21 May 2015, Case C-352/13 Cartel Damage Claims (CDC) Hydrogen Peroxide SA.
18 Spanish courts confirmed in 2018 their jurisdiction to hear truck cartel claims, although the cartel meetings did not take place in Spain and the registered offices of the cartelists are not in Spain. As an example, Commercial Court No. 3 of Valencia has stated that the Valencia courts are best placed to rule on a case where the claimant was based in Valencia during the cartel and acquired the trucks through an authorised dealer that is also located in Valencia (Judgment of Commercial Court of Valencia No. 3 of 4 October 2018). In the same context, Commercial Court No. 12 of Madrid has ruled that it has international jurisdiction to hear the case and has deemed that private enforcement of national and European antitrust law based on a conduct that restricts competition falls within the competence of the commercial courts instead of the first instance courts (Judgment of Commercial Court of Madrid No. 12 of 12 September 2018).
exists a rebuttable presumption that the parent company dictated the economic behaviour of its subsidiary.\textsuperscript{19} The CNMC repeatedly cites this European case law in cartel cases\textsuperscript{20} to extend the liability of cartel members to their parent companies.\textsuperscript{21}

### IV LENIENCY PROGRAMMES

The leniency programme\textsuperscript{22} was introduced in Spain in 2007 by the Competition Act and entered into force in February 2008. In June 2013, the authority published a Communication on Leniency Programme aimed at providing further guidance to leniency applicants and increasing the transparency of its decisions.

Following the European model, the programme offers full leniency (immunity from fines) as well as partial leniency (reduction of the fine). The benefits of the programme are available not only to undertakings but also to individuals (whether because the original applicant is an individual or because the company requests that leniency be extended to its employees).

Only the first undertaking or individual who provides evidence that enables the CNMC to order an inspection or prove a cartel infringement will be eligible for full leniency, and this is subject to the condition that the CNMC does not already have sufficient evidence of the infringement.

Undertakings or individuals are eligible for partial leniency when they provide evidence of the alleged infringement that adds significant value to evidence that the CNMC already possesses (i.e., the new evidence makes it significantly easier for the CNMC to prove the infringement).

Immunity from or reduction of the fine will also be subject to satisfaction of the following requirements:

- \(a\) full, continuous and diligent cooperation with the CNMC throughout the investigation;
- \(b\) immediate cessation of participation in the infringement, unless the CNMC considers participation necessary to preserve the effectiveness of an investigation;
- \(c\) no evidence relating to the application for the exemption has been destroyed;

\textsuperscript{19} Although the presumption is theoretically rebuttable, in practice there are almost no European or Spanish precedents in which competition authorities have accepted arguments attempting to demonstrate the subsidiary's autonomy.


\textsuperscript{21} The Supreme Court’s Judgment of 29 March 2012 in \textit{Sogecable and Audiovisual Sport/Tenaria} confirmed that, when a company is wholly owned by its parent company, the CNMC may presume that the parent company determines the economic behaviour of its subsidiary. The Supreme Court also held that there is a rebuttable presumption of parent company liability when, \textit{inter alia}, the parent company holds the majority of the subsidiary’s voting rights or has the authority to appoint and remove members of the subsidiary’s board of directors.

\textsuperscript{22} The Competition Act specifically refers to ‘applications for the exemption from payment of the fine’ (Article 65) and ‘reduction of the amount of the fine’ (Article 66).
there has been no direct or indirect disclosure to third parties, other than the competition authorities, of the fact of the evidence’s contemplated application or any of its content; and

c. no measures have been adopted to coerce other undertakings to participate in the infringement. This last obligation is only required for full leniency applicants.

Full cooperation with the CNMC during the proceedings is the leniency beneficiary’s main obligation. Full cooperation implies that applicants must:

a. provide the CNMC, without delay, with all relevant information and evidence relating to the presumed cartel that is either in the applicant’s possession or available to it;

b. remain available to the CNMC to respond, without delay, to all requests that could contribute to establishing the underlying facts;

c. facilitate interviews with the company’s employees and current executives and, if applicable, former executives;

d. refrain from destroying, falsifying or concealing relevant information or evidence in relation to the presumed cartel; and

e. abstain from disclosing the filing or content of the application for the fine exemption or reduction prior to notification of the statement of objections or such time as may be determined by the CNMC.

The CNMC applies elevated standards when determining whether undertakings have fully and continuously collaborated. In several cases in which the information provided by the undertaking had added value, the former CNC nevertheless withheld the benefits of the leniency programme from undertakings on the basis that it considered that they had not complied with their collaboration obligations under the programme.23 During the course of the proceedings, the applicant has the right to be informed about whether the authority intends to maintain the conditional immunity that has been granted.24

It is important to bear in mind that the moment at which participants in a cartel reveal information (prior to or following the opening of an investigation) is highly relevant not only for immunity applicants (who must be the first to report the information) but also for undertakings or individuals seeking partial leniency. The range for the reduction of the fine imposed depends on that timing: 30 to 50 per cent for the second party revealing information, 20 to 30 per cent for the third party, and up to 20 per cent for the remaining parties.

The Communication on Leniency Programme sets out the information and documentation that has to be included in the leniency application. Although Spanish legislation does not have a marker system, the CNMC may grant, upon an applicant’s prior

23 See CNC decisions of 2 March 2011 in Case S/0086/08, Professional hairdressing, and 23 February 2011 in Case S/244/10, Baleares ship operators.

24 The Competition Directorate must specify, on a reasoned basis, both in the statement of objections and in the proposed resolution, whether it is maintaining the conditional exemption that was granted, and progressively evaluate the applicant’s fulfilment of its cooperation duties during the course of the investigation. If the Competition Directorate believes such duties have been breached, it will so state and submit a reasoned proposal to the CNMC Council not to grant the exemption, so the applicant can submit the pleadings it deems fit on the matter.
justified request, additional time for submitting evidence about the cartel. Following the submission of the evidence within the agreed time limit, the filing date for the leniency application will be understood to be the date of the initial application.25 At the request of the applicant, oral applications for leniency may be accepted. To do so, a meeting has to be arranged at the CNMC offices and, after the recording has been transcribed, the declaration will be registered. The transcript’s entry date and time in the CNMC register will determine the order of receipt of that leniency application.

The filing of a request for immunity from a fine or a reduction application and all application data and documents will receive confidential treatment until the statement of objections is issued.26 Interested parties will then have access to that information,27 provided that this is necessary to submit a response to the statement of objections.

Private litigants may not request that the CNMC or other competition authorities produce materials submitted within the scope of a leniency programme.28 Indeed, RDL 9/2017 provides complete protection to the leniency statements and settlement submissions, which cannot be disclosed under any circumstances. As regards other evidence available in the CNMC’s file, national courts would be able to order the disclosure only after a competition authority has closed its proceedings, by adopting a decision or otherwise.29

V PENALTIES

The Competition Act establishes civil and administrative sanctions against undertakings that participate in a cartel. Spanish law does not establish any criminal sanction for infringements of competition regulations.30 Legal representatives and managers who have directly participated in the cartel can be sanctioned with a fine of up to €60,000. Although the CNMC had not traditionally applied this provision, in 2016 it changed its practice and since then it has imposed sanctions on legal representatives and managers in four decisions.31 The fines imposed ranged between €4,000 and €40,000.

Significant fines have been imposed in cartel cases, demonstrating the CNMC’s commitment to detecting cartels and sanctioning those involved.

Fines imposed on undertakings can be up to 10 per cent of the violator’s total turnover in the year preceding the imposition of the sanction. On 29 January 2015, the Supreme Court issued a judgment32 clarifying the interpretation of this limit.

25 Article 46(5) of the Defence of Competition Regulation.
26 Article 51 of the Defence of Competition Regulation.
27 This access right does not include obtaining copies of any statement by the fine exemption or reduction applicant that has been specifically made for submission with the related application.
28 Article 15 bis of Law 1/2000 of 7 January on Civil Procedure (Civil Procedure Act).
29 Article 283 bis (j) of the Civil Procedure Act.
30 Nevertheless, some practices, such as bid rigging, may constitute a criminal offence if they relate to public tenders.
32 Judgment of 29 January 2015, Appeal No. 2872/2015, BCN Aduanas y Transportes SA.
On the basis of the proportionality principle, the Supreme Court held that:

- the 10 per cent limit on the annual turnover of a sanctioned company is the maximum sanction. This percentage is supposed to be the ceiling of a range within which the amount of the fine has to be fixed in proportion to the seriousness of the infringement. The final amount of the fine must be set within a range of between zero and 10 per cent according to the principle of proportionality. As a consequence, the turnover limit should only be triggered in the most serious infringements; and
- this percentage must be calculated over a company’s total annual turnover, including sales of products not affected by the infringement.

The Supreme Court also declared that the criteria contained in the Fining Guidelines adopted in 2009 by the former CNC are contrary to Spanish administrative and constitutional law. As a consequence, the fining method applied by the CNMC had to be modified to comply with the proportionality principle. The Supreme Court declared that the final amount of the fine should be established, taking into account the following criteria mentioned in the Competition Act:

- the size and characteristics of the market affected by the infringement;
- the market shares of the undertakings;
- the scope of the infringement;
- its duration;
- the effect of the infringement on the rights and legitimate interests of consumers or on other economic operators;
- the illicit benefits obtained from the infringement; and
- aggravating and mitigating circumstances in relation to each undertaking.

As a result, the CNMC adopted a new methodology to calculate the amount of the fines. On 6 November 2018, the CNMC published provisional guidance on the setting of fines explaining this methodology. Under the new system, the determination of the fine is a two-tier process.

- First, approximately 60 per cent of the fine corresponds to the application of the general penalty regime. It determines the infringement’s level of unlawfulness. It takes into account several factors, such as the particularities of the affected market, the market share of the companies involved, the infringement’s scope, the effect on consumers, users and economic operators, and whether multiple companies are involved.
- Second, approximately 40 per cent of the fine corresponds to the application of an individual penalty regime. It depends on the specific conduct of each company and considers factors such as the duration of the conduct or the individual aggravating or mitigating factors.

Based on these factors, the CNMC calculates a percentage that is applied to each undertaking’s overall turnover to determine the fine.

Afterwards, the agency reviews the final penalty to ascertain whether the amount is proportionate to the scale of the infringement.

If the undertaking benefits from a reduction following the application of the leniency programme, the reduction is applied to the final figure determined by application of these criteria.
The use of this methodology has not led to a reduction in the level of the fines imposed by the CNMC. Moreover, it has given rise to a great degree of legal uncertainty because undertakings cannot foresee the amount of the fine that they could be facing. To address this concern, the CNMC intends to publish new guidelines for the calculation of fines.

Spanish law does not establish any settlement procedure for cartel cases. Nevertheless, it is important to take into consideration that, in some cases, the CNC has granted significant (up to 15 per cent) reductions to undertakings that did not benefit from the leniency programme. This has occurred based on the mitigating circumstances of undertakings that admitted their participation in a cartel in their response to the statement of objections, and even in cases in which the CNC concluded that the undertaking had not complied with its collaboration obligations under the leniency programme. The CNMC has announced its intention to introduce a settlement procedure in line with the one applied at EU level in order to be able to apply significant reductions to the fines imposed on companies that cooperate and do not contest the existence of an infringement.

Finally, since 22 October 2015, natural and legal persons sanctioned for serious infringements that distort competition can be banned from contracting with public bodies for up to three years. This prohibition can be applied in addition to the penalties set out in the Competition Act. For the prohibition to be effective, the sanctioning decision must be final. No prohibitions have yet been imposed.

VI ‘DAY ONE’ RESPONSE

Law 3/2013 grants broad powers to CNMC officials to carry out unannounced inspections of companies’ premises. In 2017, the CNMC carried out eight inspections.

Under Spanish law, access to premises must be consented by either the occupants or a court by way of a warrant. Access to premises is only mandatory if authorised by a court through a warrant. In the absence of a judicial warrant, undertakings are entitled to deny access to their premises (although not to oppose the inspection, which is mandatory). In practice, the CNMC usually requests a warrant in advance to secure access to premises.

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33 CNC decisions of 19 October 2011, in Case S/226/10, Public tenders for roadway maintenance works and 5 August 2013, in Case S/380/11, Car rental.
34 CNC decisions of 2 March 2011, in Case S/0086/08, Professional hairdressing and 23 February 2011, in Case S/244/10, Baleares ship operators.
35 Act 40/2015 of 1 October on the Public Sector.
36 Inspections carried out during 2018 took place on 18 January, Railway electrification; 28 February, Tobacco; 28 March, School books; 17 May, Railway electrification; 30 May, Civil engineering; 4 July, Real estate construction; 25 October, Aquaculture; 18 December, Railway signalling.
37 Information contained in the investigation order prepared by the Competition Directorate for investigation or the warrant of the court must include the following information: the date of the inspection; the names of the CNMC officials who will be in charge of the inspection; the identification of the undertaking and the address of the premises subject to inspection; and the object of the inspection. It is important to verify this information is correct before allowing the inspection to be carried out. The Supreme Court (Judgment of 27 February 2015, Appeal No. 941/2015) has stated that inspection orders must have a degree of specificity, meaning that they cannot be defined so vaguely that they allow ‘fishing expeditions’, and they cannot simply quote the infringements set out in the Competition Act in abstract terms.
The Supreme Court has declared the inspection of a company’s premises illegal because the inspectors did not inform the company that a judge had rejected the CNMC’s application for a warrant and, therefore, the company’s consent to the inspection was deemed invalid.38

During the inspection, officials are permitted to seize and make copies of all documents (whether physical or electronic) located at the company’s premises (excluding private or legally privileged documents).39 Personal and privileged documents must be identified during the inspection.40 Some CNMC inspections have been annulled by the Supreme Court since it considered that officials had exceeded the original scope of the inspection orders, which constituted a violation of the fundamental right to inviolability of domicile.41

Officials may also address any questions to the company’s employees. Employees are legally obliged to cooperate with the inspectors by providing them with all information requested and answering all questions, unless the questions directly incriminate the company.42

In June 2016, the CNMC published an informative note regarding inspections, which contains a detailed description of the obligations of a company under investigation and the possible sanctions if it fails to cooperate.

Fines of up to 1 per cent of the total turnover in the previous year can be imposed on a company that by any means obstructs the inspection tasks of the CNMC. The former CNC imposed fines on several companies for breaching the duty to collaborate with the information request by submitting misleading or fake information.43

VII PRIVATE ENFORCEMENT

To date, there have been only a few cases regarding private litigation arising from antitrust infringements in Spain. However, the number of cases has increased significantly during the past year as a result of the enactment of RDL 9/2017 implementing the provisions of the EU Damages Directive.

RDL 9/2017 introduces significant changes in the Spanish regime, the main ones being:

a increasing the limitation period from one to five years. This period is suspended from when a competition authority initiates proceedings until at least one year after the decision on an alleged infringement is made final;

b introducing a presumption of harm in cartel infringements. As a general rule under Spanish law, to apply for damages, claimants are required to prove the causation of harm and its amount, and it was not always easy for them to have access to the evidence required to quantify the amount of the damages claimed. RDL 9/2017 sets out a presumption of harm in cartel cases and allows courts to estimate the amount

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39 The attorney–client privilege only applies to correspondence between clients and external counsel. It does not apply to correspondence with in-house counsel.
40 Spanish courts have confirmed that CNMC officials have broad powers to seize documents during inspections. In particular, it is the obligation of the undertaking alleging that a document is protected or falls outside the scope of the inspection order to identify such documents and to provide proof of the protected nature of the same (see the Supreme Court Judgment of 27 April 2012 in Stanpa).
42 The CNMC usually requested access to web emails of employees by asking for their passwords to confirm whether the email addresses had been used for professional purposes.
43 See CNC decisions of 31 July 2012, in Case SNC/26/12, Mediapro and 31 May 2012, in Case SNC/19/12, CPV.
thereof if it is not possible to calculate the damages. These changes are expected to make it easier for claimants to obtain an indemnity. Claimants would be allowed to obtain full compensation of the damages suffered, comprising the right to be indemnified for actual loss and loss of profit, plus interest;

c. introducing a presumption of harm to indirect purchasers. Spanish civil law states that the burden of proof in civil proceedings lies with the party that alleges the harm. Thus, indirect purchasers must provide evidence of the defendant’s unlawful conduct, the causal link and the existence of harm and its quantification. In RDL 9/2017 this rule is reversed, introducing a presumption of harm in favour of indirect purchasers. It is relevant to mention here that Spanish courts have recognised the passing-on defence when considering a defendant’s position44 in damage claims involving cartel infringements;

d. introducing specific mechanisms to facilitate claimants’ access to relevant documents before substantiating the claim. The pretrial disclosure process in Spain was rather limited and courts have been reluctant to award broad disclosures of documents to claimants. RDL 9/2017 modifies this regime and makes it easier for claimants to access evidence that is required to substantiate the claim. However, claimants must justify the request and provide reasonable available evidence to support a damages claim. They will also need to identify specific items of evidence or, at least, relevant categories of evidence. Thus, RDL 9/2017 does not foresee the introduction of a discovery system in Spain. Moreover, the party who requests access is expected to exercise sufficient caution to cover the expenses incurred by the defendant as well as any potential damage they may suffer as a result of the misuse of the information obtained. Specific protection for leniency statements and settlement submissions are guaranteed, as it has been until now, and specific mechanisms are foreseen to ensure the confidentiality of business secrets of entities called to reveal documentary evidence;

e. making CNMC’s final decisions declaring infringements of competition law binding on Spanish courts. A final decision made by any other Member State’s national competition authority creates a presumption that a competition law infringement exists;

f. extending the liability of parent companies for damage caused by their subsidiaries to civil proceedings;

g. declaring the joint and several liability of all co-infringers in relation to damages caused as a result of anticompetitive behaviour. This principle of joint liability is exempted in cases involving small and medium-sized enterprises that meet certain requirements and beneficiaries of immunity; and

h. declaring the effective compensation of the damages caused before the adoption of a decision by the CNMC as a mitigating factor for the purposes of setting the amount of the antitrust fines.

RDL 9/2017 has clearly fostered awareness among claimants and it has incentivised them to bring damages actions for antitrust infringements in Spain.

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44 See Judgment of 20 February 2009 of Civil Court No. 11 in Valladolid in Gullón et al/Acor; Judgment by the Provincial Court of Madrid of 9 October 2009 in Nestlé España et el/Acor; and Judgments of the Supreme Court of 8 June 2012 in Acor/Gullón, 7 November 2013 in Nestlé España/Ebro Foods and 4 June 2014 in Endesa Distribución Eléctrica SL/Energía-VM Gestión de Energía.
The Civil Procedure Act sets out different ways to submit collective actions. The simplest type of collective action involves the consolidation of the claims of multiple plaintiffs, provided that there exists a link between all the actions through the same object or the same petition.\textsuperscript{45} Moreover, although class actions are not technically recognised under Spanish law, Article 11 of the Civil Procedure Act includes some provisions in relation to collective legal standing in cases that are limited to the defence of the interests of ‘consumers and final users’. Consumers’ associations have standing to protect not only the interests of their associates but also the general interests of all consumers and final users. This could be applicable to antitrust cases, particularly those involving the declaration of antitrust infringements or injunctions.

When a consumers’ association initiates a collective action under Articles 11(2) to (3), the admission of the claim will be made public.\textsuperscript{46}

\section*{VIII CURRENT DEVELOPMENTS}

The CNMC published provisional guidance on the setting of fines in 2018. Moreover, the CNMC has changed its previous practice to include in the proposal decision that is submitted by the Competition Directorate to the Council the proposed amount of the fine to be imposed so that the parties would have the opportunity to submit observations thereto before a final decision is adopted. Also, several oral hearings before the Council have taken place in 2018. The CNMC has announced that it is considering the introduction of a settlement procedure that will mirror the one applied at EU level so that companies may benefit from significant reductions in the amount of the fine if they admit the existence of an infringement.

Finally, private litigation for antitrust infringements have significantly increased in Spain since the enactment of RDL 9/2017 and the number of cases bought before Spanish courts is expected to increase in the coming years.

\textsuperscript{45} The court would presume that such a link exists if the actions are based on the same underlying facts.

\textsuperscript{46} Collective actions in defence of the interest of consumers and end users fall into two categories depending on the degree of certainty as to the identification of the consumers or users affected by the claim.

- First, if a particular group of identifiable consumers or users is harmed by specific anticompetitive behaviour, the \textit{locus standi} for defending the interests of that group would fall with consumers’ associations and the groups of affected consumers. In such cases, consumers or users whose interests may be affected must be informed by the plaintiff so that all potentially affected consumers may defend their interests in the civil proceedings at any time (opt-in clause).

- Second, if anticompetitive behaviour compromises the interests of a group of consumers or users that cannot easily be identified, the only entities with the standing to represent those interests in court are consumers’ associations that are ‘widely representative’. For this purpose, the courts will acknowledge that a consumer association is widely representative if it is a member of the Consumers and Users’ Council. In such cases, publication would be considered sufficient for all interested consumers to identify themselves. Spanish law establishes that the proceedings will resume after two months. Affected consumers or users who do not identify themselves to the court within that term will not be permitted to join the action, although they may nevertheless benefit from the case’s outcome. It is important to take into consideration that, in such cases, the judgment will be binding on all affected consumers and users, and not only on those who have appeared in the proceedings.
I ENFORCEMENT POLICIES AND GUIDANCE

The Federal Law on Cartels and Other Restraints of Competition of 6 October 1995 (the Cartel Act), as amended, is the legislation regulating cartels in Switzerland. The regulatory framework is complemented by several federal ordinances, and general notices and communications of the Competition Commission (the Commission).

The federal authorities responsible for the investigation of cartel matters are the Commission and the Secretariat of the Commission (the Secretariat), which are independent of the federal government. The Commission consists of 13 members, who are elected by the Federal Council, and is headed by a president and two vice presidents. The majority of the members must be independent experts (having no interest in or special relationship with any economic group whatsoever) – they are usually professors of law or economics. The Commission is the deciding body in cartel matters, while investigations are conducted by the Secretariat. The Secretariat also prepares the Commission’s decisions. It 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 70 employees, including a significant number of economists.

The Cartel Act prohibits unlawful restraints of competition such as anticompetitive agreements or concerted practices. Anticompetitive agreements are characterised by the following three elements:

\( a \) 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.

\( b \) Irrespective of the form it takes, any agreement qualifies under the Cartel Act, be it bilateral (a cooperative or non-enforceable agreement, a binding, non-binding or ‘gentlemen’s agreement’) or the concerted practices of several undertakings.

\( c \) 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 not, in principle, 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.

However, 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:

\begin{itemize}
  \item horizontal agreements that:
    \begin{itemize}
      \item directly or indirectly fix prices;
      \item restrict quantities of goods or services to be produced, purchased or supplied; or
      \item allocate markets geographically or according to trading partners; and
    \end{itemize}
  \item vertical agreements that:
    \begin{itemize}
      \item contain minimum or fixed resale prices; or
      \item foreclose geographical markets.
    \end{itemize}
\end{itemize}

Such a presumption may be rebutted if it can be shown that, as a matter of fact, effective competition is not eliminated by these agreements. If competition is not eliminated, it has to be assessed whether the agreement significantly restricts competition. According to the Federal Supreme Court’s Gaba and BMW decisions, hard-core agreements on prices, quantities and territories constitute per se, in principle, significant restraints of competition and are unlawful if they cannot be justified on economic efficiency grounds.

In addition, in exceptional cases and at the request of the undertakings concerned, the Federal Council may authorise specific conduct of undertakings for compelling public interest reasons.

**II COOPERATION WITH OTHER JURISDICTIONS**

As Switzerland is not part of the European Union, investigations, prosecutions and sanctions decided by the European Commission have no legal implications for the Commission. The same applies for decisions by antitrust authorities in other jurisdictions. 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.

However, the bilateral agreement between the European Community and the Swiss Confederation on Air Transport provides for directly applicable substantive and procedural provisions regarding competition law. According to the agreement, the European Commission rules on the admissibility of agreements, decisions and concerted practices as well as abuses of a dominant position concerning routes between Switzerland and the European Union, whereas the Commission remains responsible for routes between Switzerland and third countries. In the case of investigations on possible infringements that are carried out under these competences, the Swiss and European authorities are obliged to cooperate fully (i.e., to give the other party all necessary information and assistance in the case).

Also, Switzerland was the first state to sign a second-generation cooperation agreement in competition matters with the European Union, which entered into force on 1 December 2014. This agreement is the legal basis for cooperation between the European Commission (but not the Member States) and the Swiss authorities. Its aim is closer cooperation. By improving access to evidence, reducing administrative overlaps and ensuring due consideration of mutual interests, the European Commission and the Commission seek
to combat cross-border anticompetitive practices more effectively. Therefore, the competition authorities may inform each other of enforcement activities and coordinate investigation procedures (e.g., parallel dawn raids) as well as transmit certain information even without the consent of the undertakings concerned and may use this information for the enforcement of their respective competition laws. The exchange of information without consent is subject to narrow restrictions. The competition authorities must investigate the same or related conduct. Information obtained under leniency or settlement procedures must not be exchanged without consent. The same applies to information that has been received in breach of procedural rights, such as legal professional privilege and the right against self-incrimination. Further, the competition authorities are entitled but not obliged to exchange information.

In the absence of an agreement, the Swiss authorities are able to share confidential information with other competition authorities if all the undertakings concerned have issued a waiver.

### III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

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. The Commission imposed severe sanctions on Nikon and BMW in 2015 because their European dealer agreements contained provisions prohibiting exports to countries outside the European Economic Area (EEA). As Switzerland is not part of the EEA (and was, as a result, affected by those provisions), the Commission was of the opinion that these restrictions led to a foreclosure of the Swiss market. In general, the Commission tends to interpret effects in Switzerland rather broadly – the mere possibility of effects suffices.

The Federal Supreme Court confirmed in the Gaba and BMW cases that, pursuant to the effects doctrine, restrictions of competition committed outside Switzerland also fall into the geographical scope of the Cartel Act. It is sufficient that the restriction of competition may potentially have an effect on the Swiss market. Whether the restrictions of competition actually had an effect on the Swiss market is not decisive.

### IV LENIENCY PROGRAMMES

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.

There are no statutory deadlines for applying for immunity or leniency. However, only the first applicant may enjoy total immunity. Markers are available and may be applied for, preferably by email or fax and precedent announcement by phone. In addition, it is also possible to deliver the marker in person or to have it delivered by a representative, to send it by mail or, with the agreement of the Secretariat, to make an oral statement on record at its premises. However, one must bear in mind that these options are slower than a notification by email or fax, particularly during a dawn raid. Further, if the submission is delivered by post, it may not be possible under certain circumstances to precisely timestamp the report upon receipt and to establish the order of precedence or ranking. It is not possible to apply...
for a marker by phone. Marker requirements are set out in the notice on leniency published by the Secretariat, including a brief description of the company and the conduct. There are no statutory deadlines for applying or perfecting a marker.

The Secretariat will acknowledge receipt of the leniency application and specify the date and time of its receipt. With the consent of the 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 should reveal its identity.

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 the leniency application was filed, sufficient information to open a preliminary or an in-depth investigation (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 the leniency application was filed, 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.
- 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 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, one decision of the Federal Administrative Court in the Metal Fittings for Windows cases clearly states the right of the leniency applicants to argue against the Commission’s legal interpretation of the facts.

Where an undertaking does not meet these conditions but has cooperated with the Commission and terminated its involvement in the infringement no later than the time at which it submitted evidence, the Commission still has the option of reducing the sanction. 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 five months of notification of the restraint and the undertaking continues to implement the restraint of competition.

In addition, Article 29 of the Cartel Act provides that the Secretariat may propose settlements to the 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 that 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 Section V).

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 yet been tested in court. The catalogue of protective instruments includes the option of submitting 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 accessing the files at the premises of the Secretariat. The right to take photocopies was limited to annexes, while copies of the main body of corporate statements or 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 Secretariat case team knows about the existence or identity of leniency applicants. Moreover, the leniency documents are stored in a separate file.

When opening an investigation, the Secretariat gives notice by way of official publication. The notice states the parties to the investigation and its purpose. 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 for as long as possible. However, even if the final decision does not reveal the name of the leniency applicant, it is not impossible that a party familiar with the facts of the case may deduce the applicant's identity from the context.

Furthermore, according to its practice, the Commission excludes leniency information completely from the disclosure to third parties of data of a cartel investigation, which is closed and the respective Commission's decision is final and binding.

Under Swiss law, a 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 different kinds of sanctions apply to individuals and undertakings, as a general rule it is advisable to seek independent legal advice (see Section V).
V PENALTIES

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 or participate in hard-core vertical restraints pursuant to Article 5(4) of the Cartel Act (see Section I).

The Federal Supreme Court confirmed in the Gaba and BMW cases that direct sanctions may also be imposed for hard-core agreements pursuant to Article 5(3) and (4) of the Cartel Act that significantly restrict but do not eliminate effective competition. This question had been disputed for a long time in the Swiss doctrine.

The Ordinance on Sanctions lays down the method of calculation of fines. In addition, the Commission has issued an explanatory communication on the Ordinance of Sanctions.

The maximum administrative sanction is a fine of up to 10 per cent of the turnover realised in Switzerland during the preceding 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. In a first step, the Commission determines the base amount of the penalty that, 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 according to the duration of the infringement. In a third step, the penalty may be increased or reduced because of 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, in a last step, 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.

Furthermore, an undertaking that violates an amicable settlement to its own advantage, a legally enforceable decision of the Commission or a judgment by either the Federal Administrative Court or the Federal Supreme Court can be fined up to 10 per cent of the turnover it achieved in Switzerland in the preceding three financial years. In assessing the amount, the likely profit that resulted from the unlawful behaviour is taken into account.

Finally, an undertaking that fails to provide information or produce documents, or that only partially complies with its obligations during an 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.

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.

There are no direct criminal sanctions for individuals for cartel activities in the Cartel Act. Swiss law does not provide for imprisonment for cartel conduct. However, individuals
acting for an undertaking, but not the undertaking itself, who violate a settlement decision, any other enforceable decision or court judgment in cartel matters, may be fined up to 100,000 Swiss francs. In addition, individuals who intentionally fail to comply or only partly comply with the obligation to provide information during an 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. Further, individuals involved in cartel conduct in public procurement proceedings may be subject to direct criminal sanctions under the Swiss Criminal Code, particularly for fraud and forgery of documents.

VI ‘DAY ONE’ RESPONSE

The Secretariat has broad investigative powers. It may hear the parties who have allegedly committed a competition law infringement, 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 and each of the vice presidents of the Commission have the power to order inspections, dawn raids and seizures at the request of the Secretariat. In the case of a dawn raid the Secretariat has the right to search all types of premises, both business premises and private apartments, and all types of devices. In the field of electronic data, the search authorisation extends to all data that can be accessed from within the searched premises.

The persons concerned have an obligation to endure the dawn raid passively and not interfere with any investigation activity. Access to the rooms and computer systems to be searched has to be granted by opening doors and safes and disclosing passwords. Further, no documents or data may be destroyed or hidden, since it cannot be ruled out that such behaviour may be classified as preventing an officer from performing a duty, which is punishable according to the Swiss Criminal Code. In addition – as has already happened – violations of the obligation to submit may be taken into account as an aggravating factor when calculating the sanction.

However, the persons concerned have no duty to cooperate as long as the undertaking has not decided to file for leniency. They are not required to participate actively in the search. Undertakings subject to an inspection have the right to be assisted by external lawyers. Nevertheless, 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. However, 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.

In view of the above, it is advisable for an undertaking to have dawn raid guidelines redacted and implemented stating the following: (1) the search warrant and the identification documents of the inspectors have to be inspected carefully and copied; (2) the inspectors
have to be granted access and be accompanied by an employee; (3) the legal department and
the chief executive officer have to be informed immediately; and (4) the employees must not
prevent or impede the search (i.e., neither destroy nor hide any documents or data).

VII PRIVATE ENFORCEMENT

Third parties impeded by an unlawful restraint of competition from entering or competing
in a market may request before the civil courts:

a. the elimination of the unlawful agreement or cartel;

b. an injunction against the unlawful agreement or cartel;

c. damages; or

d. restitution of unlawful profits.

However, contrary to the proceedings before the Commission the burden of proof in civil
proceedings is with the claimant. 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. Also, court costs and legal costs must usually be borne by the losing party
in the proceedings. As a consequence, civil proceedings are very rare in Switzerland.

The 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.

VIII CURRENT DEVELOPMENTS

i Federal Administrative Court clarifies treatment of non-binding retail price
 recommendations

In January 2018, the Federal Administrative Court reversed the sanctions against Pfizer, Eli
Lily and Bayer imposed by the Commission. Pfizer, Eli Lilly and Bayer sell their medications
for erectile dysfunction in Switzerland through pharmacies and self-dispensing physicians
who are authorised to sell medications. All three pharmaceutical companies had published
retail price recommendations (RPR) for these medications, which were explicitly designated
as ‘non-binding’. In November 2009, the Commission ruled that publishing and following
the RPR under the specific circumstances of the case would result in an unlawful and
sanctionable vertical price-fixing. Pfizer, Bayer and Eli Lilly were prohibited from further
publishing the RPR. In addition, the three pharmaceutical companies were fined a total of
5.7 million Swiss francs.

With its three decisions of 19 December 2017, the Federal Administrative Court
set aside the sanctions against Pfizer, Eli Lily and Bayer imposed by the Commission.
The Federal Administrative Court held that unilaterally announced, recommended prices
are only problematic from a competition law point of view if they lose their character as a
recommendation and are monitored and enforced by exerting pressure or granting incentives.
The Federal Administrative Court’s decisions have not entered into legal force yet.

ii Federal Supreme Court confirms admissibility of international forum running

In its decision of 14 March 2018, the Federal Supreme Court ruled that securing an
advantageous place of jurisdiction in Switzerland (known as forum running) during
international disputes is a sufficient interest for an action seeking a negative declaratory judgement. With this ruling, the Federal Supreme Court deviates from its previous case law, according to which Swiss parties who were confronted with an impending legal action by the counterparty abroad were not in a position to pre-empt it by filing an action for a negative declaratory judgment (i.e., an action seeking a declaration that the claim asserted by the counterparty does not exist) in Switzerland. The background of the Federal Supreme Court’s new ruling was the decision of Swatch Group and two of its subsidiaries (the plaintiffs) to stop supplying the defendant (an English wholesaler of watch parts; the defendant) in the context of introducing a selective distribution system. The defendant asked the plaintiffs to confirm that they would resume the delivery as otherwise the defendant would file an action before the High Court in London for violation of European antitrust law without further notice. The defendant subsequently filed an action in London. However, shortly before that, the plaintiffs filed an action for a negative declaratory judgment in the Commercial Court of the Canton of Berne. In this action, the plaintiffs asked for a declaration that they are not obliged to supply the defendant and that they do not owe the defendant anything in connection with the termination of supply, in particular no damages. The Court limited the proceedings, inter alia, to the question of whether the plaintiffs had a legitimate interest in such an action. On the basis of Swiss law, the Court denied this interest and dismissed the action on procedural grounds. As the last instance, the Federal Supreme Court upheld the complaint by Swatch Group and its two subsidiaries, and concluded that on the basis of Swiss law, the aim of a plaintiff (i.e., the defendants in forthcoming foreign proceedings) to secure a favourable place of jurisdiction in Switzerland is a sufficient interest in an action for a negative declaratory judgment. According to the Federal Supreme Court, the previous restrictive approach disadvantaged parties in Switzerland in disputes since they were denied the possibility of filing such an action in Switzerland whereas this opportunity was available to their counterparties abroad. According to the Federal Supreme Court, this change of jurisprudence applies ‘at least in the international context’. It thus remains unclear whether the Federal Supreme Court would also abandon its restrictive approach with regard to forum running in domestic disputes and would permit actions for a negative declaratory judgment to this end.

iii Federal Supreme Court must decide whether appeal of merger decisions require joint action of involved parties

In May 2017, the Commission prohibited a proposed merger between the two Swiss ticket distributors Ticketcorner and Starticket after an in-depth review. Ticketcorner and Starticket both distribute tickets for concerts and shows through physical and online channels. They also provide software solutions for the direct sale of tickets. As a result of the merger, Starticket would have become a wholly owned subsidiary of Ticketcorner. Ticketcorner filed an appeal before the Federal Administrative Court against the Commission’s decision, whereas the joint venture partner did not appeal the decision. In its judgement of 3 May 2018, the Federal Administrative Court rejected Ticketcorner’s appeal and argued that Ticketcorner was not in a legal position to appeal the decision of the Commission without its joint venture partner. However, the Federal Administrative Court also held that there was neither a legal practice nor a relevant provision in the applicable statutes addressing this question. Ticketcorner subsequently appealed the Federal Administrative Court’s decision before the Federal Supreme Court. The Court will have to decide whether an appeal of a merger decision by the Commission requires a joint action of all the involved joint venture parties.
I ENFORCEMENT POLICIES AND GUIDANCE

i Definition
Cartels are regulated by the provisions governing concerted actions under the Taiwan Fair Trade Act (TFTA). The term ‘concerted action’ relates to the conduct of any enterprise, by means of a contract, agreement or any other form of mutual understanding* with a competing enterprise to determine jointly the price of goods or services, or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, thereby restricting each other’s business activities. A concerted action is limited to a horizontal action that is conducted by enterprises competing at the same stage of production or sale, and that may interfere with the market mechanism with regard to the production or supply and demand of goods or services.*

Since the TFTA was amended on 6 February 2015,4 the Taiwan Fair Trade Commission (TFTC) is permitted to presume the existence of an agreement on the basis of circumstantial evidence, such as market conditions, characteristics of the products or services involved, and profit and cost considerations. By way of this amendment, the new law substantially shifts the burden of proof regarding the existence of an agreement among competitors from the TFTC to the enterprises that are investigated or penalised.

ii Exemption
A concerted action is prohibited unless it meets one of the requirements stipulated in Article 15 of the TFTA, is beneficial to the economy as a whole and in the public interest, and the application filed with the TFTC for the concerted action has been approved.

1 Stephen Wu is a partner and Rebecca Hsiao and Wei-Han Wu are associate partners at Lee and Li, Attorneys-at-Law.
2 Any other form of mutual understanding means a meeting of minds other than a contract or agreement, regardless of whether it is legally binding, which would in effect lead to joint actions. A resolution of an association’s general meeting of members or a board meeting of directors or supervisors to restrict the activities of its member enterprises will also be deemed a horizontal concerted action.
3 Article 14 of the Taiwan Fair Trade Act (TFTA).
4 For the case precedents cited in this chapter, all provisions referred to are based on the original article numbers under the version of the TFTA that was in place at the time of the decision or ruling by the Taiwan Fair Trade Commission (TFTC).
Article 15 of the TFTA provides the following eight requirements for a concerted action to be approved by the TFTC:

\( a \) unification: it unifies the specifications or models of goods for the purpose of reducing costs, improving quality or increasing efficiency;

\( b \) joint research and development: it entails joint research and development for the purpose of enhancing technology, reducing costs, improving quality or increasing efficiency;

\( c \) specialisation: it develops a separate and specialised area for the purpose of rationalising operations;

\( d \) export: its purpose is for entering into agreements solely concerning competition in foreign markets, to secure or promote exports;

\( e \) import: its purpose is for importing foreign goods to strengthen trade;

\( f \) economic downturn: its purpose is to limit the quantity of production and sales, equipment or prices to meet the demand expected during an economic downturn, meaning that the enterprises in a particular industry have difficulties in maintaining their business or face overproduction;

\( g \) small to medium-sized enterprises: its purpose is for improving operational efficiency or strengthening the competitiveness of small to medium-sized enterprises; and

\( h \) catch-all provision: any other joint acts for the purpose of improving industrial development, technological innovation or operational efficiency.

Since a prior approval system is adopted for a concerted action, enterprises participating in a concerted action must submit the documents specified in Article 13 of the Enforcement Rules of the TFTA for prior approval. The TFTC is required to make a decision within three months of receipt of an application, but may extend that three-month period once. The three months start from the time when all the required documents have been submitted to the TFTC. The approval granted by the TFTC shall specify a time limit not exceeding five years for the implementation of a concerted action and may attach conditions to the approval. At least three months prior to expiry of the approval the enterprises may, with justification, file a written application with the TFTC for an extension of the approval period for no more than another five years.

Moreover, in March 2016, the TFTC published a ruling explaining that if the combined market shares of all participants in a cartel do not reach 10 per cent in the relevant market, it can be presumed that the cartel scheme will not generate any restrictive effect on the market. However, the ruling also indicates that if the subject cartel aims to restrict the price, quantity, trading counterparty or trading area of the relevant product or service, the aforesaid rule cannot be applied.

### Enforcement rules

The TFTC has enacted several guidelines and regulations detailing the concrete steps that the TFTC should take in reviewing a cartel case.

The following are guidelines relating to an application for concerted action approval:

\( a \) TFTC Guidelines on Handling Filing for Approvals of Concerted Actions by Enterprises;

\( b \) TFTC Guidelines for Concerted Petroleum Purchasing by Individual Petrol Stations;
The following regulations are relevant to the Leniency Programme in Taiwan and were introduced into the TFTA at the end of 2011:

- Regulations on Immunity and Reduction of Fines in Illegal Concerted Action (the Leniency Programme; see Section IV); and
- Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 (i.e., monopoly) and 15 (i.e., cartel) of the TFTA (the Fine Formula; see Section V).

### Key policies

The TFTC is in charge of enforcement of the TFTA and policymaking. The TFTC’s priority objectives regarding cartel enforcement for 2017 to 2020\(^5\) are:

- to continue the aggressive enforcement of cartel regulations and to improve the effectiveness of the operation of antitrust funds; and
- to participate more actively in the international community of competition law, expanding international and cross-strait cooperation, and building a foundation for mutual assistance on global cartel cases.

### Controversies

#### Exemption requirements

The newly amended TFTA adds a catch-all provision in the hope of covering all types of pro-competition cooperation as broadly as possible. So far, there has been no actual case regarding how the catch-all provision could apply. It is unknown whether the new law can indeed ease the difficulty that enterprises have in finding a legal ground to justify their cooperation.

#### Leniency Programme

The Leniency Programme helped the TFTC disband a cartel of optical disk drive (ODD) manufacturers in September 2012 (see Section VIII). A remarkable aspect of the case is that the TFTC did not disclose the identity of the enterprise that applied for leniency at the enterprise’s request. While this non-disclosure option is unheard of in some jurisdictions, whether such an option is appropriate has sparked intense debate; thus far, no conclusive answer has been reached.

### II COOPERATION WITH OTHER JURISDICTIONS

See Section VIII.
III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Determining the extent of the TFTC’s jurisdiction is based on the effect of the conduct in question. Coordination between or among foreign enterprises conducted either in Taiwan or other jurisdictions is subject to the TFTA if the conduct is likely to affect the Taiwanese market. The TFTC has conducted investigations into the conduct of foreign enterprises and has issued directives confirming that their conduct may violate the TFTA if it affects the Taiwanese market. A noteworthy example is the ODD case (see Section VIII.i).

IV LENIENCY PROGRAMMES

i Overview

On 23 November 2011, the president announced the amended TFTA, introducing a Leniency Programme for enterprises participating in a cartel (Article 35) and imposing a higher fine for violation of cartel provisions (Article 40). The Leniency Programme, which came into effect on 6 January 2012, specifies, inter alia, the requirements for leniency, the maximum number of cartel participants eligible for leniency, the fine reduction percentage, the required evidence and the confidentiality treatment. Adoption of the Leniency Programme has significantly affected the enforcement of cartel regulations in Taiwan.\(^6\)

ii Elements of leniency immunity

According to the Leniency Programme, an enterprise violating the cartel prohibitions under the TFTA can be exempted from a fine or entitled to a reduction if it meets one of the following requirements, and the TFTC agrees in advance that the enterprise qualifies for the immunity or reduction:

- before the TFTC knows about the unlawful cartel activities or commences an investigation on its own initiative, the enterprise voluntarily reports in writing to the TFTC the details of its unlawful cartel activities, provides key evidence and assists the TFTC in its subsequent investigation; or
- during the TFTC’s investigation, the enterprise provides specific evidence that helps prove unlawful cartel activities and assists the TFTC in its subsequent investigation.

iii Markers

An enterprise that intends to apply for immunity from a fine, but that does not have all the information and evidence required by the Leniency Programme and is therefore not qualified to file the application to the TFTC, either in writing or orally, requesting preservation of the priority status for fine immunity (i.e., to obtain a marker), must submit the following information:

- the enterprise’s name, paid-in capital, annual revenue, the name of its representative, and the address and date of company registration;
- the product or service involved, the form of the concerted action, the geographical areas affected and the duration of the action; and
- the names, company addresses and representatives of other cartel members.

An enterprise that has been granted a marker should provide the information and evidence required by the Leniency Programme within the period specified by the TFTC, or it will lose the marker. An application for a marker should be made in writing and follow the format designated by the TFTC.

iv Applicant's obligations to cooperate

From the time an application is filed until the case is concluded, the enterprise that files the application (the applicant) should withdraw from the cartel immediately (or at the time specified by the TFTC), follow the instructions of the TFTC, and provide honest, full and continued assistance to the TFTC during its investigation. The assistance should include the following:

a The applicant should provide the TFTC as early as possible with all the information and evidence regarding the cartel that it currently possesses or may obtain in the future. For those applying for a fine reduction, the information and evidence provided must be of significant help in the TFTC's investigation into the cartel or enhance the probative value of the evidence the TFTC has already obtained.

b The applicant should follow the instructions of the TFTC and provide prompt descriptions or cooperation to help the investigation regarding related facts that are capable of proving the existence of the cartel.

c If necessary, the applicant must allow those of its staff members or representatives who participated in cartel-related activities to be questioned by the TFTC.

d The content of the statements, information or evidence provided may not contain any untruths; and no destruction, forgery, alteration or concealment of any information or evidence related to the cartel will be tolerated.

e Without the consent of the TFTC, the applicant may not disclose to any other parties the filing of the application or any content of the application before the case is concluded.

v Immunity or reduction of fines

No more than five applicants can be eligible for immunity from a fine or a fine reduction in any one case. The first applicant to file the application can qualify for full immunity from a fine. The fines for the second to fifth applicants can be reduced by 30 to 50 per cent, 20 to 30 per cent, 10 to 20 per cent, and 10 per cent or less, respectively. An applicant that has coerced any other enterprises to join or not to exit the cartel cannot be eligible for immunity or a fine reduction.

The board of directors, representatives or managers of an involved enterprise, or others with the authority to represent the enterprise who should be jointly penalised based on the Republic of China (ROC) Administrative Penalty Act, may be granted immunity or a fine reduction if the following requirements are met: (1) the enterprise is an applicant that is eligible for immunity or a fine reduction; (2) the aforementioned persons have provided honest and full statements with regard to the unlawful act; and (3) those persons have followed the instructions of the TFTC, and have provided honest, full and continued assistance to the TFTC during its investigation and until the case is concluded.
vi Non-disclosure versus discovery of materials

According to the Leniency Programme, when the TFTC grants an applicant immunity or a fine reduction, it must take the following steps to protect the confidentiality of the applicant’s identity:

\( a \) It should not indicate the name of the applicant, the fine imposed, the amount of the fine reduction or the reasons, without the consent of the applicant. If consent is not given, the TFTC should use aliases and other confidential means to indicate the identity of the applicant and avoid giving any information that may reveal the identity of the applicant.

\( b \) It should send its decision letter to each violating enterprise, with the main text regarding the fine referring only to the enterprise that receives the decision letter. The decision letter should not contain information about other violating enterprises involved in the same case.

Furthermore, the conversation records or original documents containing information about the identity of the applicant should be kept in a file and stored appropriately. The same measures should be taken for other documents that may reveal the identity of the applicant. Unless otherwise stipulated by law, the conversation records and documents stated above may not be provided to any agencies, groups or entities other than investigatory and judicial agencies. Despite the foregoing, if any injured party files a civil lawsuit for damages against the violating enterprises, the injured party may request that the court ask the TFTC to provide relevant documents according to the ROC Code of Civil Procedure. The applicant is likely to be identifiable during the court procedure.\(^7\)

V PENALTIES

i Basic concept: administrative fine first, criminal liability later

If any enterprise is found to have conducted a concerted action without the TFTC’s approval, the TFTC may, pursuant to Article 40 of the TFTA, order it to discontinue the illegal conduct, or set a time limit for it to rectify the conduct or take necessary corrective measures, and impose an administrative fine of between NT$100,000 and NT$50 million. If the violating party fails to act as ordered, the TFTC may continue to order the violating party to cease the violation, or set another time limit for the violating party to comply, and may impose successive administrative fines of between NT$200,000 and NT$100 million until the violating party complies.

In addition to the aforementioned administrative punishments, a violation of cartel regulations may also carry criminal liability. That is, if any enterprise is ordered by the TFTC, pursuant to Article 40 of the TFTA, to cease, rectify or carry out necessary measures to correct its violation of the cartel regulations under the TFTA, but fails to follow such an order or repeats the violation, its responsible person and any employees involved may face a prison term of up to three years, while the enterprise may receive a criminal fine of up to NT$100 million in accordance with Article 34 of the TFTA.


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ii Higher administrative fine for serious violation

According to the Fine Formula (see Section VIII.ii), if the TFTC considers a concerted action to be serious, it may impose a fine of up to 10 per cent of the violating enterprise’s revenue in the previous fiscal year. The fine is not capped by the amounts mentioned in Section V.i.

In the calculations, revenues from an enterprise’s domestic and foreign branches should be included, but those from its subsidiaries (if any) are excluded. The reason for this is that the TFTC considers a subsidiary as a separate entity that operates independently. Given the above, the TFTC will not consider the consolidated revenues of a conglomerate, but only the revenues of the enterprise that violates the TFTA. Since some enterprises (such as holding companies) do not have actual operational activities, the fine calculated without including the consolidated revenues may be much lower than the TFTC’s expectation.

A serious concerted action is one that materially affects competition in the relevant market by taking the following factors into account:

a. the scope and extent of the market competition and order affected;
b. the duration of the damage to market competition and order;
c. the market status of the violating enterprise and the structure of the corresponding market;
d. the total sales and profits obtained from the unlawful conduct during the violation period; and
e. the type of concerted cartel: joint price decision on product or service, or restriction on quantity, trading counterpart or trading area.

In the event of either of the following circumstances, the violation should be deemed serious: (1) the total amount of turnover of the relevant products or services during the period the cartel is active exceeds NT$100 million; or (2) the total amount of gains derived from the cartel exceeds the maximum fine under the TFTA (i.e., NT$50 million).

iii Calculating fines for serious cartels

According to the Fine Formula, the amount of the fine imposed on a serious cartel should be based on the basic amount and adjusting factors. The ‘basic amount’ equates to 30 per cent of the total amount of turnover of the relevant products or services during the cartel period. The adjusting factors include aggravating factors and mitigating factors.

The aggravating factors are that the violating enterprise:

a. has organised or encouraged the unlawful conduct;
b. has implemented supervision or sanctioning measures to ensure that the concerted action is upheld or executed; and
c. has been sanctioned for violation of monopoly or cartel regulations within the past five years.

The mitigating factors are that:

a. the violating enterprise immediately ceased the unlawful act when the TFTC began the investigation;
b. the violating enterprise has shown real remorse and cooperated in the investigation;
c. the violating enterprise has established compensation agreements with the victims or has initiated remedial measures;
the violating enterprise has participated in the concerted action under coercion; and
other government agencies approve or encourage a reduction of the fine imposed, or
the fine reduction can be granted in accordance with other laws.

iv Administrative settlement
In addition to the Leniency Programme, the administrative settlement provides another
channel for seeking plea bargaining. According to the TFTC Guidelines for Handling
Administrative Settlement Cases, the TFTC may settle a case with a party if it does not have
enough evidence to secure a sanction. This is a contractual arrangement between the TFTC
and the party. In assessing whether to settle a case, the TFTC will have to consider the legality
and appropriateness of the settlement, the possible impact on the public interest and the
possible detriment to the interested parties.8

How this settlement mechanism should work after the Leniency Programme comes
into effect or how it should be calibrated to complement the Leniency Programme remain
open issues.

VI ‘DAY ONE’ RESPONSE
i Limit of the TFTC’s power
Under the current legal framework, the TFTC is not entitled to apply to the courts for a search
warrant because it has not been granted judicial power. Therefore, the investigatory power
granted by the TFTA and other administrative regulations is somewhat limited compared
with that of other foreign competition authorities or the prosecutors’ office. Accordingly, in
Taiwan, while a dawn raid may be initiated by a prosecutor based on a search warrant, the
TFTC cannot take such action.

If the TFTC has carried out unscheduled visits to target enterprises, it may request
that the enterprises provide necessary documents and information; however, it cannot
compel those enterprises to submit documents and information to the TFTC, or search the
enterprises’ premises to obtain the requested documents and information.9

ii The TFTC’s investigatory tools
According to the TFTA, the TFTC has investigatory tools that allow it to:
order the parties and any related third parties to appear before the TFTC to make
statements;
order relevant agencies, organisations, enterprises or individuals to submit books and
records, documents and any other necessary materials or exhibits;
dispatch personnel to conduct any necessary on-site inspection of the office, place of
business or other locations of the relevant organisations or enterprises; and

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8 Parties that have entered into a settlement agreement with the TFTC include Matra Transport International
(1998), RCA Thomson Licensing Corporation (1998) and Microsoft Taiwan Corporation (2003). However,
none of these settlements is related to cartel prohibition.

9 See footnote 6.
Seize articles discovered during any of the above-mentioned investigations that may serve as evidence. The articles and period of the seizure should be limited to those necessary for the investigation, inspection, verification or any other purpose of preserving evidence.\(^\text{10}\)

In addition, when conducting an investigation, the TFTC must observe the principles in the Administrative Procedure Act (the Act) in the same way as all other administrative government agencies. In particular, the principle of proportionality under the Act requires that (1) the method adopted by a government agency should help achieve the intended objective, (2) where there are several methods that could lead to the same result, the method that causes the least harm to the people concerned should be adopted, and (3) the harm caused by an action should not be disproportionately greater than the benefits from the action.

### iii Punishment for non-cooperation

If any person refuses an investigation without justifiable reasons, or refuses to appear when called to answer queries before the TFTC, or to submit books and records, documents or exhibits upon request with the set time limit, an administrative penalty of between NT$50,000 and NT$500,000 may be imposed upon that person. If that person continues to withhold cooperation without justification upon another notice, the TFTC may continue to issue notices of investigations, and may successively impose an administrative penalty of between NT$100,000 and NT$1 million each time until the person cooperates with the investigation, appears when called to answer queries, or submits books and records, documents or exhibits upon request.

### VII PRIVATE ENFORCEMENT

According to the TFTA, if any enterprise violates the TFTA and thereby infringes the rights and interests of another entity, the injured party may demand the removal of the infringement; if there is a likelihood of infringement, prevention may also be claimed. Additionally, the injured party may claim damages from the violating enterprise.\(^\text{11}\)

As to the calculation of damages, if the violating enterprise makes any gains from its act of infringement, the injured party may demand damages based solely on the monetary gain of the violating enterprise. Otherwise, the general principle under the civil lawsuit will apply to the calculation of damages. That is, the compensation will be limited to the injury actually suffered and the interests that have been lost. ‘Interests that have been lost’ refers to those that were expected in the ordinary course of matters, from decided projects or equipment, or in other special circumstances.\(^\text{12}\)

Moreover, the TFTA allows claims for punitive damages. That is, if the violation is intentional, the injured party is entitled to request that the court awards damages exceeding actual damage, provided that no award exceeds three times the amount of the proven damage.\(^\text{13}\)

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10 Article 27 of the TFTA.
11 Articles 29 and 30 of the TFTA.
12 Article 216 of the Civil Code.
13 Article 31 of the TFTA.
Although the TFTA provides legal grounds for civil action, so far there is no TFTC case precedent in which an injured party has successfully obtained compensation from an enterprise violating the cartel regulations.

The Leniency Programme offers confidentiality protection to the applicant, forbidding the TFTC from disclosing the identity of the applicant and relevant documents while issuing the decision letter. However, as mentioned in Section IV.vi, the applicant is likely to be identifiable during the court procedure if any injured party files a civil action against the enterprises involved in the violation.

VIII CURRENT DEVELOPMENTS

i The first application of the Leniency Programme: the ODD case

**Background**

In September 2012, the TFTC ruled that four manufacturers of optical disk drives – Toshiba Samsung Storage Technology Korea Corporation (TSST-K), Hitachi-LG Data Storage Korea Inc (HLDSK), Philips & Lite-On Digital Solutions Corporation (PLDS) and Sony Optiarc Inc (SOI) – had conspired during a bidding process held by Hewlett-Packard Company (HP) and Dell Inc (Dell), and hence had violated the cartel provisions under the TFTA.

According to the TFTC, between September 2006 and September 2009, the four ODD manufacturers, during or before the bidding procedure held by HP and Dell, exchanged their bidding prices and expected bid ranking through emails, telephone calls and meetings. Additionally, in several bidding cases, they agreed on the final price and ranking in advance while exchanging between themselves other sensitive information, such as capacity and amount of production. A market survey indicated that the four ODD manufacturers jointly occupied at least 75 per cent of the ODD market, and HP’s and Dell’s notebooks and desktops made up around 10 per cent of the relevant Taiwanese market. As 90 per cent or more of the disk drives used in HP’s and Dell’s notebooks and desktop computers were purchased through bidding processes, the bid rigging by the four ODD manufacturers had certainly affected supply and demand in the domestic ODD market. Therefore, the TFTC fined TSST-K, HLDSK, PLDS and SOI, respectively, NT$25 million, NT$16 million, NT$8 million and NT$5 million.

The TFTC indicated that it began investigating the case because some of the parties involved in the cartel had pleaded guilty and settled the case with the US Department of Justice in November 2011. After the commencement of the TFTC’s investigation, one manufacturer applied to the TFTC for leniency and provided all relevant evidence in accordance with the Leniency Programme under the TFTA. Having fully cooperated with the TFTC, the leniency applicant was awarded full immunity from the fine. The identity of the applicant has been kept confidential by the TFTC at the applicant’s request.

**Implications**

The ODD case is the first that the TFTC has concluded successfully with the help of an applicant since the Leniency Programme came into effect in 2011. Before the Leniency

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14 TFTC decision announced on 24 September 2012. The full content of the decision letter was not published because of protection of the leniency applicant.
Programme was incorporated into the TFTA, local practitioners doubted that the ‘whistle-blower mechanism’ would work in Taiwan as it does in other countries. Enterprises within the same industry in Taiwan have close interaction, and employees of these enterprises socialise with each other regularly. In addition, the requirement by the Leniency Programme for an enterprise to betray its business partners in return for immunity from or reduction of fines contradicts business practice. Nevertheless, the Leniency Programme, within one year of coming into effect, assisted the TFTC in bringing the cartel members in the ODD case to justice.15

This case is also the first instance of the TFTC seeking assistance from competition authorities in other jurisdictions (such as the United States and the European Union) because the cartel involved foreign markets and entities. A TFTC news release also indicates that the TFTC’s documents were served upon foreign entities in other countries with help from the Ministry of Foreign Affairs and its overseas offices.16

ii Record-breaking fine imposed on power producers17

Background

The TFTC rendered a decision on 13 March 2013, penalising nine independent power producers (IPPs) that are members of the Association of IPPs. During Association meetings between August 2008 and October 2012, these IPPs had agreed en bloc to refuse to amend the existing power purchase agreements with the Taiwan Power Company, and not to adjust the sale price of electricity even when there was a reduction in electricity production costs.

The TFTC found that the IPPs’ joint refusal could disrupt the functioning of the market, since each participating IPP could boost its profits by maintaining the existing sale price even when its electricity production costs decreased. Eventually, this refusal to adjust the price would lead to a price rise for the consumer. The TFTC therefore found the joint refusal to be a material violation of the concerted action regulations. To penalise the nine IPPs for their concerted action, the TFTC invoked the newly amended punishment provision under the TFTA (i.e., the Fine Formula), in which the maximum fine imposed on each violating enterprise can be up to 10 per cent of its turnover in the previous fiscal year. By applying the formula, the total fine in the subject case was NT$6.32 billion, which is the highest amount imposed in a single cartel case in the TFTC’s enforcement history.

The IPPs filed an administrative appeal with the Executive Yuan against the TFTC’s decision. In September 2013, the Executive Yuan ruled that the TFTC had calculated the fine recklessly. In particular, the Fine Formula had come into effect in April 2012 and the alleged concerted action straddled the new and old laws. Consequently, the Executive Yuan asked the TFTC to re-evaluate whether the old punishment provision, which capped the fine for a first offence at NT$25 million, should be considered when imposing fines on each IPP. Even though the TFTC reached a second decision in November 2013, whereby the fine imposed on each IPP was reduced by NT$30 million, that decision was also revoked by the Executive Yuan, in May 2014. According to the Executive Yuan, the TFTC failed to consider that each IPP’s culpability may vary, and thus reducing the fines uniformly would not comply with the legal requirements. Therefore, the TFTC made a third decision, in July 2014, whereby

15 See footnote 6.
17 TFTC decision letter dated 15 March 2013, Ref. No. 102035.
the fines on various levels were reduced according to each IPP’s business operation and involvement in the case. Although the fines are still being disputed in the administrative appeal procedure, the substance of the case (i.e., whether concerted action exists among the IPPs) has been moved to the administrative litigation process. On 29 October 2014, the Taipei High Administrative Court revoked the TFTC’s decision on the grounds that, *inter alia*, no ‘provision of electricity’ market exists in the subject case where IPPs can conspire to impair competition. Instead, it is a contract dispute between the IPPs and Taiwan Power Company. The TFTC appealed to the Supreme Administrative Court (the Supreme Court). In July 2015, the Supreme Court revoked the Taipei High Administrative Court and remanded the case to the Taipei High Administrative Court on the basis that several issues – such as whether a relevant market exists, whether the IPPs reached a meeting of minds and whether the IPPs’ conduct affected the market function – require further clarification. The TFTC filed an appeal against the judgment of the Taipei High Administrative Court. Then, in September 2018, the Supreme Court revoked and remanded the case again to the Taipei High Administrative Court. There is no final decision on this case as yet.

**Implications**

As this is the first case that has adopted the Fine Formula, the general public is anticipating that the interpretation of when a case should be considered as a material violation and how the 10 per cent turnover Fine Formula should be calculated will be clarified by the subsequent appeal decision and lawsuit (if any). Furthermore, the TFTC has shown how heavy-handed it can be when the interests of the public are at stake. Enterprises that receive a high degree of public attention should be cautious when interacting with their competitors.

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**iii The highest fine ever imposed on foreign enterprises in a cartel case**

**The Capacitor case**

**Background**

On 9 December 2015, the TFTC handed down a NT$5.8 billion fine on 10 international capacitor suppliers for price-fixing.\(^\text{18}\) Seven aluminium capacitor companies – Nippon Chemi-Con Corporation, Hongkong Chemi-Con Limited, Taiwan Chemi-Con Corporation, Rubycon Corporation, ELNA Co Ltd, Sanyo Electric (Hong Kong) Ltd and Nichicon (Hong Kong) Ltd – and three tantalum capacitor companies – NEC Tokin Corporation, Vishay Polytech Co Ltd and Matsuo Electric Co Ltd – were found to have violated the cartel regulations under the TFTA. According to the TFTC, all these enterprises were involved in exchanging sensitive information pertaining to clients, pricing, and production capacity and volume through meetings or bilateral communications starting in 2005. As Taiwan’s electronics manufacturing sector heavily relied on the importing of capacitors, with domestic supply accounting for minimal market share, the subject price-fixing scheme had detrimentally undermined competition in the Taiwanese market. Some of the capacitor suppliers have appealed to the Taipei Administrative Court against the TFTC’s decision; these cases are being reviewed by the Court.

\(^\text{18}\) The TFTC published a press release on its decision on 9 December 2015. It did not disclose the full text of the decision because of protection of the leniency applicants.
Implications

The heavy fine in the Capacitor case demonstrates that the TFTC will use the enterprise’s ‘global’ revenues to determine the cap of the fine for a serious violation. Also, by imposing the highest fine on foreign enterprises in its enforcement history, the TFTC said it would like to set an example for upholding fair business practices. Separately, the TFTC also pointed out that its decision was reached following a joint investigation launched last year with the European Union, Singapore and the United States. Among those agencies investigating the subject cartel, the TFTC is the first to conclude the case and reach a decision. This shows that the TFTC has gradually gained its exposure in the international antitrust community and has ample capability for handling cross-border cartels involving foreign enterprises.

iv Compliance programme

Guidance from the TFTC

To assist Taiwanese enterprises in establishing internal compliance rules to curb their risk of violating antitrust laws of other countries, in December 2011 the TFTC published the Guidelines on Setting up Internal Antitrust Compliance Programmes (the Guidelines) and the Antitrust Compliance Dos and Don’ts (the Principles of Conduct).

According to the Guidelines, an enterprise should stipulate an antitrust compliance programme that is appropriate for its business strategies and corporate culture. The programme should cover at least the following measures to ensure compliance:

a. developing a corporate culture where legal compliance is essential;
b. stipulating policies and procedures that everyone should observe;
c. providing education or training programmes;
d. establishing audit, review and report mechanisms;
e. creating proper rewards and punishments; and
f. designating a means for contact or consulting.

To allow each enterprise to grasp which actions are and are not permissible, the TFTC published the Principles of Conduct, including the types of violations under the TFTA and antitrust laws of other jurisdictions. The Principles of Conduct list the ‘dos and don’ts’ relating to cartels, restrictions on resale prices, monopolies and abuse of market power.

The Guidelines and the Principles of Conduct are administrative directives with no binding legal effect. However, the TFTC encourages Taiwanese enterprises to take the initiative in drafting their own compliance programmes so as to lower their risk of violating the relevant laws. In addition, besides referring to the Guidelines and the Principles of Conduct, the TFTC recommends that each enterprise takes its corporate culture and industry characteristics into consideration while drafting a compliance programme.19

Reaction from the enterprises

Several Taiwanese enterprises have been penalised by foreign competition authorities during the past decade for their involvement in international cartels. The most recent and notorious case ended with AU Optronics Corporation (AUO), its US subsidiary and two senior executives being convicted by a jury in March 2012 of violating US antitrust laws by colluding

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to fix prices of LCDs between 2001 and 2006. In September 2012, the court fined AUO US$500 million and imposed on each of the executives a prison sentence of three years and a fine of US$200,000. The severe penalties imposed on AUO and its high-ranking officers stunned the industry and alerted Taiwanese enterprises to the importance of compliance with antitrust law. In the wake of this case, Taiwanese enterprises may be more eager to establish internal compliance programmes to monitor the risk of cartel violation in various jurisdictions, as advised by the TFTC.20

IX OUTLOOK

In the past, the TFTC devoted most of its administrative resources to unfair competition matters, such as false advertisements or multi-level sales, while antitrust issues such as cartels received scant attention. Nonetheless, the amendment to the concerted action provisions, in particular the introduction of the Leniency Programme, may considerably transform how the TFTC enforces cartel regulations. As foreign competition authorities have vowed to take aggressive action to curb the growth of international cartels, the TFTC may follow the trend. The TFTC can be expected to develop a more mature enforcement strategy in the near future.21

In the February 2015 amendments to the TFTA, the TFTC’s original proposal of empowering the TFTA to search and seize (i.e., conduct dawn raids) did not pass the Legislative Yuan’s final review because of concerns that the power to conduct dawn raids may be unconstitutional. In the past few years, the TFTC has advocated such a proposal several times. However, as there have already been strong criticisms against such a move on the grounds of the separation of powers between administrative agency and judicial authority, there is no certainty that this dawn-raid power will be adopted and become effective in the near future. In November 2018, the TFTC proposed a draft bill to amend Article 41 of the TFTA regarding the statute of limitations. The amended Article 41 stipulates that the statutory limitation on the TFTC’s power to impose sanctions will be interrupted on the day on which the TFTC starts an investigation. This amendment significantly prolongs the amount of time available to the TFTC for conducting investigations and imposing sanctions on anticompetition conduct. The draft bill is subject to the approval of the Executive Yuan and then three readings of the Legislative Yuan. Thus, whether and when it will become effective is still unknown.

The TFTA was amended in June 2015 to introduce a whistle-blower reward scheme. According to Article 47-1 of the amended TFTA, and other sources, 30 per cent of the funds for this reward, described as an ‘antitrust fund’ under the TFTA, will come from the penalties collected by the TFTC. As outlined in a TFTC news release, this reward scheme aims to encourage employees to report illegal activities carried out by their employers. By obtaining such internal information from whistle-blowers, the TFTC’s chances of detecting and proving a cartel can be effectively escalated.22

20 See footnote 7.
21 See footnote 6.
Chapter 27

TURKEY

Gönenç Gürkaynak

I ENFORCEMENT POLICIES AND GUIDANCE

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.

Article 4 is akin to and closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). 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 set out a definition of ‘cartel’, but rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement.

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 the broad discretionary power of the Competition Board (the Board).

Article 4 sets out a non-exhaustive list of restrictive agreements that is, to a large extent, the same as Article 101(1) of the TFEU. In particular, it prohibits agreements that:

a directly or indirectly fix purchase or selling prices or any other trading conditions;
b share markets or sources of supply;
c limit or control production, output or demand in the market;
d place competitors at a competitive disadvantage or involve exclusionary practices, such as boycotts;
e apart from exclusive dealing, apply dissimilar conditions to equivalent transactions with other trading parties; and
f conclude contracts in a manner contrary to customary commercial practice, 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 list is intended to generate further examples of restrictive agreements.

The Competition Law authorises the Board to regulate, through communiqués, certain matters under Competition Law, such as Communiqué No. 2010/2 on Oral Hearings Before

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the Board, which regulates the procedures under which oral hearings are held before the Board, and Communiqué No. 2012/2 on the Application Procedure for Infringements of Competition, which regulates the procedures and principles related to applications to the Turkish Competition Authority (TCA) on infringement of Articles 4, 6 or 7 of the Competition Law.

The secondary legislation specifying the details of the leniency mechanism, namely the Regulation on Active Cooperation for Discovery of Cartels (the Leniency Regulation), entered into force on 15 February 2009. Moreover, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance (the Regulation on Fines) sets out detailed guidelines as to the calculation of monetary penalties applicable in the case of an antitrust violation.

The Board published the Guideline Regarding the Regulation on Active Cooperation for the Purpose of Discovery of Cartels (the Leniency Guideline) on 19 April 2013. This Guideline was prepared to provide certainty in interpretations, to reduce uncertainty in practice and, as a requirement of the transparency principle, to provide guidance for undertakings to enable them to benefit from the leniency programme more efficiently.

II COOPERATION WITH OTHER JURISDICTIONS

Article 43 of Decision No. 1/95 of the EC-Turkey Association Council (Decision No. 1/95) authorises the TCA to notify and request the European Commission (Directorate-General for Competition) to apply relevant measures if the Board believes that cartels organised in the European Union adversely affect competition in Turkey. The provision grants reciprocal rights and obligations to the parties (the European Union and Turkey), and thus the European Commission has the authority to request that the Board apply necessary measures to restore competition in the relevant markets.

There are also a number of bilateral cooperation agreements on cartel enforcement matters between the TCA and the competition agencies of other jurisdictions (e.g., Romania, Korea, Bulgaria, Portugal, Bosnia-Herzegovina, Russia, Croatia and Mongolia). The TCA also has close ties with the Organisation of Economic Co-operation and Development, the United Nations Conference on Trade and Development, the World Trade Organization, the International Competition Network and the World Bank.

The research department of the TCA 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. A cooperation protocol was signed on 14 October 2009 between the TCA and the Turkish Public Procurement Authority to procure a healthy competition environment with regard to public tenders by cooperating and sharing information. Informal contacts do not constitute a legal basis for the Turkish Competition Authority’s actions.

Nevertheless, the interplay between jurisdictions does not materially affect the way the Board handles cartel investigations. The principle of comity is not included as an explicit provision in the Competition Law. Cartel conduct (whether Turkish or non-Turkish) that was investigated elsewhere in the world can be prosecuted in Turkey even if it has had an effect on non-Turkish markets.

There is no regulation under the Competition Law on restricting or supporting international cooperation regarding extradition or extraterritorial discovery. Nevertheless, in the same way as many other competition authorities, the TCA faces various issues in which
international cooperation is required. In this respect, there have been various decisions\(^2\) for which the TCA has requested cooperation on dawn raids, information exchange, notifications and collection of monetary penalties from the competition authorities in other jurisdictions via the Ministry of Foreign Affairs and the Ministry of Justice. However, the TCA has been unsuccessful in these requests.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Turkey is an ‘effects theory’ jurisdiction in which the main concern is whether the cartel activity has affected the 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, unless there is an effect on Turkish markets.\(^3\) The Board is yet to enforce monetary or other sanctions against firms located outside Turkey without any presence in Turkey, mostly because of enforcement handicaps (such as difficulties of formal service). The specific circumstances surrounding indirect sales have not been tried under Turkish cartel rules. Article 2 of the Competition Law could potentially support an argument that the Turkish cartel regime does not extend to indirect sales because the cartel activity that takes place outside Turkey does not in and of itself produce effects in Turkey.

The underlying basis of the Board’s jurisdiction is found in Article 2 of the Competition Law, which captures all restrictive agreements, decisions, transactions and practices to the extent that they have an effect on a Turkish market, regardless of where the conduct takes place.

The Competition Law applies both 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. Therefore, the Competition Law applies to individuals and corporations alike if they act as an undertaking.

Unlike the TFEU, the Competition Law does not refer to ‘appreciable effect’ or ‘substantial part of a market’, and thereby excludes any \textit{de minimis} exception. However, the enforcement trends and proposed changes to the legislation are increasingly focusing on \textit{de minimis} defences and exceptions.

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 Article 4. Nevertheless, there are sector-specific antitrust exemptions. 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.

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\(^3\) See, for example, Sisecam/Yioula No. 07-17/155-50 dated 28 February 2007, Gas Insulated Switchgears No. 04-43/538-133 dated 24 June 2004 and Refrigerator Compressors No. 09-31/668-156 dated 1 July 2009.

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The applicable block exemption rules are:

a Block Exemption Communiqué No. 2002/2 on Vertical Agreements;
b Block Exemption Communiqué No. 2008/3 for the Insurance Sector;
c Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements;
d Block Exemption Communiqué No. 2013/3 on Specialisation Agreements;
e Block Exemption Communiqué No. 2016/5 on Research and Development Agreements; and
f Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicles Sector.

The Board has also published a significant secondary legislation instrument, namely the Guidelines on Horizontal Cooperation, which contains a general analysis of Articles 4 and 5 of the Competition Law and general competition law concerns on information exchanges, research and development agreements, joint production agreements, joint purchasing agreements, commercialisation agreements and standardisation agreements. These are all modelled on their respective equivalents in the European Union.

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. 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 illegal *per se*.

The antitrust regime also condemns concerted practices, and the TCA easily shifts the burden of proof in connection with concerted practice allegations through a mechanism called the presumption of concerted practice. A concerted practice is a form of coordination without a formal agreement or decision by which two or more companies come to an understanding to avoid competing with each other. The coordination need not be in writing. It is sufficient that the parties have expressed their joint intention to behave in a particular way, for example in a meeting, a telephone call or an exchange of letters.

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the justified decision of the Board. 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, upon request of the plaintiff, the court, by providing its justifications, may decide to stay the execution of the decision if its execution is likely to cause serious and irreparable damage, and the decision is highly likely to be against the law (that is, showing of a *prima facie* case).

The judicial review period before the Ankara administrative courts usually takes between 12 and 24 months. As a result of recent legislative changes, which came into force in July, 2016, administrative litigation cases (and private litigation cases) are subject to judicial review before the newly established regional courts (established in 2016), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the Court of Appeals for private cases).

A regional court will go through a case file both on procedural and substantive grounds, and investigate the case file, then make a decision considering the merits of the case. The regional court’s decision will be considered final, but in exceptional circumstances will be subject to review by the Council of State, as set out in Article 46 of the Administrative Procedure Law. In such cases, the decision of the regional court will not be considered final.
and the Council of State may decide to uphold or reverse that decision. If the decision is reversed by the Council of State, it will be returned to the deciding regional court, which will in turn issue a new decision that takes into account the Council of State’s decision.

As the regional courts are newly established, there is as yet insufficient experience of how long it takes for a regional court to finalise its review of a file. Accordingly, the Council of State’s review period (for a regional court’s decision) within the new system should also be tested before providing an estimated time period. Court decisions 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 between 24 and 30 months.

IV LENIENCY PROGRAMMES

The leniency programme is available to cartel members. The Leniency Regulation does not apply to other forms of antitrust infringement. Section 3 of the Leniency Regulation 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 up to the point that the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine.

Pursuant to the Leniency Regulation, the following conditions must be met before a cartel member can benefit from immunity or fine reduction. The applicant must submit:

a information on the products affected by the cartel;
b information on the duration of the cartel;
c the names of the cartelists;
d the dates, locations and participants of the cartel meetings; and
e other information or documents about the cartel activity.

The required information may be submitted verbally. Additionally:
a the applicant must avoid concealing or destroying information or documents on the cartel activity;
b unless the Leniency Division decides otherwise, the applicant must stop taking part in the cartel;
c unless the Leniency Division instructs otherwise, the application must be kept confidential until the investigation report has been served; and
d the applicant must continue to actively cooperate with the TCA until the final decision on the case has been rendered.

In any case where an application containing limited information is accepted, further information needs to be submitted subsequently. Although no detailed principles on the marker system are provided under the Leniency Regulation, pursuant to Section 6 of the Regulation, a document (showing the date and time of the application and request for time (if such a request is in question) to prepare the requested information and evidence) will be given to the applicant by the assigned unit.

The first firm to file an appropriately prepared application for leniency may benefit from total immunity if the application is made before the investigation report is officially served and the TCA is not in possession of any evidence indicating a cartel infringement. Employees or managers of the first applicant will also be totally immune; however, the
applicant must not have been the ringleader. If the applicant has forced any other cartel members to participate in the cartel, a reduction in the fine of only 33 to 50 per cent is available for the firm and between 33 and 100 per cent for the employees or managers.

In addition to this, the applicant must:

a. end its involvement in the infringement;
b. provide the TCA with all relevant information on the infringement (e.g., dates and locations of meetings, the products affected, the companies and individuals implicated);
c. not conceal or destroy any information; and
d. continue to cooperate with the TCA after applying for leniency and to the extent necessary.

The second firm to file an appropriately prepared application will receive a fine reduction of between 33 and 50 per cent. Employees or managers of the second applicant who actively cooperate with the TCA will benefit from a fine reduction of between 33 and 100 per cent.

The third applicant will receive a reduction of between 25 and 33 per cent. Employees or managers of the third applicant who actively cooperate with the TCA will benefit from a reduction of 25 to 100 per cent.

Finally, subsequent applicants will receive a reduction of between 16 and 25 per cent. Employees or managers of subsequent applicants will benefit from a reduction of between 16 and 100 per cent.

The current employees of a cartel member also benefit from the same level of leniency or immunity that is granted to the entity. There are, as yet, no precedents about the status of former employees. Apart from this, according to the Leniency Regulation, a manager or employee of a cartel member may also apply for leniency until the investigation report is officially served. Such an application would be independent from applications (if any) by the cartel member itself. Depending on the application order, there may be total immunity from, or a reduction of, a fine imposed on the manager or employee. The reduction rates and conditions for immunity or reduction are the same as those designated for the cartel members.

In addition, according to the Regulation on Fines, cooperation by a party is one of the mitigating factors that the Board can consider while determining the amount of the fine to be imposed. In such a case, if mitigating circumstances are established by the violator, the fine would be reduced by between 25 and 60 per cent.

Turkish law does not prevent counsel from representing both the investigated corporation and its employees as long as there are no conflicts of interest. That said, employees are hardly ever investigated separately.

V PENALTIES

The sanctions that may 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 of the individuals implicated. That said, there have been cases in which the matter was referred to a public prosecutor before and after the investigation under the Competition Law was complete. On that note, bid rigging activity may be criminally prosecutable under Sections 235 et seq. of the Criminal Code. Illegal price manipulation (i.e., manipulation through disinformation or other fraudulent means) may also be punished by up to two years’ imprisonment and a judicial monetary penalty under Section 237 of the Criminal Code.
In cases of proven cartel activity, the undertakings concerned will be separately subject to fines of up to 10 per cent of the turnover generated in Turkey in the financial year prior to the date of the fining decision (or, 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. 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 following, in determining the magnitude of the monetary penalty:

- the level of fault and the amount of possible damage in the relevant market;
- the market power of the undertakings within the relevant market;
- the duration and recurrence of the infringement;
- the cooperation or driving role of the undertakings in the infringement; and
- the financial power of the undertakings or their compliance with their commitments.

The Regulation on Fines applies to both cartel activity and abuse of dominance but does not cover illegal concentrations. According to the Regulation, 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 (or, if this is not calculable, the turnover for the financial year nearest to the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines applies also to managers or employees who had a determining effect on the violation (such as participating in cartel meetings and making decisions that would involve the company in cartel activity) and provides for certain reductions in their favour.

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 measures necessary to restore the level of competition and status to that existing prior to the infringement. Furthermore, such a restrictive agreement will be deemed legally invalid and unenforceable with all its legal consequences. Similarly, in cases where there is a possibility of serious and irreparable damages, the Competition Law authorises the Board to take interim measures until the final resolution on the matter.

Therefore, in brief, the Board is authorised to take all necessary measures to terminate the restrictive agreement, remove all factual and legal consequences of every action that has been taken unlawfully, and take all other necessary measures to restore the level of competition and status that existed before the infringement.

The Board does not enter into plea bargaining arrangements, and mutual agreements (which must take the form of an administrative contract) on other liability matters have not been tested in Turkey.

Besides the above-mentioned leniency programme, Article 9 of the Competition Law, which generally entitles the Board to order structural or behavioural remedies to restore the status quo, sometimes operates as a conduit through which infringement allegations are settled before a full-blown investigation is launched. This can only be established by a 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 only to an Article 9 warning, the Board at least found a mitigating factor in the fact that the entity immediately took measures to cease any wrongdoing and to remedy the situation where possible.

Additionally, the participation of an undertaking in cartel activities 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’ rationale, 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 parallelism 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 if price changes in the market, the supply and demand equilibrium or fields of activity of enterprises bear a resemblance to those in markets where competition is obstructed, disrupted or restricted. Turkish antitrust precedents recognise that conscious parallelism is rebuttable evidence of forbidden behaviour and constitutes sufficient grounds to impose fines on the undertakings concerned. The burden of proof is very easily swapped, 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.

VI ‘DAY ONE’ RESPONSE

Article 15 of the Competition Law authorises the Board to conduct dawn raids. Accordingly, the Board is entitled to:

* a. examine the books, paperwork and documents of undertakings and trade associations, and, if necessary, take copies of the same;

* b. request undertakings and trade associations to provide written or verbal explanations on specific topics;

* c. conduct on-site investigations with regard to any asset of an undertaking; and

* d. fully examine computer records, including but not limited to deleted items.

Refusal to grant the staff of the TCA 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 (or, 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 for 2018 is 21,036 Turkish lira. A refusal may also lead to the imposition of a periodic daily fine rate of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, 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) for each day of the violation.

The Competition Law therefore provides broad authority to the TCA on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to allow the dawn raid. While the specific wording of the Law allows verbal testimony to be compelled of employees, case handlers do allow a delay in giving an answer as long as this is quickly followed up by written correspondence. Therefore, in practice, employees can avoid providing answers on issues about which they are uncertain, provided that a written response is submitted within a mutually agreed timeline. Computer records are fully examined by the experts of the TCA, 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 (which is written on the deed of authorisation).

The Board may also 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 (or, 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). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

VII PRIVATE ENFORCEMENT

A cartel matter is primarily adjudicated by the Board. Enforcement is also supplemented with private lawsuits. In private suits, cartel members are adjudicated before regular courts.

One of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Articles 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. Owing to a treble damages clause allowing litigants to obtain three times their loss as compensation, private antitrust litigations increasingly make their presence felt in the cartel enforcement arena. Most courts wait for the decision of the TCA, then build their own decision on that finding.

Turkish procedural law does not allow for class actions or procedures. Class certification requests would not be granted by Turkish courts. 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. Moreover, as previously mentioned, 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.

VIII CURRENT DEVELOPMENTS

The most recent change with respect to the Turkish cartel regime is the publication of the amended Guidelines on Vertical Agreements, which concluded two years of work by the Competition Authority. The amended version of the Guidelines now includes internet sales, which are acknowledged to provide a wider data set that allows price comparison to the consumers. Furthermore, there are revisions concerning most-favoured customer clauses, a contemporary topic deemed significant by competition authorities around the globe.

In addition to that, the Prime Ministry sent the Draft Law on Protection of Competition, which is designed to introduce new concepts to the Turkish competition cartel regime such as the de minimis defence and the settlement procedure, to the Presidency of the Parliament on 23 January 2014. In 2015, the Draft Law became obsolete again because of the general elections in June and November 2015. It is yet to be seen whether the new
parliament or the government will renew the Draft Law. As stated in its 2015 Annual Report, the TCA requested the reinitiation of the legislative procedure concerning the Draft Law. The Report notes that the TCA may take steps towards the amendment of certain articles if parliament does not pass the Draft Law – it is currently statute barred. In order to reinitiate the parliamentary process, the Draft Law must again be proposed and submitted to the presidency of the Turkish parliament. Although it is not possible to indicate an exact timing, it is likely that a draft reform law will remain on the parliamentary agenda.

The TCA also announced a public consultation on the Draft Regulation on Administrative Monetary Fines. This is due to replace the current Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance. Consultations on the Draft Regulation are still under way.

The TCA’s annual report for 2017 states that the Board finalised 80 cases relating to competition law violations. Of those 80 cases, 37 were subject to Article 4 (anticompetitive agreements) only, 29 were subject to both Article 4 and Article 6 (abuse of dominant position) and one case was subject to Articles 4, 6 and 7 (merger control). There were 41 cases relating to anticompetitive agreements, 26 of which concerned horizontal agreements. The Board issued fines amounting to a total of 41,320,930 Turkish liras, 38,776,937 Turkish liras for cases analysed in terms of Article 4 and 2,543,993 Turkish liras for cases analysed in terms of Articles 4 and 6. The figures for fines imposed in 2017 show that, in total, the Board imposed roughly four times less in fines to Article 4 cases while the fines imposed on Article 6 cases has tripled. Further, the Board imposed fines relating to cases that were evaluated with respect to both Article 4 and Article 6 for the first time in five years (133,693,788 Turkish liras for anticompetitive agreements in 2016). This figure shows that there was an increase in 2016 in terms of fines issued for anticompetitive agreements, compared with the remarkable drop that had been seen in recent years. Therefore, the trend during the course of several years has shown that the Board does not hesitate to impose administrative monetary penalties when it comes to horizontal anticompetitive and cartel arrangements.

In terms of its recent cartel enforcement activity, one of the Board’s most recent and important decisions concerning leniency applications is the Corporate Loans decision (28 November 2017, 17-39/636-276). The Board launched an investigation against 13 financial institutions, including local and international banks active in the corporate and commercial banking markets in Turkey with respect to whether they have violated Article 4 of Law No. 4054 by way of exchanging competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. The Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU) made a leniency application on 14 October 2015 to benefit from Article 4 of the Regulation on Leniency. After an in-depth investigation lasting 19 months, the Board unanimously concluded that BTMU, ING Bank AŞ (ING) and the Royal Bank of Scotland Plc Merkezi Edinburgh İstanbul Merkez Şubesi (RBS) had violated Article 4 of Law No. 4054. In this respect, the Board imposed administrative monetary penalties on ING and RBS of 21.1 million Turkish liras and 66,400 Turkish liras, respectively, relative to their annual turnover in fiscal year 2016. However, the Board resolved that BTMU should not have an administrative monetary penalty imposed pursuant to its leniency application, granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary penalty.
I ENFORCEMENT POLICIES AND GUIDANCE

The two principal pieces of national legislation regarding cartel activity in the United Kingdom are the Competition Act 1998 and the Enterprise Act 2002 (both as amended by the Enterprise and Regulatory Reform Act 2013). In addition, Regulation (EC) No. 1/2003 requires the UK competition authorities and courts to apply and enforce Article 101 of the Treaty on the Functioning of the European Union (TFEU) in relation to cartel conduct that may affect trade between Member States.

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 of the TFEU and is intended to be interpreted consistently with the corresponding EU rules. On 23 June 2016, the UK electorate voted to leave the European Union. The leave vote, or Brexit, as it is commonly known, has caused much political, economic and legal uncertainty. It is likely to result in changes to cartel regulation within the United Kingdom. However, at the time of writing, there is a degree of uncertainty surrounding the terms on which the United Kingdom will leave the European Union and the future trading relationship between the parties, meaning it is difficult to predict how and when the legal framework may change.

Under the Enterprise Act, it is a criminal offence for an individual to agree 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.

The principal enforcement agency in the United Kingdom is the Competition and Markets Authority (CMA). The sectoral regulators for communications matters, electricity

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1 Philippe Chappatte is a partner and Paul Walter is a special adviser at Slaughter and May. The authors would like to thank Robert Walmsley, a trainee solicitor at Slaughter and May, for his help in preparing this chapter.


3 Section 60 of the Competition Act 1998. The UK government has published a draft of the Competition (Amendment etc.) (EU Exit) Regulations 2019, which are intended to make certain changes to the UK’s competition regime after exit from the European Union. The Regulations envisage that Section 60 will be replaced by Section 60A, which provides that competition regulators and UK courts will continue to be bound by an obligation to ensure no inconsistency with the pre-exit EU competition case law when interpreting UK competition law, but that they may also depart from such pre-exit EU case law where it is considered appropriate in the light of particular circumstances.
and gas, water and sewerage, civil aviation, health, railway services and financial services have concurrent competition powers. The sectoral regulators are required to consider whether the use of these powers would be more appropriate than their sector-specific powers to promote competition. Nonetheless, cartel investigations have tended to be handled by the CMA, given that it is the only competition regulator with the power to investigate criminal cartels under the Enterprise Act. In November 2017, the CMA published new guidance establishing that the CMA is now the single first port of call for all leniency applications in the United Kingdom, including those in the regulated sectors.

The CMA’s guidelines state that cartel activities ‘are among the most serious infringements of competition law’.\(^4\) However, the CMA is prepared to offer lenient treatment to businesses and individuals that come forward with information about a cartel in which they are involved. The framework principles for the leniency policy are set out in the publications ‘Applications for leniency and no-action in cartel cases’ and ‘Guidance as to the appropriate amount of a penalty’. The CMA has also published prosecution guidance in respect of the cartel offence.\(^5\)

II Cooperations with other jurisdictions

The CMA currently cooperates extensively with the European Commission and with the national competition authorities in the other Member States through the European Competition Network (ECN) (see the European Union chapter for further details). These arrangements may be expected to change post-Brexit. In addition, the United Kingdom is party to mutual assistance arrangements relating to competition law enforcement with a number of other non-EU countries, including the United States, Australia, Canada, China and New Zealand.

The CMA’s current guidance states that information supplied as part of an application for leniency will not be passed on to an overseas agency without the consent of the provider except in one situation: the information may be disclosed within the ECN in accordance with the provisions and safeguards set out in the European Commission’s Network Notice.\(^6\)

If leniency has been applied for in other jurisdictions, the CMA generally expects the leniency applicant to provide a waiver of confidentiality to allow the CMA to discuss matters with those other jurisdictions. Normally, any transfer of information in these circumstances is limited to that which is necessary to coordinate planned concerted action, such as on-site investigations.

Where the United Kingdom has extradition relations with another territory, individuals may be extradited for prosecution for participation in a cartel.

\(^4\) CMA guidance as to the appropriate amount of a penalty, April 2018.
\(^5\) CMA Cartel Offence Prosecution Guidance, March 2014.
\(^6\) See Paragraphs 40 and 41 of the Commission Notice on cooperation within the Network of Competition Authorities and Paragraph 7.31 of the Office of Fair Trading (OFT) publication ‘Applications for leniency and no-action in cartel cases’, July 2013 (adopted by the CMA).
III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES
AND EXEMPTIONS

i Extraterritoriality
The Chapter I prohibition can apply to agreements between undertakings located outside
the United Kingdom if they may affect competition within the country. The Chapter I
prohibition applies wherever the agreement, decision or practice is, or is intended to be,
implemented in the United Kingdom. Similarly, the criminal offence under the Enterprise
Act will apply to an agreement outside the United Kingdom if it is, or is intended to be,
implemented in whole or in part in the United Kingdom.

ii Parent company liability
The UK competition authorities and courts follow the principles established by the Court
of Justice of the European Union (CJEU) on the issue of parent company liability (see the
European Union chapter for further details). Accordingly, the conduct of a subsidiary (and,
in certain circumstances, a minority interest holding) may be imputed to a parent company
where, having regard to the economic, organisational and legal links between those two
entities, the subsidiary does not decide independently upon its own conduct on the market
but carries out in all material respects the instructions given to it by the parent company.
Where a parent company has a 100 per cent shareholding in a subsidiary, there is a rebuttable
presumption that the parent company exercises a decisive influence over its subsidiary and,
therefore, the two entities form a single undertaking.

Shareholdings below 100 per cent may also give rise to a position of a single
undertaking, depending on the level of the shareholding and the nature of the links between
the companies.7

iii Affirmative defences and exemptions
Although exemptions are available for conduct that falls within the Chapter I prohibition or
Article 101 of the TFEU, it is highly unlikely that a hard-core cartel agreement could qualify
for such an exemption.

The Competition Act does, however, exclude certain agreements from the scope of
the Chapter I prohibition relating to the production of, or trade in, agricultural products.
Certain types of public transport ticketing schemes are also exempt. The Secretary of State
may exclude further categories of agreement if he or she is satisfied that there are exceptional
and compelling public policy reasons for exclusion.

7 See, for example, Case C-97/08 P, Akzo Nobel NV and others v. Commission, judgment of
10 September 2009.
As stated above, the CMA has published guidance on leniency applications, with the effect that it is now the single first port of call for all applications, including those in the regulated sectors. The CMA’s leniency programme provides different types of protection to an applicant depending on its order in the queue and whether an investigation has already commenced:

- **Type A immunity** – available where the undertaking is the first to apply and there is no pre-existing civil or criminal investigation (or both) into the 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 disqualification as a director.

- **Type B immunity** – available where the undertaking is the first to apply but there is already a pre-existing civil or criminal investigation (or both) into the activity. In these circumstances, the CMA retains discretion as to 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 disqualification as a director. Type B immunity will no longer be available when 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 on a blanket or individual basis. Cooperating individuals should also avoid disqualification as a director.

- **Type C leniency** – available to undertakings that 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 disqualification as a director.

In addition to fulfilling the above criteria, an undertaking must fulfil the following conditions in order to be granted Type A or Type B immunity or leniency:

- accept that it participated in cartel activity in breach of the law;

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10. Immunity from criminal prosecution is granted in the form of a no-action letter issued by the CMA. A no-action letter will prevent a prosecution being brought against an individual in England, Wales and Northern Ireland. Guarantees of immunity from prosecution cannot be given in relation to Scotland, but cooperation with the CMA will be reported to the Lord Advocate, who will give such cooperation serious weight when considering whether to prosecute the individual in question and may give an early decision as to whether that individual remains liable to be prosecuted.
In order to be granted Type C leniency, an undertaking must also fulfil each of the above conditions, except condition e, which does not apply.

i  Markers
An initial approach to the CMA may be made by an undertaking’s legal advisers on a hypothetical ‘no names’ basis to secure a preliminary marker protecting the applicant’s place in the queue. In order to do so, the adviser must have instructions to apply for Type A immunity if the CMA confirms that it is available. Before contacting the CMA, the adviser must therefore ensure that there is a ‘concrete basis’ for a suspicion of cartel activity and be able to confirm that the undertaking has a ‘genuine intention to confess’ – that is, acceptance that the available information suggests that it has been engaged in cartel conduct in breach of the Chapter I prohibition or Article 101 of the TFEU, or both.

In order to confirm the availability of a preliminary marker, the CMA must be provided with sufficient details to allow it to determine whether there is a pre-existing civil or criminal investigation or a pre-existing applicant. If the CMA confirms that Type A immunity is available, the adviser must identify the undertaking and apply for immunity by providing an application package with details of the suspected infringement and the evidence uncovered at that stage. A discussion of the timing and process for confirming the marker would then follow.

A similar approach may be made to obtain a preliminary 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.

An applicant may also apply for a preliminary marker in respect of Type B and Type C leniency. To confirm the marker, the applicant must provide in the application package all relevant information available to it in relation to the cartel, and that information must, as a minimum, add significant value to the CMA’s investigation.

ii  Duties of cooperation
A senior representative of the applicant will be asked to sign a letter indicating that the applicant understands the conditions for the grant of leniency, and in particular that it is committed to continuous and complete cooperation throughout the CMA’s investigation and subsequent enforcement action. The CMA notes in its guidance that the requirement

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11 The CMA should not as a condition of leniency require waivers of legal professional privilege (LPP) over any relevant information in either civil or criminal investigations. However, save where the position is uncontroversial and clear to the CMA’s satisfaction, the CMA will ordinarily require a review of any relevant information in respect of which LPP is claimed by an independent counsel selected, instructed and funded on a case-by-case basis by the CMA. See OFT publication, ‘Applications for leniency and no-action in cartel cases’, July 2013 (adopted by the CMA).
to maintain continuous and complete cooperation implies that the overall approach to
the leniency process must be a constructive one designed genuinely to assist the CMA in
efficiently and effectively detecting, investigating and taking enforcement action against cartel
conduct.12 If, at any time, the CMA has concerns that the applicant is not adopting such a
constructive approach, or that there are unreasonable delays in providing information or
otherwise cooperating with CMA requirements, the matter will be raised with the applicant
by the case team.

iii Access of private litigants to leniency materials
In March 2017, the United Kingdom implemented the provisions of the EU’s Directive
of December 2014 on rules governing actions for damages under national law for breach
of the EU antitrust rules and those of Member States (the Damages Directive – see the
European Union chapter and Section VII for further details).13 The new provisions include
a number of safeguards in relation to leniency programmes. These ensure that leniency
corporate statements and settlement submissions (except those that have been withdrawn)
have absolute protection from disclosure or use as evidence, and that documents specifically
prepared in the context of the public enforcement proceedings by the parties (e.g., replies
to authorities’ requests for information) or the competition authorities (e.g., a statement
of objections) have temporary protection (i.e., for the duration of the relevant competition
authority’s investigation).

iv Representation by counsel of the corporate entity and its employees
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, separate representation is likely to be appropriate if individual employees face
possible criminal prosecution under the Enterprise Act, given the real possibility of conflicts
of interest between the corporate entity and the employee.

V PENALTIES
The principal sanction that may be imposed for a breach of the Chapter I prohibition or
Article 101 of the TFEU is a civil fine of up to 10 per cent of the infringing undertaking’s
worldwide turnover in its previous business year.14

The UK competition authorities have imposed severe financial penalties in respect of
cartel activities, including:
a in April 2010, the Office of Fair Trading (OFT) announced fines totalling £225 million
after finding that two tobacco manufacturers and 10 retailers had engaged in unlawful

12 See OFT publication, ‘Applications for leniency and no-action in cartel cases’, July 2013 (adopted by
the CMA).
13 The provisions of the Damages Directive were implemented into UK law by the The Claims in respect of
Loss or Damage arising from Competition Infrigements (Competition Act 1998 and Other Enactments
(Amendment)) Regulations 2017.
14 Section 36 of the Competition Act.
practices in relation to retail prices for tobacco products in the United Kingdom. The highest individual fine was £112 million, imposed upon Imperial Tobacco. However, the fines imposed upon Imperial Tobacco and a number of the retailers were quashed following an appeal on liability to the Competition Appeal Tribunal (CAT). The Court of Appeal also ordered the CMA to repay the penalties paid by two other infringers under early resolution agreements entered into with the OFT on grounds of procedural fairness;\(^{15}\)

\(b\) in April 2012, the OFT imposed a fine of £58.5 million on British Airways for its role in an alleged fuel surcharge price-fixing agreement with Virgin Atlantic; and

\(c\) in August 2011, the OFT announced total fines of £49.51 million in respect of its finding that four supermarkets and five dairy processors had been involved in a number of infringements covering the dairy market.

**i  Factors taken into account when setting the penalty**

A financial penalty imposed by the CMA under the Competition Act will be calculated following a six-step approach:

\(a\) The starting point is calculated with regard to the seriousness of the infringement and the relevant turnover of the undertaking. The relevant turnover is that of the undertaking in the relevant product and geographical markets affected by the infringement in the last financial year before the infringement ended. The starting point will not exceed 30 per cent of the relevant turnover. The CMA will in general use a starting point of between 21 and 30 per cent for cartel activities.

\(b\) Adjustment for duration. The starting point may then be multiplied by a figure up to a maximum of the number of years the infringement lasted. Part years may be treated as full years for these purposes. Any duration of less than a year will normally be treated as a full year although, exceptionally, the starting point may be decreased where the duration is less than a year.

\(c\) Adjustment for aggravating and mitigating factors.

\(d\) Adjustment for specific deterrence and proportionality. The penalty may be increased to ensure that the infringing undertaking will be deterred from breaching competition law again, having regard to its size and financial position, and any other relevant circumstances. The penalty figure may also be increased 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.

\(e\) Adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy.

\(f\) Adjustment for leniency or settlement discounts, or approval of a voluntary redress scheme, or both.\(^{16}\)

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\(^{15}\) See Gallaher Group Ltd & Anor & Anor v. Competition and Markets Authority [2016] EWCA Civ 719 (15 July 2016). The CMA has subsequently sought permission from the Supreme Court to appeal the Court of Appeal’s judgment.

\(^{16}\) The Consumer Rights Act permits the CMA to approve voluntary redress schemes, that is to say, binding commitments entered into by infringers to provide compensation (whether monetary or otherwise) to consumers.
In exceptional circumstances, the CMA may reduce a penalty if the undertaking is unable to pay because of its financial position. However, the guidance emphasises that such financial hardship adjustments will be exceptional, and there can be no expectation that a penalty will be adjusted on this basis.17

ii Sanctions applying to individuals

Any individual found guilty of committing a criminal cartel offence under the Enterprise Act may be imprisoned for up to five years and receive an unlimited fine. In addition, an application may be made for the disqualification of a company director in certain circumstances.18

In an attempt to facilitate convictions, the government amended the Enterprise Act to remove a dishonesty element from the cartel offence pursuant to the Enterprise and Regulatory Reform Act. 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. The new-look offence only applies to arrangements entered into on or after 1 April 2014.19

A number of additional amendments were introduced by the Enterprise and Regulatory Reform Act, including:

a two new exclusions from the cartel offence: the notification exclusion (whereby customers are provided with relevant information before the arrangements are made) and the publication exclusion (whereby the relevant information is publicised in the manner specified);20

b a provision that an individual will not commit the offence if the agreement is made to comply with a legal requirement; and

c three new defences to the cartel offence: (1) where there is no intention to conceal the nature of the arrangements from customers; (2) where there is no intention to conceal the nature of the arrangements from the CMA; and (3) where the defendant took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or (as the case may be) their implementation.

The CMA has published prosecution guidance in an attempt to bring further transparency to the exercise of its prosecutorial discretion.21

Three individuals were tried for the cartel offence in 2015, following an investigation into suspected cartel activity within the supply of galvanised steel tanks for water storage.

17 OFT guidance as to the appropriate amount of a penalty, September 2012. The CMA is currently considering some limited revisions to this guidance based on recent decisional practice.

18 In December 2016, the CMA announced that, for the first time, it had used its power to accept an undertaking from a director of a company that had breached competition law not to act as a director of any UK company for five years, pursuant to a cartel investigation (Online sales of posters and frames (2016)). In September 2017, the CMA disqualified another individual from acting as a company director for seven years (Supply of pre-cast concrete drainage products (2017)). At the time of writing, the CMA is analysing feedback from a consultation on proposed revisions to its guidance on director disqualification orders.

19 In September 2017, an individual was given a two-year suspended prison sentence and made the subject of a six-month curfew order in criminal cartel proceedings brought by the CMA in relation to the supply of pre-cast concrete drainage products to the construction industry. As the relevant conduct took place prior to 1 April 2014, it fell under the old cartel offence.

20 The pre-existing exclusion relating to the notification of bid-rigging arrangements is retained.

21 CMA Cartel Offence Prosecution Guidance, March 2014.
Two of the individuals were acquitted as the jury was not persuaded that they had acted dishonestly. The third individual had pleaded guilty and received a six-month suspended sentence with an order to complete 120 hours of community service. The CMA’s Senior Director for Cartels noted that the trial experience in the Galvanised Steel Water Storage Tank case ‘would tend to suggest that the challenge of establishing dishonesty and bringing a successful prosecution for pre-April 2014 cartels may be greater than even the CMA or OFT had anticipated’.22

iii Early resolutions and settlement procedures

The CMA’s formal settlement procedure includes the following key features:

a a reduced penalty where an undertaking is prepared to admit that it has breached competition law and accepts that a streamlined administrative procedure will govern the remainder of the investigation;

b the CMA will retain broad discretion in determining which cases to settle. Businesses will not have a right to settle in a given case, but are also not under any obligation to settle or enter into any settlement discussions where these are offered by the CMA. Settlement discussions can be initiated either before or after the statement of objections is issued;

c at a minimum, the CMA will require a settling undertaking to make a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement, cease the infringing behaviour and confirm that it will pay a penalty set at a maximum amount;

d the streamlined administrative procedure will normally include streamlined access to file arrangements; no written representations on the statement of objections (except in relation to manifest factual inaccuracies); no oral hearings; no separate draft penalty statement after settlement has been reached; and no case decision group will be appointed;

e settlement discounts will be capped at a level of 20 per cent. The actual discount awarded will take account of the resource savings achieved in settling a particular case at that particular stage in the investigation. The discount available for settlement before the statement of objections is issued will be up to 20 per cent, and the discount available for settlement after the statement of objections is issued will be up to 10 per cent; and

f the leniency policy and the use of settlements are not mutually exclusive – it is possible for a leniency applicant to settle a case and benefit from both leniency and settlement discounts.23


VI ‘DAY ONE’ RESPONSE

CMA officials may carry out announced or unannounced inspections anywhere in the United Kingdom to investigate possible cartel activities. If the CMA has obtained a warrant, officials may enter and search both business and domestic premises, and may:

- examine books and other business records;
- take copies or originals of books and records (including from electronic devices);
- require on-the-spot oral explanations of documents; and
- seal any business premises and books or records for the time necessary for the investigation.24

It is a criminal offence to obstruct an inspection by the CMA, to provide false or misleading information or to destroy, falsify or conceal evidence. It is a civil offence not to comply with a formal information request without a lawful excuse and the CMA may impose fines for failure to provide documents or answer questions. It is therefore essential to develop a coordinated strategy for dealing with an inspection, which should cover issues such as:

- arranging for each official to be assisted or shadowed by a member of staff or lawyer;
- briefing relevant employees that they should not obstruct the investigation (e.g., by destroying or deleting records) while also noting that anything they say to the officials may be recorded as evidence;
- establishing a process for identifying documents that may be covered by legal privilege before officials are allowed to see or copy them;
- maintaining a record of what officials ask for and inspect, and keeping copies of documents copied by the officials; and
- ensuring that the fact that the inspection is taking place is not leaked outside the company.

In addition to carrying out inspections, the CMA may issue information requests under the Competition Act as a means of obtaining information from undertakings. The CMA also has powers to require any individual who has a connection with a business under investigation to answer questions on any matter relevant to the investigation. The CMA may also require the individual to provide information that may be relevant to the investigation. As noted above, the CMA has the power to fine any person who fails, without reasonable excuse, to comply with a formal notice to answer the CMA’s questions.

In light of the significant penalties that may be imposed for a breach of the Chapter I prohibition or Article 101 of the TFEU, a tailored strategy should be developed to deal with the fallout from an unannounced inspection or receipt of an information request covering alleged cartel activities. Active consideration should be given to whether it is appropriate to be making applications for leniency. The strategy should be developed with senior management and the legal department in view of the surrounding facts and the different issues and risks

24 CMA officials are also able to inspect businesses premises without a warrant in certain circumstances.
raised in all potentially relevant jurisdictions. Delay in the implementation of a strategy could have serious consequences (e.g., in terms of priority of leniency applications), as could the implementation of a policy that does not take due account of identifiable risks (e.g., in terms of potential civil actions and follow-on investigations in other jurisdictions).

VII PRIVATE ENFORCEMENT

i Private actions

Private actions brought before the English courts claiming damages or other relief for breaches of competition law are generally framed as tortious actions for breach of statutory duty. In practice, claims relating to anticompetitive agreements are often based on both the relevant EU and UK provisions.

A claimant may bring a competition claim either before the High Court or the CAT. The High Court has jurisdiction over England and Wales; the jurisdiction of the CAT extends to the whole of the United Kingdom. On 1 October 2015, the Consumer Rights Act 2015 introduced a number of reforms in this area, including:

a extending the CAT’s jurisdiction to hear stand-alone as well as follow-on cases (while permitting the transfer of cases between the High Court and the CAT);

b harmonising the limitation periods for the CAT with those of the High Court;

c enabling the CAT to grant injunctions in order to bring anticompetitive behaviour to a halt; and

d introducing a fast-track procedure for simpler competition claims in the CAT.

In May 2016, the CMA published guidance for consumers and businesses on obtaining redress for competition law breaches.\(^\text{25}\) The guidance reflects the changes in the law as a result of the Consumer Rights Act and takes account of the Damages Directive.

ii Interplay between government investigations and private litigation

Currently, where there exists a prior finding by a UK competition authority or the European Commission of an infringement, and where the redress sought is limited to a claim for damages, a claimant may bring an action for damages as a follow-on claim. In such a follow-on action, the claimant can rely on the decision to establish that the defendant has infringed the relevant competition law, and thus only needs to prove causation and loss. The decisions by the national competition authorities of other EU Member States regarding the infringement of EU competition law do not have the same standing but are treated as \textit{prima facie} evidence that an infringement of competition law has occurred.

Post-Brexit, the decisions of the European Commission will no longer have the same binding force on the UK courts. However, the UK government has published a draft statutory instrument, which envisages that claimants will still be able to bring claims for alleged breaches of EU competition law on a stand-alone basis (meaning that the claimant will need to prove the defendant has infringed competition law) based on anticompetitive conduct that occurred while the United Kingdom was a Member State.

\(^{25}\) Competition law redress – A guide to taking action for breaches of competition law, May 2016.
iii  Damages

Compensatory damages are available in the United Kingdom for breaches of competition law, and those damages ought to be calculated by reference to what is necessary to restore the victim to the position he or she would have been in had the infringement not occurred. A defence or a reduction in the damages otherwise payable is available where the defendant can show that the claimant has avoided or mitigated its loss by passing on the loss (e.g., in a chain of purchasers in which prices have been increased down the chain).

In 2014, the CJEU ruled that another species of damages, known as umbrella damages, must also be available if a cartel has inflated the price of a good or service and, in light of this, a non-cartelist has raised its prices as well (under the protection of the cartel’s umbrella, as it were). In those circumstances, a party that has paid a non-cartelist an inflated price can claim umbrella damages from the cartelists. The amount of the umbrella damages will be the difference between the inflated price and the competitive price of the good or service in question.

On 9 March 2017, the Competition Act was amended to reflect the Damages Directive’s provisions. The updated regime applies equally to breaches of EU and domestic competition law. Its major substantive provisions include:

- introducing a rebuttable presumption that cartels cause harm;
- clarifying that the burden of proving that an overcharge has been passed on rests with the defendant;
- prohibiting the award of exemplary damages;
- stating what an indirect purchaser must show to establish a claim for damages;
- implementing the Damages Directive’s requirements in relation to the effect of consensual settlements on a competition claim and any contribution claims; and
- creating a specific limitation period regime of six years beginning from the later of the day on which the infringement that is the subject of the claim ceases or the day on which the claimant first knows (or could reasonably be expected to know) of the infringement.

In addition, certain key procedural changes have been made, including:

- implementing the Damages Directive’s requirements concerning disclosure (see Section IV.iii for further details);
- introducing legislation in relation to the assessment of contributions between those jointly liable for an infringement; and
- allowing final infringement decisions of other Member States’ competition authorities or courts to be presented as prima facie evidence of an infringement.

The new substantive provisions apply only to claims in respect of loss suffered as a result of an infringement that commenced on or after 9 March 2017; the procedural provisions apply to all proceedings brought on or after 9 March 2017, regardless of when the infringing conduct occurred.

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26 Case C-557/12, Kone AG and others v. OBB-Infrastruktur AG, judgment of 5 June 2014.
27 The Competition Act was amended by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017.
28 Previously exemplary damages were available, in theory, in limited circumstances and at the court’s discretion.
iv  Indirect purchasers

Recent jurisprudence of the English courts has confirmed that damages for breach of 
competition law are available not just to direct purchasers of cartelised goods or services, 
but also to indirect purchasers (i.e., those further down the distribution chain).29 The 
implementation of the Damages Directive has confirmed that such indirect purchasers may 
bring a claim provided they can prove that the defendant infringed competition law resulting 
in an overcharge to its direct purchasers, and that the claimant purchased cartelised goods 
or services.

v  Collective actions

On 1 October 2015, the Competition Act and the Enterprise Act were amended by virtue of 
the Consumer Rights Act with a view to facilitating actions for damages under a more liberal 
collective actions regime. The previous regime was criticised as ill-equipped to maximise the 
economies of scale of collective actions.

Under the new regime, any person authorised by the CAT may act as the representative 
of the claimants. The new regime applies to both follow-on and stand-alone cases, and is 
available to both consumer and business complainants. The CAT will now allow opt-out 
as well as opt-in) collective proceedings. The opt-out aspect of a claim applies only to 
UK-domiciled claimants but non-UK claimants are able to opt in to a claim if desired.

The regime establishes a range of safeguards to protect against frivolous or unmeritorious 
cases being brought. In particular, the CAT is prohibited from awarding exemplary damages; 
the use of contingency fees that are determined by reference to the amount of damages 
awarded is also prohibited in opt-out collective actions. Moreover, the CAT, in its gatekeeper 
role, will only authorise a representative to bring a claim if it considers that it is just and 
reasonable for it to do so. It will also only allow collective actions where it considers that 
claims raise the same, similar or related issues of fact or law and are suitable to be brought in 
collective proceedings. These measures, along with a strong process of judicial certification 
and the maintenance of the loser-pays rule, are designed to guard against a US-style culture 
of class actions.

A number of applications to commence collective actions have been made under the new 
regime. The first application was adjourned and subsequently withdrawn by the applicant.30 
The second, concerning follow-on actions arising from the European Commission’s decision 
regarding interchange fees charged by Mastercard, was rejected,31 indicating that the CAT 
will closely scrutinise applications to commence collective proceedings. At the time of 
writing, two separate collective action applications have been made to the CAT relating to 
the European Commission’s Trucks cartel decision.

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30  Case 1257/7/7/16, Dorothy Gibson v. Pride Mobility Products Limited.
31  Case 1266/7/7/16, Walter Hugh Merricks CBE v. Mastercard Incorporated and Others. The CAT found 
the claims not ‘suitable to be brought by collective proceedings’ based on the absence of key issues in 
common among potential class members relating principally to the quantum of loss, and the difficulty 
of appropriately calculating an aggregate damages award and individual payments to class members on a 
reasonable compensatory basis. On 28 September 2017, the CAT refused permission to appeal its collective 
proceedings order (CPO) decision, finding in particular that there was no statutory right to appeal to the 
Court of Appeal. However, on 13 November 2018, the Court of Appeal held that there is a right of appeal 
from the ruling of the CAT refusing the application for a CPO.
vi Private litigation funding rules

In the private sector, interest in third-party funding (in which businesses offer litigation funding in return for a percentage of the damages) has been fuelled by predictions of a surge in private actions before the English courts based on competition law. A number of firms are authorised by the Financial Conduct Authority to provide these services, and an increasing number of cases are now funded in this way. However, as noted in Section VII.v, this type of funding is prohibited by the CAT in relation to opt-out collective actions.

VIII CURRENT DEVELOPMENTS

On 23 June 2016, the UK electorate voted to leave the European Union. On 29 March 2017, the British Prime Minister, Theresa May, triggered Article 50 of the Treaty on European Union, formally starting the two-year withdrawal process. On 25 November 2018, the European Council endorsed a draft Withdrawal Agreement, setting out the proposed terms on which the United Kingdom will leave the European Union, and a Political Declaration, setting out a vision for the future relationship between the United Kingdom and the European Union. However, at the time of writing, it is unclear whether the UK Parliament will ratify the texts.

The draft Withdrawal Agreement provides for a transition period until 31 December 2020, which may be extended by mutual agreement. During the transition period, there will be no change to the status quo in the United Kingdom as far as cartel regulation is concerned. EU competition law will continue to be directly applicable in the United Kingdom and the CJEU and European institutions, including the European Commission, will continue to have jurisdiction over the United Kingdom.

The draft Withdrawal Agreement and Political Declaration envisage that the United Kingdom will withdraw from both the European Union and the European Economic Area, which may have a significant impact on cartel regulation. In particular, there is a risk that businesses could face parallel investigations in the United Kingdom and the European Union, as the European Commission would no longer have jurisdiction over the UK aspects of anticompetitive arrangements. This could lead to a number of challenges for businesses under investigation, including an increased regulatory burden and a risk of inconsistent outcomes. Leniency applicants would also need to consider lodging applications with both regulators, as an application to the European Commission would no longer cover conduct in the United Kingdom.

In the meantime, the CMA is increasing its focus on cartel enforcement, following the award of £2.8 million in additional funds from the UK government. This follows a 30 per cent increase in the number of tip-offs received by the CMA in 2017 and the launch of a new digital tool to combat bid rigging in December 2017. In February 2018, the CMA also launched a new campaign to encourage more people to come forward with information regarding illegal cartels.
I ENFORCEMENT POLICIES AND GUIDANCE

The statutory basis for the prohibition on cartel activity in the United States is the Sherman Antitrust Act, 15 USC Section 1, which states, in the pertinent part, that ‘Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is prohibited’. Federal law, as well as most state statutes, provides for criminal and civil sanctions and applies to both corporations and individuals. Within the categories of conduct that violate Section 1, only some of them, including agreements to fix prices, rig bids or allocate markets, are regularly punished criminally. These three specific types of agreements are prosecuted criminally because they are regarded as particularly harmful to competition.

As the language of Section 1 implies, a criminal offence under the Sherman Act requires an agreement between horizontal competitors. Most agreements between competitors that directly affect prices are unlawful and can be the basis for criminal prosecution. Agreements to control the outcome of a public or private bidding process or not to compete in a particular geographical or product market may also create criminal liability. Such agreements need not be explicit, as in the form of a written contract. An agreement can be demonstrated as long as there is a sufficient ‘meeting of the minds’ to conduct an anticompetitive course of action. Such an agreement may be proven by direct or circumstantial evidence.

Under Section 1, a corporation may be fined up to US$100 million or twice the gain from the illegal conduct or twice the loss to the victims. The Antitrust Division of the US Department of Justice (the Antitrust Division or the Division), which is the principal government enforcer of the prohibition, increasingly seeks the latter penalty in its larger cases. A corporation convicted of cartel conduct may also be debarred from participation in federal contracts, potentially a crippling sanction in some industries. Individuals may be fined up to US$1 million and face prison sentences of up to 10 years. Average sentences recently have
been 20 months; the highest sentence yet imposed is 60 months. The Antitrust Division insists upon a prison term for every individual defendant, including any foreign national, who pleads guilty to a Section 1 violation.

Corporate and individual leniency programmes are the primary means by which the Antitrust Division uncovers potential cartel agreements. The Leniency Program creates a race among conspirators to disclose the cartel to authorities in order to receive immunity from prosecution, as well as a limitation on the damages that may be recovered by private plaintiffs in subsequent litigation. The Antitrust Division grants only one leniency application per conspiracy. Subsequent cooperators are not immune from criminal prosecution, but will generally receive smaller fines and expose fewer of their executives to indictment than do non-cooperators.

The Antitrust Division’s Leniency Plus Program (also known as the Amnesty Plus Program) is also a significant source of investigative leads. If a company is under investigation for one antitrust conspiracy but is too late to obtain leniency for that conspiracy, under Leniency Plus it can receive substantial benefits in its plea agreement for that conspiracy by reporting its involvement in a separate conspiracy. The size of the Leniency Plus discount depends on a number of factors and involves a considerable exercise of discretion by Antitrust Division staff. Leniency Plus has led to several significant investigative leads in many high-profile antitrust investigations, such as the Air Cargo and Auto Parts investigations.

The Antitrust Division has a wide variety of investigative tools at its disposal, including wiretap authority and broad subpoena powers. Antitrust Division staff often cooperate with other law enforcement agencies, including the Federal Bureau of Investigation (FBI) and US Attorney’s offices, to make use of their specific expertise. In addition, joint investigations between the Antitrust Division and the Criminal Division of the US Department of Justice (the Criminal Division) have become common, especially in market manipulation cases, such as those involving foreign exchange rates and benchmark interest rates. Antitrust conspiracies often implicate other US criminal statutes, including those covering obstruction of justice, lying to federal agents and fraudulent use of mail or wire communications, and the Antitrust Division often adds such charges to its indictments as a means of protecting the integrity of its investigative processes. In some cases, including those involving allegations of market manipulation, defendants have been criminally charged with violations of the wire fraud statute, but not violations of the Sherman Act.

As the global economy has become more integrated, increasingly cartel behaviour has reached across borders, requiring an integrated response from the enforcement authorities of multiple jurisdictions. The United States relies on close working relationships with those

8 See Plea Agreement, United States v. UBS Securities Japan Co Ltd, No. 12-cr-268 (D. Conn. 19 December 2012).
The Antitrust Division also seeks to use treaties and other bilateral agreements to extradite foreign nationals whose criminal conduct has a substantial impact on US commerce, although thus far it has had limited success. Proceedings against foreign defendants still depend largely upon them submitting voluntarily to the jurisdiction of the US courts or being arrested opportunistically during a visit to the United States.

II TYPES OF AGREEMENTS PROHIBITED

Of the conduct deemed unlawful by US federal antitrust statutes, only conduct that violates Section 1 of the Sherman Act may be prosecuted criminally. The Antitrust Division generally prosecutes hard-core violations, including agreements among competitors to fix prices, agreements to rig bids and market allocation agreements. Such agreements are prosecuted criminally because they are very damaging to competition and inherently difficult to detect, making a strong deterrence programme necessary and appropriate. It is no defence to a criminal Section 1 charge that the agreement resulted in a price that was commercially reasonable, that competition was not actually affected or that the agreement was necessary because of difficult market conditions.

No matter the type of agreement being considered, a criminal offence under Section 1 requires proof of four legal elements: (1) a concerted action (i.e., an agreement) (2) between two or more competitors (3) to restrain trade (4) that affects interstate commerce or commerce with foreign nations. The burden is on the Antitrust Division to prove these elements beyond reasonable doubt, which is the highest burden of proof in the US legal system.

i What is an agreement?

The first legal element – proof of an agreement – is the essence of a criminal offence under Section 1 and is the element upon which most criminal cartel cases turn. The difference between permissible and impermissible contact among competitors depends upon whether an agreement exists. An agreement can be explicit, such as a written contract or compact between competitors, or implicit, such as an oral exchange of promises or even hints. An agreement can be demonstrated so long as there is a sufficient ‘meeting of the minds’ between competitors as to an anticompetitive course of action. As a result, an agreement between competitors can be proven either by direct evidence (such as the testimony of a participant) or circumstantial evidence (such as identical errors in bids by purported competitors). The mere exchange of market information, even regarding current or prospective prices, does not

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9 Scott D Hammond, ‘The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades’, speech at the Twenty-Fourth Annual National Institute on White Collar Crimes, 25 February 2010, at 14, available at https://www.justice.gov/atr/file/518241/download. (‘There is a growing worldwide consensus that international cartel activity is harmful, pervasive, and is victimizing businesses and consumers everywhere. The shared commitment of competition enforcers to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world in order to more effectively investigate and prosecute international cartels.’)
violate Section 1. Note, however, that some conduct that does not violate Section 1 and does not result in an agreement or deceptive behaviour, such as invitations to collude, may be prosecuted civilly under Section 5 of the Federal Trade Commission Act.10

ii Competitors

Competitors are firms that do business in the same product and geographical market, such that an agreement between or among them to fix prices is likely to harm competition. Only independent entities can reach an agreement within the meaning of Section 1; multiple controlled subsidiaries or divisions of a single corporate entity cannot conspire with one another to violate the antitrust laws.11 Joint ventures, standard-setting organisations, group purchasing organisations and the like may involve multiple independent entities, but price and output agreements in these contexts are generally evaluated civilly under a burden of proof known as the ‘rule of reason’.

iii Restraining trade

Only agreements that restrain trade (i.e., affect competition) are reached by Section 1. These agreements generally involve price-fixing, bid rigging, market allocation or other agreements that reduce competition, such as agreements to reduce output.

iv Territorial reach

Broadly speaking, the Sherman Act is intended to reach only conduct affecting US commerce. During the past 25 years, cartel cases have gone global, involving industries that operate both in the United States and abroad. This has raised difficult questions regarding the territorial reach of the US antitrust laws that the courts have struggled to resolve. With a 1982 statute, the Foreign Trade Antitrust Improvements Act (FTAIA),12 Congress attempted to clarify its intent in this area, but subsequent litigation addressing the FTAIA has raised as many questions of interpretation as it has answered. These issues are dealt with further in Section III.ii.

III IMMUNITIES AND AFFIRMATIVE DEFENCES

Congress has granted immunity from the antitrust laws to certain highly regulated industries. Two judge-made doctrines, the filed rate doctrine and the Noerr-Pennington doctrine, have

10 For a recent example, see In the Matter of Fortiline, LLC, Docket No. C-4592 (complaint filed 23 September 2016) (alleging that statements made in two meetings and an email communication expressing Fortiline’s preference that a manufacturer increase its prices in two states was unlawful as an invitation to collude). An invitation to collude via email or a telephone call – even if no agreement is reached – may also constitute mail or wire fraud, both of which carry criminal penalties. In such situations, the Federal Trade Commission [FTC] will refer the matter to the US DOJ Criminal Division. For another example of a violation of Section 5, see In the Matter of Drug Testing Compliance Group, LLC, Docket No. C-4565 (complaint filed 21 January 2016) filed before the FTC. Here, the FTC alleged that a maker of drug and alcohol testing products contacted a competitor to convince that competitor to enter into a market allocation agreement, in violation of Section 5. ibid. The FTC claimed that the defendant violated Section 5 by inviting its competitor to collude.
12 15 USC Section 6a.
also granted an exemption to particular forms of conduct in the regulatory context. There are also a number of statutory and common law doctrines that offer potential affirmative defences to an alleged Section 1 violation.

i Immunities
A number of industries, including insurance and freight railways, are expressly granted immunity by statute from application of the antitrust laws. Separately, implied immunity exists where application of the antitrust laws would be ‘repugnant’ to a ‘pervasive’ federal regulatory scheme, as for instance with the sale of securities.\textsuperscript{13} The state action doctrine similarly exempts actions taken pursuant to a state regulatory scheme,\textsuperscript{14} whether such an action was taken by the state itself or by non-state actors with delegated authority to act or regulate anticompetitively.\textsuperscript{15} Finally, certain activities and agreements related to labour and collective bargaining are exempt.\textsuperscript{16}

Federal statutes give some regulatory agencies the exclusive right to set rates for the utilities they regulate, including railways and electricity suppliers. These rates are often based on market data submitted by the utilities themselves. The filed rate doctrine both protects consumers by mandating that only the agency-set rate may be charged, and seeks to avoid conflict between different branches of government by protecting such rates from collateral challenge by consumers under antitrust law.\textsuperscript{17} Strictly speaking, because this bar applies only to private suits for damages, and not to government antitrust suits or to private suits for injunctive relief, the filed rate doctrine is not an immunity but simply a limitation on damages.\textsuperscript{18} The filed rate doctrine will not bar private suits where the agency-set price would have been different but for the submission of incorrect data by the regulated entity.\textsuperscript{19}

\textit{Noerr-Pennington}, named after two Supreme Court cases,\textsuperscript{20} is a judge-made doctrine that attempts to harmonise the goals of competition policy with the First Amendment rights of private citizens under the US Constitution. \textit{Noerr-Pennington} limits enforcement of the antitrust statutes against certain acts that attempt to influence government processes, including various forms of lobbying, statements made in litigation and submissions to regulatory agencies. The implications of \textit{Noerr-Pennington} for cartels would seem to be

\begin{itemize}
\item \textsuperscript{13} \textit{Credit Suisse Securities (USA) LLC v. Billing}, 551 US 264 (2007) (underwriters of Securities and Exchange Commission-regulated securities have implied immunity from the antitrust laws).
\item \textsuperscript{14} \textit{Parker v. Brown}, 317 US 341 (1943).
\item \textsuperscript{15} See \textit{Patrick v. Burget}, 486 US 94 (1988); \textit{FTC v. Phoebe Putney Health System, Inc}, 568 US 216 (2013) (finding that, in application of the standard set forth in \textit{Town of Hallie v. City of Eau Claire}, 471 US 41 (1985), immunity will attach to anticompetitive conduct undertaken pursuant to a state’s regulatory scheme when the state has foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals, and that Georgia’s grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively).
\item \textsuperscript{16} See Norris-LaGuardia Act, 29 USC Sections 52 and 105 (2006); \textit{Connell Constr Co Inc v. Plumbers & Steamfitters Local Union No. 100}, 421 US 616 (1975).
\item \textsuperscript{17} See \textit{Keogh v. Chicago & NW Ry}, 260 US 156 (1922).
\item \textsuperscript{18} See \textit{Square D Co v. Niagara Frontier Tariff Bureau, Inc}, 476 US 409 (1986) (rejecting the claim that the filed rate doctrine should be construed as an immunity).
\item \textsuperscript{19} See, e.g., \textit{Carlin v. DairyAmerica, Inc}, 705 F3d 856 (9th Cir. 2013) (the filed rate doctrine did not bar suit by milk purchasers where a complaint alleged that the US Department of Agriculture set prices based on false data reported by defendants).
\end{itemize}
limited, since cartelists generally seek to hide their conduct from the government rather than petition in support of it. To the extent that cartel members seek to use government process to influence prices or output, however, that conduct may implicate *Noerr-Pennington*. Note, however, that the doctrine contains a ‘sham’ exception, of which the contours are not entirely clear, that covers acts of fraud, bribery, among others, that wilfully distort that process.\(^{21}\) Fraud committed on the US Patent Office, for example, is not exempted by *Noerr-Pennington*.\(^{22}\) And even if such an act of petitioning the government were exempted, any underlying agreement to fix prices or output would not be.

**ii Affirmative defences**

As competition has become more global in nature, so too has the focus of US antitrust enforcement. This is particularly true with respect to cartels. Detecting, punishing and deterring international cartels is a top enforcement priority for the Antitrust Division. As discussed below, however, the extraterritorial reach of the US antitrust laws is limited by several statutory and common law doctrines. Despite federal courts struggling for several decades to give a firm shape to these doctrines, considerable uncertainty remains.

**Foreign Trade Antitrust Improvements Act (1982)**

The FTAIA limits the extraterritorial reach of the antitrust laws by excluding from antitrust review all foreign conduct except that involving import commerce, or conduct having a ‘direct, substantial, and reasonably foreseeable’ effect on US commerce. The FTAIA was once commonly assumed to impose limits on the subject-matter jurisdiction of the US courts to consider claims involving non-US commerce,\(^{23}\) but more recent cases have revisited this view\(^{24}\) and courts now treat the FTAIA as creating a substantive requirement for stating a claim on the merits under the Sherman Act.\(^{25}\) Courts reason that the FTAIA serves to clarify the text of the Act, which reaches trade ‘among the several states, or with foreign


23. See, e.g., *United States v. LSL Biotechnologies*, 379 F3d 672, 683 (9th Cir. 2004). (*The FTAIA provides the standard for establishing when subject-matter jurisdiction exists over a foreign restraint of trade.*)

24. The Supreme Court decisions of *Arbaugh v. Y&H Corp.*, 546 US 500 (2006) and *Reed Elsevier, Inc v. Muchnick*, 559 US 154 (2010) explained that courts should interpret a statute as imposing jurisdictional limitations where Congress has explicitly articulated it as such. Those circuits to address the Foreign Trade Antitrust Improvements Act of 1982 [FTAIA] since *Arbaugh* have treated the statute as imposing a substantive merits limitation, not a jurisdictional bar. See, e.g., *Animal Sci Prods, Inc v. China Minmetals Corp*, 654 F3d 462 (3d Cir. 2011) (reasoning from the Supreme Court’s opinion in *Arbaugh* that Congress must make a clear statement when a statutory limitation is intended to be jurisdictional, and finding no such clear statement in the FTAIA); *Minn-Chem, Inc v. Agrimet Inc*, 683 F3d 845 (7th Cir. 2012) (treating the FTAIA as relating to the scope of coverage of antitrust laws as opposed to the courts’ subject-matter jurisdiction, expressly overruling *United Phosphorus Ltd v. Angus Chem Co*, 322 F3d 942 (7th Cir. 2003)); *US v. Hui Hsiung*, 778 F3d 738 (9th Cir. 2015).

25. Departing from its prior decision in *US v. LSL Biotechnologies*, 379 F3d 672 (9th Cir. 2004), the Ninth Circuit held that ‘[t]he FTAIA does not limit the power of the federal courts: rather, it provides substantive elements under the Sherman Act in cases involving non-import trade with foreign nations’. *Hui Hsiung*, 778 F3d at 753. In *Lotes Co, Ltd v. Hon Hai Precision Industry Co, Ltd*, 753 F3d 395 (2nd Cir. 2014), the Second Circuit likewise endorsed the substantive nature of the FTAIA, overruling its prior decision in *Filetech SA v. France Telecom SA*, 157 F3d 922 (2nd Cir. 1998).
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This has important consequences in the criminal context. As a substantive element of the offence, the government must adequately allege that the foreign conduct involves either import commerce, or a 'direct, substantial, and reasonably foreseeable' effect on US commerce when bringing an indictment. Outside the pleading context, courts must also take a plaintiff’s or government’s allegations as true for the purposes of deciding a motion to dismiss, and the plaintiff or government will have to prove the FTAIA’s requirements at trial to the finder of fact.

One case that confronted these issues was United States v. AU Optronics Corp, in which the government charged a Taiwanese company and its executives with price-fixing in the sale of liquid crystal displays (LCDs). The case is one of a very few in which the defendants in an international cartel prosecution have not sought plea bargains but instead litigated through trial, which meant the court confronted several issues of first impression. AU Optronics contended that, because the government had not adequately alleged either of the two prongs of the FTAIA, the court should dismiss the indictment. The court ultimately did not address that issue, holding that the indictment sufficiently alleged both ‘import trade or import commerce’ under the FTAIA and a domestic conspiracy to which the requirements of the FTAIA did not apply.

The AU Optronics court also faced the question of whether and in what circumstances the government must show that the defendants in a foreign conspiracy case intended to produce a substantial effect on US commerce. The issue arose in two arguments. First, one of the defendants argued that intent to affect US commerce exists as a substantive mens rea requirement in any Sherman Act case alleging a foreign conspiracy. The court rejected this argument, finding that intent to affect US commerce may be inferred from the fact of the

26 15 USC Sections 1 and 2; see, e.g., In re TFT-LCD Antitrust Litig, 822 F Supp 2d 953, 959 (N.D. Cal. 2011) (stating that ‘the FTAIA is not jurisdictional’); Animal Science Prods, 654 F3d at 469 (‘in enacting the FTAIA, Congress exercised its Commerce Clause authority to delineate the elements of a successful antitrust claim rather than its Article III authority to limit the jurisdiction of the federal courts’).

27 In the ‘Antitrust Guidelines for International Enforcement and Cooperation’, issued in January 2017 by the Antitrust Division and the FTC, the two agencies announced that whether the FTAIA goes to a claim’s merits or a court’s subject-matter jurisdiction will not affect their decision to bring an enforcement action: ‘This difference will not affect the Agencies’ decisions about whether to proceed with an investigation or an enforcement action because the Agencies will not proceed when the FTAIA precludes the claim on the merits or strips the court of jurisdiction.’ US Department of Justice & Federal Trade Commission, ‘Antitrust Guidelines For International Enforcement And Cooperation’ (13 January 2017) n.82, available at https://www.justice.gov/atr/guidelines-and-policy-statements-0/antitrust-guidelines-international-enforcement-and-cooperation-2017.

28 09-cr-00110 (N.D. Cal. grand jury indictment filed 10 June 2010). The case is referred to as United States v. Hui Hsiung rather than United States v. AU Optronics Corp at the court of appeals level.

29 The DOJ ultimately won convictions against AU Optronics and two of its executives. On 20 September 2012, Judge Susan Illston imposed a fine of US$500 million on the company and sentenced each of the executives to three years’ imprisonment. See Amended Criminal Pretrial Minutes, US v. AU Optronics, 09-cr-00110 (N.D. Cal. filed 27 September 2012). The convictions of all defendants were affirmed by the Ninth Circuit in US v. Hui Hsiung, 758 F3d 1074 (9th Cir. 2014).

30 Notice of Motion and Motion of Defendants AU Optronics Corporation and AU Optronics Corporation America to Dismiss Indictment (Fed. R. Crim. Proc. 12(b)(3)(B)), United States v. AU Optronics Corp, No. 3:09-cr-00110-SI (N.D. Cal. 23 February 2011).

31 Defendant Hsaun Bin Chen’s Notice of Motion and Motion to Dismiss the Superseding Indictment, United States v. AU Optronics Corp, No. 3:09-cr-00110-SI (N.D. Cal. filed 12 November 2010).
conspiracy. Second, another defendant argued that, if the Sherman Act applies to a foreign conspiracy through application of the *Hartford/Alcoa* standard, then the government must allege intent to substantially affect US commerce in its complaint. The court ultimately ducked the issue, finding that the government’s complaint contained allegations sufficient to satisfy even the defendant’s proposed standard. On appeal, the Ninth Circuit noted that the *Hartford/Alcoa* intentionality requirement was contained in the ‘targeting’ language of the jury instructions, reasoning that the conspirators could not have targeted the US market unintentionally. Similarly, in the Third Circuit, the court of appeals held that the FTAIA’s effects exception does not contain a ‘subjective intent’ requirement and that only an objectively reasonably foreseeable effect on US commerce is necessary.

Other cases decided under the FTAIA have left several unsettled questions of law surrounding the application of the statutory exceptions therein. The largest debate surrounds a circuit split concerning direct effects exception, and two tests have emerged to determine whether conduct exhibits a sufficient direct effect for the purposes of the FTAIA.

In *United States v. LSL Biotechnologies*, the Ninth Circuit confronted a government challenge to a joint venture between a domestic and foreign corporation to develop genetically modified tomato seeds with a longer shelf life. Under the terms of the joint venture agreement, each party was allocated certain exclusive territories in which it could sell the tomato seeds that were jointly developed, whereby the domestic corporation was provided the exclusive rights to the North American markets. The Ninth Circuit held that the conduct at issue was sufficiently direct, and thus outside the ambit of the FTAIA’s protection, only where the effect ‘follows as an immediate consequence of the defendant’s activity’. There, the government argued that the agreement’s ‘direct’ effect prevented the foreign company from innovating higher quality seeds in the United States. The court rejected this argument, given that the foreign corporation had not yet developed a seed capable of cultivation in the

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32 Order Denying Defendants’ Motion to Dismiss the Indictment and for a Bill of Particulars, *United States v. AU Optronics Corp*, No. 3:09-cr-00110-SI (N.D. Cal. filed 29 January 2011).
33 Under the *Hartford/Alcoa* line of cases, the Sherman Act applies to import commerce if the foreign conspiracy causes substantial intended effects on US commerce. See *Hartford Fire Insurance Co v. California*, 509 US 764, 795-96 (1993) (citing *United States v. Aluminum Co of America*, 148 F2d 416 (2d Cir. 1945), and stating that it is ‘well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States’); *Dee-K Enters v. Heveafil Sdn Bhd*, 299 F3d 281, 287 (4th Cir. 2002); *United States v. Nippon Paper Indus Co*, 109 F3d 1, 4 (1st Cir. 1997).
34 Notice of Motion and Motion of Defendants AU Optronics Corporation and AU Optronics Corporation America to Dismiss Indictment (Fed. R. Crim. Proc. 12(b)(3)(B)), *United States v. AU Optronics Corp*, No. 3:09-cr-00110-SI (N.D. Cal. filed 23 February 2011).
35 Order Denying Defendants’ Motion to Dismiss the Indictment, *United States v. AU Optronics Corp*, No. 3:09-ci-00110-SI (N.D. Cal. filed 18 April 2011).
36 *US v. Hui Hsiung*, 778 F3d 738, 748-49 (9th Cir. 2015).
38 *United States v. LSL Biotechnologies*, 379 F3d 672, 674 (9th Cir. 2004).
39 ibid.
40 id. at 680 (borrowing from the dictionary definition of direct and from the definition of direct as interpreted by the Foreign Sovereign Immunities Act).
41 id. at 681. The government also argued that the agreement enabled domestic corporations to increase profits, an argument the court found unsupported by the facts.
United States, holding that an effect cannot be direct when it relies on ‘uncertain intervening developments’. Thus, the government’s allegations failed to qualify as immediate for the purposes of the direct effects exemption.

More recently, the Ninth Circuit also applied the ‘immediate consequence’ test in the criminal context in *Hsiung*, reasoning that the defendants’ conduct – secret meetings to fix the price of a component that formed a substantial part of the cost in the finished LCD product – had an immediate consequence on the US market, especially where the foreign defendants directly negotiated with US corporations.

A clear split has emerged with a decision from the Seventh Circuit in which that court repudiated the ‘immediacy’ of the Ninth Circuit’s approach in favour of a proximate cause standard, holding instead that an effect is direct under the FTAIA if there is a ‘reasonably proximate causal nexus’. In 2014, in *Lotes Co v. Hon Hai Precision Industry Co*, the Second Circuit aligned itself with the Seventh Circuit’s approach. Although the court ultimately barred plaintiffs’ claims under the FTAIA, it recognised *in dicta* that foreign anticompetitive conduct ‘can have a statutorily required “direct, substantial, and reasonably foreseeable effect” on US domestic or import commerce even if the effect does not follow as an immediate consequence of the defendant’s conduct, so long as there is a reasonably proximate causal nexus between the conduct and the effect’. The plaintiffs and defendants manufactured USB components abroad, and both served as members of an industry standard-setting organisation; neither sold directly to the United States. The plaintiffs claimed a refusal to license supported claims of exclusionary conduct under the Sherman Act, and argued that ‘curbing competition in China will have downstream effects worldwide’ and that ‘price increases . . . will be “inevitably” passed on’ to US consumers. Recognising that ‘anticompetitive injuries can be transmitted through multi-layered supply chains’, the court announced the ‘proximate nexus’ test: ‘whether the causal nexus between foreign conduct and a domestic effect is sufficiently “direct” under the FTAIA in a particular case will depend on many factors, including the structure of the market and the nature of the commercial relationships at each link in the causal chain’.

The proper approach remains an open issue. Some scholars applaud the Ninth Circuit’s ‘immediate consequence’ test for its relative ease of application and respect for foreign sovereign’s enforcement; others have criticised it for being overly strict. The Antitrust Division favours the proximate cause standard, explaining that this standard is ‘more consistent with the language of the [Sherman Act]’. Whether, and in what form, an intent to affect US commerce exists as a requirement for Sherman Act cases based on foreign conduct will continue to be a live and hotly contested issue for years to come.

42 ibid.
43 778 F3d 738, 758-61 (9th Cir. 2015).
45 753 F3d 395, 413 (2d Cir. 2014).
46 id. at 413.
Under US law, foreign sovereigns and their ‘instrumentalities’ (which importantly may include companies owned or controlled by the state) are presumptively immune from the jurisdiction of US federal and state courts. The Foreign Sovereign Immunities Act (FSIA) is the sole basis through which US courts can obtain jurisdiction over such entities. A defendant seeking to establish FSIA immunity bears the initial burden of demonstrating that it qualifies as a foreign sovereign, after which the burden shifts to the plaintiff to prove that an exception applies.

For antitrust purposes, the most important FSIA exception applies to commercial activity. Immunity does not extend to suits based on commercial activity having a sufficient tie to US commerce. Commercial activity is ‘either a regular course of commercial conduct or a particular commercial transaction or act’, the character of which is determined ‘by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose’. The question is not one of motive but of whether the actions in question are akin to those undertaken by a private party engaged in trade or commerce.

The act of state doctrine

In some foreign jurisdictions, companies may still be subject to regulatory requirements that put them at risk of violating US law. The act of state doctrine dictates that the US courts must decline jurisdiction over a case when to decide that case might entail the court’s refusal to give effect to the official act of a foreign sovereign. Despite its name, the act of state doctrine may be invoked by both state and non-state actors. The pivotal issue is that the US court must confront the validity of the official act of a foreign sovereign in order to adjudicate the case. The act of state doctrine is based on concerns about judicial branch interference with foreign policy, which is the domain of the executive and legislative branches. Thus, while the FSIA is principally concerned with protecting the dignity of foreign sovereigns, the closely related act of state doctrine is founded upon US constitutional principles of separation of powers.

Foreign sovereign compulsion

Foreign sovereign compulsion is a narrow doctrine that is invoked only when a defendant can demonstrate that it was actually compelled by a foreign sovereign to violate US law, such that there was no way that it could possibly have complied with the law of both jurisdictions. What constitutes compulsion is likely to be a fact-specific inquiry, but compulsion is probably demonstrated when the defendant can show that its failure to comply with the directive of the foreign sovereign would have resulted in penal or other severe sanctions. In two cases based on
roughly analogous facts, the district courts found that Chinese companies arguing that they had been compelled to follow export regimes created by the Chinese Ministry of Commerce could not demonstrate compulsion when they appeared to have engaged in ‘consensual cartelization’. However, in the most recent of these cases, In re Vitamin C Antitrust Litig, the Second Circuit overturned this conclusion, but on comity grounds. The Second Circuit gave great weight to a formal proffer by the Chinese government that its laws compelled the challenge of coordination. However, the Supreme Court vacated and remanded the Second Circuit decision, holding that, while domestic courts should give respectful consideration to a foreign government’s submission, judges are not ‘bound to accord conclusive effect to the foreign government’s statements’.

Comity

International comity is a flexible, somewhat fluid doctrine under which the federal courts sometimes abstain from exercising jurisdiction over a legal matter where to do so might impinge upon the laws or interests of another nation. Comity therefore overlaps with the act of state and foreign sovereign compulsion doctrines in its concern with the extraterritorial effects of US judicial action, but because it is more flexible, it might theoretically reach cases that those two doctrines do not. However, the Supreme Court appears to have construed the doctrine rather narrowly in Hartford Fire. Subsequent to this case, comity is perhaps more potent in antitrust as an informal recognition of the need for cooperation in dealing with conduct that has transnational effects than as a formal limitation on the jurisdiction of the US courts over cases having an extraterritorial dimension. The Second Circuit’s decision in In re Vitamin C Antitrust Litig, and the Supreme Court’s subsequent remand, offers a rare illustration of an application of comity principles and underscores the value of a direct appearance of a foreign sovereign. There, in its very first appearance before a US federal court, the Chinese government submitted an amicus curiae brief to the court, consisting of ‘a sworn evidentiary proffer regarding the construction and effect of its laws and regulations’. The Second Circuit held that a US court is ‘bound to defer’ to a ‘foreign government’s official statement regarding its own laws and regulations’ that is ‘reasonable under the circumstances presented’. Finding that the Chinese government’s official statements submitted in the case ‘should be credited and afforded deference’, the Second Circuit reversed the district court

56 In re Vitamin C Antitrust Litig, 810 F Supp 2d 566.
61 In re Vitamin C Antitrust Litig, 837 F3d at 189. The Second Circuit cautioned that the absence of ‘documentary evidence or reference of law proffered to support a foreign sovereign’s interpretation of its own laws’ might render such deference ‘inappropriate’. id. at 30 n.10.
on comity grounds. However, the Supreme Court articulated a case-by-case approach for deference to foreign governments rather than the clear, bright-line test put forth by the Second Circuit. The Court held that while a federal court ‘should accord respectful consideration to a foreign government’s [reasonable] construction of its own law’, it need not ‘accord conclusive effect to that foreign government’s statements’. Rather, the court ‘may engage in its own research and consider any relevant material thus found’.

IV MEANS OF DETECTION

The Antitrust Division has a variety of means of detecting cartel conduct, including the voluntary cooperation of conspirators through the Leniency Program and Amnesty Plus, information gleaned from whistle-blower employees, customer complaints, and tips from government procurement officers, who receive training from the Antitrust Division in spotting red flags of collusive behaviour. Leads are also sometimes generated by other US law enforcement agencies, such as the FBI, the US Attorney’s offices and inspectors general for the various federal agencies, carrying out their own investigations of the industry or party in question.

Unlike some enforcement agencies, the Antitrust Division generally does not use statistical tests, or screens, to identify industries in which competition problems exist. The Division’s heavy reliance on the Leniency Program to identify violations arguably creates a bias towards uncovering conspiracies in which distrust has already developed among the conspirators, meaning that the most successful and durable cartels are not detected. Nonetheless, screens have a somewhat limited value since they are not capable of distinguishing between criminal cartel behaviour and merely cooperative behaviour in oligopoly industries, which is potentially a source of economic inefficiency but not in itself a violation of Section 1.

i Leniency

The Leniency Program is the cornerstone of the Antitrust Division’s cartel enforcement regime. It creates powerful incentives for self-reporting by wrongdoers, which can have a significant destabilising effect on a conspiracy. The Leniency Program has had a significant effect on enforcement. According to a 2011 report by the Government Accountability Office, the Division filed a total of 173 criminal cartel cases between 2004 and 2010, 129 of which involved a successful leniency applicant (75 per cent). The success of the Leniency Program has been such that more than 50 jurisdictions have adopted similar programmes of their own.

The Antitrust Division grants leniency to only one party in each conspiracy, and the race for the one leniency grant can sometimes be decided by hours when it becomes apparent to several conspirators that the agreement is on the verge of collapse. The difference

62 id. at 189.
64 id. at 1869-1870 (quoting Fed. Rule Civ. Proc. 44.1).
65 For an argument that the Division should use screens to develop investigative leads, see Rosa Abrantes-Metz and Patrick Bajari, ‘Screens for Conspiracies and Their Multiple Applications’, Vol. 24 Antitrust (Fall 2009).
in outcomes in such situations is often striking.\(^67\) Subsequent cooperators nonetheless may receive significant benefits, although those benefits will decrease the longer a party waits to cooperate. A leniency applicant must admit to a criminal violation of the antitrust laws to receive conditional leniency; it must move expeditiously to end its participation in the conspiracy and it must commit to cooperating completely with the Antitrust Division.

Recently, the Antitrust Division emphasised that the Leniency Program applies only to Sherman Act violations that are enforced by the Division.\(^68\) In other words, the programme does not provide protection from criminal prosecutions by other federal or state prosecuting agencies – including other divisions of the US Department of Justice, such as the Criminal Division.\(^69\) While the Antitrust Division encourages leniency applicants ‘with exposure to both antitrust and non-antitrust crimes’ to ‘report all crimes to the relevant prosecuting agencies’, it notes that ‘leniency applicants should not expect to use the Leniency Program to avoid accountability for non-antitrust crimes.’\(^70\) In light of this clarification from the Antitrust Division, potential applicants involved in multifaceted criminal activities will have to weigh the potential benefits of obtaining leniency from the Division with the risk that other government prosecutors could bring charges for non-antitrust violations. This complex calculus is further influenced by the fact that the Criminal Division’s policies differ from those of the Antitrust Division in important respects concerning immunity.\(^71\)

The Corporate Leniency Policy\(^72\) includes two types of leniency: Type A and Type B. Type A leniency is available only when the Antitrust Division has not received information about the activity being reported from any other source. Type B leniency, the benefits of which are not as great, is available even after the Division has commenced an investigation.

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\(^{67}\) US DOJ, ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’, 19 November 2008, updated 26 January 2017, Question 4, available at www.justice.gov/atr/public/criminal/239583.pdf. (‘Under the policy that only the first qualifying corporation receives conditional leniency, there have been dramatic differences in the disposition of the criminal liability of corporations whose respective leniency applications to the Division were very close in time.’)

\(^{68}\) id. at Question 6.

\(^{69}\) An example is the Antitrust and Criminal Divisions’ investigations into manipulation of the London InterBank Offered Rate [LIBOR]. UBS AG received amnesty under the Leniency Program and entered into a non-prosecution agreement with the Fraud Section of the Criminal Division. See Non-Prosecution Agreement Between UBS AG and US Department of Justice, 18 December 2012, available at https://www.justice.gov/iso/opa/resources/1392012121911745845757.pdf. Despite this grant of amnesty, the Criminal Division charged UBS AG’s Japanese subsidiary with a violation of the wire fraud statute and imposed a fine of $100 million. See Plea Agreement, United States v. UBS Securities Japan Co Ltd, No. 12-cr-268 (D. Conn. 19 December 2012).

\(^{70}\) US Department of Justice, ‘Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters’, 19 November 2008, updated 26 January 2017, Question 6, available at www.justice.gov/atr/public/criminal/239583.pdf. The Antitrust Division has stated that it will not prosecute ‘acts or offenses integral to’ the antitrust violation for which leniency has been granted. ibid.

\(^{71}\) Regarding immunity, prosecutors from the Criminal Division follow the policies set forth in the Justice Manual and are not obliged to grant immunity to leniency recipients. The Criminal Division has adopted leniency only for violations of the Foreign Corrupt Practices Act [FCPA]. Under the FCPA policy announced in December 2017, the Criminal Division will adopt a presumption of declination if the company meets the standards for voluntary self-disclosure, full cooperation, and timely and appropriate remediation. Justice Manual, Section 9-47.120 – FCPA Corporate Enforcement Policy, available at https://www.justice.gov/criminal-fraud/file/838416/download.

The requirements for Type A leniency are that:

a. at the time the corporation comes forward, the Division has not received information about the activity from any other source;

b. upon the discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity;

c. the corporation reports the wrongdoing with candour and completeness, and cooperates with the Division fully, continuously and completely throughout the investigation;

d. the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions by individual executives or officials;

e. where possible, the corporation makes restitution to injured parties; and

f. the corporation did not coerce any other party to participate in the activity, and clearly was not the leader in, or the originator of, the activity.

If a corporation qualifies for Type A leniency, all directors, officers and employees of the corporation who admit their involvement in the violation and cooperate with the Antitrust Division’s investigation will also receive leniency. Recent updates to the Division’s Frequently Asked Questions emphasised that such individuals will not be protected if they do not fully cooperate with the Division’s investigation. In that situation, those individuals will be ‘carved out’ from the conditional leniency letter. Paragraph 4 of the model corporate conditional leniency letter details the specific conditions for leniency protection for directors, officers and employees.

The requirements for Type B leniency are that:

a. the corporation is the first to come forward and qualify for leniency with respect to the activity;

b. at the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction;

c. upon its discovery of the activity, the corporation took prompt and effective action to terminate its part in the activity;

d. the corporation reports the wrongdoing with candour and completeness, and cooperates with the Division fully, continuously and completely in advancing the investigation;

e. the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions by individual executives or officials;

f. when possible, the corporation makes restitution to injured parties; and

g. the Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation’s role in the activity and when the corporation comes forward.

If the corporation qualifies for Type B leniency, Antitrust Division policy states that directors, officers and employees of the corporation will be considered for immunity from criminal prosecution. In the past, the Division provided leniency to qualifying employees of a Type B

74 ibid.
75 The model corporate conditional leniency letter may be found at www.justice.gov/atr/public/criminal/239524.pdf.
applicant on the same basis as it did for employees of a Type A applicant.\textsuperscript{76} Updates to the Division's Frequently Asked Questions, published in January 2017, changed this approach, noting that the Division may exclude 'those current directors, officers, and employees who are determined to be highly culpable.'\textsuperscript{77} According to the Antitrust Division, '[l]eniency must be fully earned.'\textsuperscript{78} ‘This change could lead to certain individuals deciding not to cooperate with their employer’s efforts to obtain leniency on behalf of the company.

The Individual Leniency Policy applies to a director, officer or employee of a culpable corporation who comes forward on his or her own to report a violation. Once the corporation applies for leniency, individual directors, officers and employees may be considered for leniency only under the Corporate Leniency Policy. The Individual Leniency Policy requires the director, officer or employee to meet three conditions:

\begin{itemize}
\item [a] At the time the individual comes forward to report the activity, the Division has not received information about the activity being reported from any other source.
\item [b] The individual reports the wrongdoing with candour and completeness, and cooperates with the Division fully, continuously and completely throughout the investigation.
\item [c] The individual did not coerce another party into participating in the activity, and clearly was not the leader in, or the originator of, the activity.\textsuperscript{79}
\end{itemize}

The Antitrust Division announced in January 2017 that former directors, officers and employees of a company that obtains leniency ‘are presumptively excluded from any grant of corporate leniency’.\textsuperscript{80} Prior to this announcement, the Division's position was that it was not under any obligation to grant leniency to former directors, officers or employees. This change could result in former directors, officers and employees deciding not to cooperate with, or provide information to, the Division because of the low likelihood of obtaining leniency.

\section*{ii Leniency Plus}

The Leniency Plus Program, also referred to as the Amnesty Plus Program, has also been a powerful source of investigative leads for the Antitrust Division.\textsuperscript{81} Leniency Plus is available to a company that cannot claim leniency for a conspiracy already under investigation by the Division (the A conspiracy) but that, in the course of its own internal investigation, uncovers evidence of a second conspiracy (the B conspiracy) of which the Division is not aware. Under Leniency Plus, that company is not only eligible to receive leniency for the B conspiracy, but may receive additional consideration from the Division in the A conspiracy. While sentencing discretion ultimately rests with the court, the Division will recommend to the sentencing court that the company receive a substantial discount for its role in the

\begin{itemize}
\item [77] id., at Question 22.
\item [78] ibid.
\item [81] id., at Question 8. (‘Many of the Division’s investigations result from evidence developed during an investigation of a completely separate conspiracy.’)\end{itemize}
A conspiracy in light of its cooperation in the B investigation. The size of this recommended discount depends on a variety of factors, including the strength of the evidence provided by the cooperating company in the B investigation, the potential significance of the violation reported in the B investigation and the likelihood that the Division would have uncovered the B conspiracy without self-reporting by the company.82

iii Penalty Plus

Penalty Plus is the converse of Leniency Plus. The latter rewards a corporation with reduced sentencing for a conspiracy in one market, if the corporation discovers a conspiracy in a second market during the course of its internal investigation and alerts the Division to the second conspiracy. Penalty Plus punishes a corporation with enhanced sentencing for a conspiracy in one market if the Division later learns of a conspiracy in a second market, and the corporation failed to discover the second conspiracy or failed to alert the Division.83

Failing to take advantage of the Leniency Plus Program could cost a company a potential fine as high as 80 per cent, or more, of the volume of affected commerce as opposed to no fine at all on the Leniency Plus product.84 In egregious cases, the Antitrust Division may also seek the appointment of an external monitor ‘to ensure that the company develops an appropriate culture of corporate compliance’.85 For individuals, the difference in failing to self-report could be between a lengthy jail sentence and no jail sentence.86

In 2014, the Division secured a higher fine for a defendant’s failure to disclose a separate conspiracy while pleading guilty to another conspiracy in United States v. Bridgestone. In this case, the Division noted that Bridgestone’s failure to disclose its participation in a second cartel involving anti-vibration rubber parts at the time it pleaded guilty to a prior conspiracy involving marine hoses was an aggravating factor in the US$425 million fine imposed.87 The Division stated that it would ‘take a hard line when repeat offenders fail to disclose additional anticompetitive behaviour’.

iv Government contracting

The government puts out to bid billions of dollars of contracts annually, and it is increasingly dependent upon private firms to provide services in areas such as national defence and technology services. These markets are sometimes highly concentrated, raising the risk of bid rigging. The Antitrust Division has devoted substantial resources to training federal procurement officers to detect when these competitive bidding processes have been compromised.

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82 id., at Question 9.
83 id., at Question 10.
86 ibid.
The Antitrust Division has a long tradition of outreach and training for agents and investigators in the federal and state governments. As part of that tradition, the Division created the MAPS programme in 2009, in response to the passage of the American Recovery and Reinvestment Act (the economic stimulus bill referred to as the Recovery Act). The Recovery Act directed various government agencies to spend large sums of money in a short period of time with the objective of stimulating the economy. The Division chose this time to launch a new training initiative for government officials charged with distributing these sums. The Division designed the MAPS programme to train government procurement officials to spot the red flags of collusive behaviour. MAPS training uses market analysis to identify potential high-risk bidding areas, and shows officials how to identify suspicious patterns in bidding and remarks by contractors that seem to reveal communications with other bidders. The MAPS programme also includes recommendations for best practices in procurement designed to insulate the process from bid rigging. The programme continues to be staple training for procurement officers serving state and federal agencies.

V LENIENCY PROGRAMME MECHANICS

i Securing a marker

When counsel first obtains information that his or her client may have engaged in criminal cartel behaviour, that information may be incomplete or inconclusive as to whether the law has been violated or the extent of the conspiracy. Nonetheless, counsel should move quickly to secure a marker from the Antitrust Division. The Division grants only one leniency application per conspiracy, and has made it clear that there have been several instances in which the second company in was beaten by only a matter of hours. While the marker is in effect, no other company can ‘leapfrog’ the applicant that has the marker.

The evidentiary standard for obtaining a marker is relatively low. To obtain a marker, counsel must:

a report that he or she has discovered some evidence indicating that his or her client has engaged in a criminal antitrust violation;
b disclose the general nature of the conduct discovered;
c identify the industry, product or service involved with sufficient specificity to allow the Division to determine whether leniency is still available; and
d identify the client.

Prior to 2017, the Antitrust Division allowed companies to make use of an ‘anonymous marker’, which allowed counsel to obtain a short-term marker and preserve the client’s place in line without revealing the client’s identity. An anonymous marker could be obtained if counsel disclosed the other required information but needed additional time to verify certain information before revealing the client’s name to the Antitrust Division. However, the Division’s Frequently Asked Questions, as updated in January 2017, make it clear that an

88 MAPS stands for ‘market, applications, patterns and suspicious behaviour’.
anonymous marker is available only ‘in limited circumstances’; in such cases, the anonymous marker may last for only two to three days before counsel must report the client’s identity to the Division.91

The marker is good for a finite period intended to give the applicant an opportunity to conduct an internal investigation into the alleged conduct; 30 days for an initial marker is common. The marker may be extended at the Division’s discretion if the applicant demonstrates that it is making efforts in good faith to complete its investigation in a timely manner.

In some instances, a company’s internal investigation will uncover additional crimes not disclosed in the initial marker request. In keeping with its desire to encourage offenders to self-report through the Leniency Program, the Division’s policy is to expand coverage for the applicant to include the newly discovered offences if leniency is still available for those offences.

Counsel for leniency applicants should contact the Antitrust Division’s Deputy Assistant Attorney General for Criminal Enforcement (the Criminal DAAG) or the Director of Criminal Enforcement to request a marker. Any requests for a marker that are submitted to one of the Division’s criminal offices will be sent immediately to the Criminal DAAG for his or her determination. The Criminal DAAG is responsible for reviewing and evaluating ‘all requests for leniency, including the scope of any leniency marker extended’.92 An applicant would be well advised to make a marker request orally, since written communications with the Division are potentially discoverable in subsequent civil litigation.

ii Confidentiality

The increasing willingness of jurisdictions to cooperate with one another in cartel investigations necessarily raises concerns for the leniency applicant as to the confidentiality both of its identity and of any information that it provides to the government. The Antitrust Division’s policy has always been to treat this information as confidential without agreement with the applicant, prior disclosure by the applicant or by order of a court.93 Most other major enforcement jurisdictions have followed the Division’s policy on this issue, such that, generally speaking, the leniency applicant has control over the flow of its information between governments.94

Regarding information sharing with non-US antitrust authorities, the Antitrust Division’s policy is to ‘not disclos[e] to foreign antitrust agencies information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure’.95 However, most leniency applicants consent to the sharing of their information among investigating jurisdictions so that those jurisdictions may coordinate their investigations. Coordination among jurisdictions has the potential to benefit the applicant to the extent that it reduces the need to respond separately to several information requests and also speeds resolution of a matter the corporation would generally prefer to put behind it. On the other hand, one

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91 ibid.
92 id., at Question 1.
93 id., at Question 33.
could imagine a circumstance in which the better choice would be to withhold consent, for instance where the case for liability in the jurisdiction seeking information is marginal or where the enforcement resources of that jurisdiction are limited, such that it might simply drop its investigation in the absence of cooperation. The decision as to whether to waive confidentiality is therefore strategic and fact-driven, and counsel need not apply a ‘one size fits all’ approach.

iii Carve-outs

Antitrust Division policy with respect to charging individual employees has evolved significantly during the 21st century. Formerly, corporate plea agreements typically protected most or all such employees from criminal prosecution. Committed to holding individual executives accountable for cartel offences for a more effective deterrence, the Division started ‘carving out’ individuals believed to be culpable, as well as employees who refused to cooperate or had potentially relevant information but could not be located.

In 2013, the Division implemented two changes. First, it announced that it was no longer carving out individuals for reasons other than potential culpability. Second, the Division abandoned its much-criticised policy of identifying carved-out individuals by name in plea agreements, and instead began listing their names in an appendix and requesting that the court file that document under seal. However, in the January 2017 update to its Frequently Asked Questions, the Division announced that it will carve out a company’s current director, director or employee if he or she does not fully cooperate with an investigation.

A September 2015 policy memorandum clarified that the Department of Justice’s principal focus in corporate fraud prosecutions, including for antitrust violations, is the pursuit of individual prosecutions. As a prime tenet of that focus, senior leadership at the Department announced that ‘[t]o be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct’, clarifying that the policy applies to civil and criminal proceedings alike. Although the Department clarified that this change would not affect the protection of those individuals who otherwise qualify for protection under the Division’s Corporate Leniency Policy, the memorandum has led the Division to be far more restrictive in its view of which employees may ultimately be entitled to that protection, particularly concerning the cooperation it may require of a carved-in employee. For example, in Leniency Plus cases where a company under investigation reports a new conspiracy, the Division will require full and timely cooperation.

97 ibid.
98 ibid.
from employees to obtain protection under the company’s leniency letter. Thus, an individual who chooses to participate in the leniency investigation but refuses to cooperate in the non-leniency investigation will not be covered by the company’s leniency letter.101

iv Cooperation with the Antitrust Division

Paragraph 2 of the Antitrust Division’s model corporate conditional leniency letter describes with specificity the cooperation obligations of the leniency applicant, including the provision of documents, making best efforts to secure the cooperation of current employees and paying restitution to victims.102 The leniency agreement does not require the company to turn over documents protected by attorney–client privilege or attorney work-product doctrine, although of course the company may do so voluntarily.103 The company must make best efforts to secure the cooperation of current employees, but failure to secure that cooperation will not necessarily disqualify it from consideration for leniency.104 The Antitrust Division will consider the number and significance of the individuals who do not cooperate in deciding whether the company has actually confessed its wrongdoing and whether the Division is receiving the full benefit of the leniency agreement.105 If the Division ultimately grants leniency to the corporation, however, employees who have declined to cooperate are not covered by the leniency grant and are subject to indictment.106

If the Antitrust Division determines prior to granting a final, unconditional leniency letter that the applicant has not provided the cooperation set forth in the conditional leniency letter, it may revoke the applicant’s conditional acceptance and seek to indict the applicant and any culpable employees. The Division’s only attempt to revoke leniency ultimately failed. In 2002, after the Wall Street Journal published an article strongly suggesting that illegal activity had taken place in the bulk liquids shipment industry, Stolt-Nielsen reported to the Division its participation in an unlawful customer allocation conspiracy.107 Stolt-Nielsen sought acceptance into the Leniency Program and received a marker, although the leniency application may have been triggered by the newspaper article. Stolt-Nielsen cooperated with the investigation, and during meetings with Antitrust Division staff, counsel for Stolt-Nielsen represented that the company had taken prompt steps to end its participation in the cartel.108 The Division secured guilty pleas from two of Stolt-Nielsen’s competitors and certain of their executives. The Division eventually concluded that Stolt-Nielsen had not fulfilled the leniency conditions, revoked Stolt-Nielsen’s conditional leniency grant and arrested a company executive.109

102 The model corporate conditional leniency letter may be found at www.justice.gov/atr/public/criminal/239524.pdf.
104 id., at Question 18.
105 ibid.
106 ibid.
108 id., at 565.
Stolt-Nielsen and the arrested executive sought an injunction barring the Antitrust Division from prosecuting them. The district court granted the injunction, finding that the Division cannot unilaterally rescind a leniency agreement but must seek a judgment from a district court that the applicant has breached the agreement; the court also found that Stolt-Nielsen had not breached the agreement. This injunction was vacated by the court of appeals, which held that the district court should not have decided the issue in the absence of an indictment.110 The Antitrust Division then indicted Stolt-Nielsen and the executive. Stolt-Nielsen renewed its objection and the district court dismissed the indictments, again finding that Stolt-Nielsen had not breached the conditional leniency agreement.111

Some members of the corporate defence bar expressed alarm regarding the Antitrust Division’s decision to revoke Stolt-Nielsen’s conditional leniency. Following the decision in Stolt-Nielsen, the Division was quick to confirm its commitment to a fair and transparent Leniency Program.112

**v Limitation on treble damages under the Antitrust Criminal Penalty Enhancement and Reform Act (2004)**

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) provides a measure of protection on the civil side for successful leniency applicants. Under ACPERA, so long as a leniency recipient provides ‘satisfactory cooperation’ to the civil plaintiff, the leniency recipient may only be held liable for ‘actual damages sustained . . . attributable to the commerce done by the applicant in the goods or services affected by the violation’, as opposed to the treble damages remedy normally imposed under Section 4 of the Clayton Act.113 Joint and several liability is also unavailable to the plaintiff.114

A court hearing the civil antitrust case is tasked with determining whether a leniency recipient has provided ‘satisfactory cooperation’; however, the precise contours of what constitutes ‘satisfactory cooperation’, as the term is used in ACPERA, remains somewhat unclear. The text of the Act specifies that it includes providing the civil plaintiff with all facts known to the leniency applicant that are ‘potentially relevant to the civil action’, furnishing potentially relevant documents, and making him or herself (in the case of individual applicants) available for depositions or testimony, or (in the case of corporate applicants) using best efforts to secure depositions or testimony from cooperating individuals.115 In 2010, Congress amended ACPERA to provide that a court must also consider the timeliness of the leniency applicant’s cooperation when deciding whether that cooperation was ‘satisfactory’.116

In practice, leniency applicants face an interesting strategic choice in deciding how much cooperation to afford civil litigants. Since Section 4 does not provide for prejudgment interest, any delay in civil adjudication benefits the defendant. The defendant may also be reluctant to provide data that plaintiffs need to prove their quantum of damages. On the other hand, civil proceedings provide the leniency applicant with the chance to assist in a case that

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110 id., at 184.
113 Pub L No. 108-237, Section 213.
114 ibid.
115 ibid.
may result in treble damages against their co-conspirators, which may confer a competitive advantage. The applicant’s decision regarding the timing and extent of its cooperation is therefore strategic and fact-driven.\footnote{For a plaintiff’s perspective on the defendant’s duty to cooperate under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 [ACPERA], see Jay L. Himes, ‘It Ain’t Funny How Time Slips Away: Amnesty Recipient Cooperation in Civil Antitrust Litigation’, \textit{Global Competition Policy} (August 2009). (‘The very specificity of ACPERA’s cooperation provisions demonstrates that Congress intended to afford the civil plaintiffs meaningful assistance pursuing their case, not a fleeting shadow to be forever chased.’)}

For the moment, there is scant case law to help leniency applicants determine precisely how recalcitrant they can be before they risk some adverse consequence by failing to provide ‘satisfactory cooperation’, nor is it clear what the consequences might be. To date, only two decisions have addressed the duty of a leniency applicant to cooperate with civil plaintiffs under ACPERA. In \textit{In re TFT-LCD (Flat Panel) Antitrust Litigation},\footnote{\textit{In re TFT-LCD (Flat Panel) Antitrust Litig}, 618 F Supp 2d 1194, 1196 (N.D. Cal. 2009).} the Antitrust Division’s investigation into price-fixing in the LCD market lasted for several years, during much of which time civil discovery was stayed. The plaintiffs asked the district court hearing the civil case to compel the leniency applicant to reveal itself and cooperate with the plaintiffs’ investigation. The Division opposed the motion, arguing that compelling the applicant’s cooperation in civil discovery would prejudice the Division’s criminal investigation.\footnote{United States’ Opposition to Direct Purchaser Plaintiffs’ Motion to Compel the Amnesty Applicant Defendant to Comply with ACPERA or Forfeit Any Right It May Have to Claim Reduced Civil Liability, dated 1 May 2009 filed in \textit{In re TFT-LCD (Flat Panel) Antitrust Litig}, No. M07-1827 (N.D. Cal.).} The district court held that until the civil case was finally adjudicated against the applicant, the court could not address the adequacy of its cooperation and whether it was entitled to the benefit of ACPERA.\footnote{\textit{ibid.}} In 2013, in \textit{In re Aftermarket Automotive Lighting Products Antitrust Litigation},\footnote{\textit{In re Aftermarket Auto Lighting Products Antitrust Litig}, No. 09 MDL 2007-GW PJWX, 2013 WL 4536569 (C.D. Cal. 26 Aug. 2013).} the district court recalled that the Congressional Committee Report indicated the term ‘potentially relevant’ was intended to preclude a ‘parsimonious view of the facts or documents to which a claimant is entitled’.\footnote{id., at *4 (quoting 150 Cong Rec H3657 (2 June 2004) (statement of Rep. Sensenbrenner)).} It held that the obligation of a leniency applicant to provide a ‘full account’ of ‘all facts known’ and ‘all documents . . . that are potentially relevant to the civil action’ implies more than mere compliance with discovery obligations under federal rules.

These decisions do not provide much insight into the scope of the applicant’s duty to cooperate, and the necessary quantum and timeliness of ‘satisfactory’ cooperation remain closely contested issues in civil litigation. Until the law in this area is clarified, defendants are likely to continue to do just enough not to imperil the benefit they receive under ACPERA.\footnote{As noted elsewhere, the Antitrust Division maintains the confidentiality of leniency applicants unless compelled to reveal an applicant’s identity by court order. In some circumstances, however, firms that are publicly traded in the United States may be required to reveal their participation in the Leniency Program, as well as some information regarding the underlying conduct, as part of their securities disclosure obligations.}

vi Represenational conflicts

Representational conflicts are a frequent issue for corporate counsel who investigate potential cartel activity. Corporate internal investigations will generally involve interviews with senior
company personnel, some of whom may face significant criminal exposure themselves and whose interests are not always aligned with those of the company. *Upjohn* warnings are essential in this context.¹²⁴

The Leniency Program’s protections for individuals associated with a corporate leniency applicant have softened the representational conflict issue for companies that receive corporate leniency.¹²⁵ For companies that receive Type A leniency, leniency will automatically extend to directors, officers and employees of the corporation so long as the individuals admit their involvement ‘with candor and completeness’ and assist the Division throughout its investigation.¹²⁶ For companies that receive Type B leniency, the Division has the discretion to extend leniency to the same set of individuals under the same circumstances.¹²⁷ When both the company and its officers, directors and employees are protected under the same leniency ‘umbrella’, their interests are closely aligned, as both have an interest in assisting the Division and preserving leniency. Note, however, that the possibility of shared leniency does not automatically eliminate a potential conflicts issue. For instance, an individual may choose to assert his or her innocence rather than share in the corporation’s leniency, which would be likely to place his or her interests at odds with those of the corporation.

For cartel participants who do not receive Type A leniency, the corporation’s interests may still lie in cooperating with the government. In that event, however, the corporation cannot use the Division’s Leniency Program to shield its directors, officers and employees. In many circumstances, an employee’s personal interests might be better served by declining to cooperate. This divergence can create a conflict of interest problem around which counsel must navigate very carefully.

*United States v. Norris*,¹²⁸ in which the court convicted a British executive of conspiracy to obstruct justice in connection with an Antitrust Division investigation into price-fixing in the industries for various carbon products, underlines the degree of caution corporate counsel should use when speaking to officers and employees. The government alleged that Ian Norris, then the chief executive officer of Morgan Crucible, obstructed the Division’s investigation by, *inter alia*, conspiring with others to create falsified ‘scripts’ that would incorrectly characterise certain meetings with competitors as joint venture meetings.¹²⁹ Norris provided the scripts to Morgan Crucible’s corporate counsel, who in turn produced the documents to the Antitrust Division.¹³⁰

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¹²⁴ *Upjohn Co v. United States*, 449 US 383 (1981). In *Upjohn*, the Court held that a company could invoke attorney–client privilege to protect communications made between company lawyers and company employees (including non-management employees), but that the privilege belonged to the company only. The *Upjohn* warning is sometimes colloquially referred to as the *corporate Miranda*, after the Supreme Court case that established the principle that the police must advise a criminal suspect of his or her right to counsel and right to refuse to answer questions during a custodial interrogation. *Miranda v. Arizona*, 384 US 436 (1966).

¹²⁵ Recall that Type A leniency is available only to the first cartel participant that files for a marker, and then only under certain conditions. See Section IV.i of this chapter.


¹³⁰ 722 F Supp 2d at 635.
The Division subsequently indicted Norris on several counts, including price-fixing and corruptly persuading others with intent to cause others to alter, destroy, mutilate or conceal records. Norris attempted to exclude testimony by the attorney for Morgan Crucible, to whom he had given the allegedly fabricated scripts, arguing that his communications with the lawyer were protected by attorney–client privilege. The key issue was whether an attorney–client relationship existed between corporate counsel and Norris as an individual, or whether counsel represented only the company. As supporting evidence for the existence of an attorney–client relationship with Norris as an individual, Norris cited an email in which the attorney said he had told the Antitrust Division that ‘the firm represents the parent company, its affiliates and its current employees’. The trial court found that no attorney–client relationship existed between counsel for the corporation and Norris as an individual, and allowed the lawyer to testify.

Although the holding in Norris ultimately came out against the individual employee, the case serves as a cautionary tale for corporate counsel handling a cartel investigation.

vii Whistle-blower protection

In July 2012, two members of the US Senate, Charles Grassley and Patrick Leahy, introduced proposed legislation to protect employees who report antitrust violations to federal officials. The Criminal Antitrust Anti-Retaliation Act (CAARA) would amend ACPERA to allow an employee who feels his or her employer has retaliated against him or her for reporting wrongful conduct to file a complaint with the Secretary of Labor. If the complaint is substantiated, the employee would be entitled to reinstatement, back pay and litigation costs, including attorney’s fees. Unlike some whistle-blower statutes, the Grassley–Leahy proposal does not include financial incentives for employees to report wrongdoing. The 2012 iteration of CAARA died in a Senate Committee without a vote. The bill was reintroduced in 2013, and the Senate voted unanimously to pass the bill in November 2013. The bill was again reintroduced in 2015 and unanimously passed by the Senate on 22 July 2015. The bill was reintroduced in 2017 and was passed by the Senate on 22 November 2017. The Antitrust Division has not taken a position on the legislation, apparently believing that whistle-blowers are protected by existing federal law.

VI PENALTIES

The primary determinant for sentencing in cartel cases is the US Sentencing Guidelines (the Sentencing Guidelines). Although most cartel cases brought by the Division result in plea agreements in which the Division negotiates an agreed sentence with each defendant,

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131 Second Superseding Indictment (see footnote 129).
132 Ian P Norris’ Memorandum in Opposition to Antitrust Division’s Motion In Limine to Permit Testimony of Sutton Keany; Request for Evidentiary Hearing, at 5, 2:03-cr-00632-ER (E.D. Pa. filed 5 June 2010).
133 Norris’ appeal was denied by the Third Circuit, which agreed with the trial court that the communications were not privileged. United States v. Norris, No. 10-4658, 2011 WL 1035723 (3d Cir. 23 March 2011) (not published).
134 S 42, 113th Cong (2013).
137 United States Sentencing Commission Guidelines Manual [USSG], Section 2R1.1 (Bid Rigging, Price Fixing or Market Allocation Agreements Among Competitors).
the Sentencing Guidelines are the starting point for these negotiations. Judges are involved in the sentencing process either when they consider approval of plea agreements or impose sentences after trial; in both cases, their discretion is informed by the Sentencing Guidelines. Although the Guidelines take a number of factors into account, the volume of commerce affected by an antitrust conspiracy is the dominant factor in calculating the recommended sentence for a Section 1 violation.

### Volume of commerce

The volume of commerce affected is the most important variable in determining the recommended sentence for cartel participants under the Sentencing Guidelines. The sentencing calculation differs between individuals and corporations, but in both cases the volume of commerce is the most important factor. For individuals, the sentencing recommendation is composed of both imprisonment and a fine. The recommended term for imprisonment is determined primarily by reference to an offence level. Cartel offences have a base offence level of 12, with an increase of up to 16 levels depending on the volume of commerce affected. To illustrate the importance of volume of commerce, if all other factors were held constant, the same criminal action would result in a recommended sentence of 10 to 16 months if the volume of commerce affected were less than US$1 million, as compared with a recommended sentence of six-and-a-half to eight years if the volume of commerce affected were greater than US$1.5 billion.

For both corporations and individuals, calculating the recommended fine begins by taking a specific proportion of the volume of commerce (20 per cent for corporations and between 1 and 5 per cent for individuals). For individuals, the calculation stops there. Corporate fines are subject to adjustment by a multiplier depending on the corporation’s ‘culpability score’, but the multiplier cannot fall below three-quarters or rise above four.

Given the dominant role that volume of commerce plays in cartel sentencing, it is perhaps surprising that there is no established method for calculating the ‘volume of commerce affected’ by a given conspiracy. The Sentencing Guidelines offer virtually no guidance, and because most criminal cartel defendants strike plea bargains with the Antitrust Division prior to the sentencing phase of the case, there is scant case law on the issue.

The *Air Cargo* cases illustrate the amplified effect that variations in the method for determining the volume of commerce can have on the length of a cartel defendant’s sentence. The Division takes the position that the volume of commerce must include the entire price paid by customers, rather than just the component of the total price that was subject to price-fixing. In the *Air Cargo* cases, this meant calculating the volume of commerce using the

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138 *After United States v. Booker*, 543 US 220 (2005), judges may deviate from the recommendations embodied in the Sentencing Guidelines. However, judges must begin sentencing opinions by calculating the recommended sentence under the Guidelines, and failure to do so is a reversible error.

139 The Sentencing Guidelines also take the criminal history of the defendant into account. See USSG Section 5A (sentencing table).

140 USSG Section 2R1.1.

141 The percentage calculation for individual fines is subject to a lower cap of US$20,000 – that is, the recommended fine for an individual can never fall below US$20,000. Ibid.

142 According to the Sentencing Guidelines, ‘the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation’. Ibid.
total price of air transport for cargo, rather than the fuel surcharge that many airlines levied against customers and that had been inflated by price-fixing. The result was a volume of commerce calculation many times larger than it would otherwise have been.

One outstanding issue concerns whether the volume of commerce in international cartel cases should include sales made outside the United States. While public statements by the Antitrust Division indicate that only US sales are to be included in the volume of commerce calculation, the Division has nevertheless considered foreign sales when determining fines. The most recent example comes from the ongoing Auto Parts investigation. In its plea agreement with corporate defendant Furukawa, the Antitrust Division fined the company for its participation in the Auto Parts conspiracy based on:

a. sales of auto parts that were manufactured abroad, but sold into the United States for installation in cars made or sold in the United States;
b. sales of auto parts that were actually manufactured in the United States and sold to automotive manufacturers in the United States; and
c. in part, sales of fixed auto parts that were manufactured and sold abroad, but put into cars on assembly lines that were destined for the United States.

In Auto Parts and other cases, the Division has shown a propensity to expand the volume of commerce affected by a conspiracy by looking at both direct and indirect sales made into the United States.

Determining the volume of commerce in a cartel case is more art than science. In most cases, there is a process of negotiation between the Division and the parties. In general, the Division will seek the widest possible definition of volume of commerce, while the parties will seek the smallest. However, the Division’s ambitions are tempered by at least two factors: the risk that a court might reject an overly aggressive definition, and the fact that the

143 See Plea Agreement at 3, United States v. Korean Air Lines Co, Criminal No. 07-184 JDB (D. DC 1 August 2007), available at www.justice.gov/atr/cases/f225500/225524.pdf. (The price used to calculate volume of commerce ‘consisted of a base rate and, at times during the relevant period, various surcharges and fees, such as a fuel surcharge and a security surcharge.’)

144 See Brief for the United States and the Federal Trade Commission as Amici Curiae, Statoil ASA v. Heeremac VOF, No. 00-1842 (3 January 2002), available at www.ftc.gov/sites/default/files/documents/amicus_briefs/statoil-asa-petitioner-v-heeremac-v.o.f.et-al./statoil.pdf. (‘It is the policy of the United States to calculate the Base Fine by using only the domestic commerce affected by the illegal scheme, and in all but two of the dozens of international cartel cases prosecuted, fines obtained by the government were based solely on domestic commerce.’); Gary R Spratling, ‘Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases’, speech before the 13th Annual National Institute on White Collar Crime 18 (4 March 1999), available at https://www.justice.gov/atr/file/518591/download. (The Division ‘will normally use the volume of US commerce affected by the defendant’s participation in a conspiracy when calculating that defendant’s Sentencing Guidelines’ fine range.’)

145 The third category of commerce was taken into consideration in determining the starting point for the cooperation discount. Scott Hammond, Deputy Assistant Attorney General for the Antitrust Division, stated: ‘Not considering that commerce at all would have, I think, understated the seriousness of the offence and the impact this conduct had on the United States.’ Ron Knox, ‘The GCR Cartel Roundtable’, Global Competition Review, 10 May 2012, www.globalcompetitionreview.com/features/article/31774/the-gcr-cartel-roundtable.
Division does not wish to make entering plea agreements an unattractive proposition for cartel participants. Cartel participants considering whether to enter a plea agreement must weigh the likely outcome of a negotiation against the volume of commerce definition.

18 USC Section 3571

Under the Sherman Act as modified by ACPERA, the maximum possible fine for a corporate defendant is US$100 million. However, the Antitrust Division has long taken the position that fines larger than US$100 million are made possible by 18 USC Section 3571. That statute, which is a general criminal sentencing provision not specific to antitrust, provides that when any person derives pecuniary gain from a defendant’s offence, the defendant ‘may be fined not more than the greater of 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’. It is this provision that has allowed the Antitrust Division to negotiate numerous plea agreements with corporate defendants for fines substantially in excess of US$100 million.

Prior to the verdict in *AU Optronics*, the Division had seen little success in pursuing alternative fines under Section 3571 outside the context of a plea agreement. *AU Optronics* was the first case in which a court imposed a sentence greater than the Sherman Act’s US$10 million statutory maximum in a contested sentencing after a jury trial. The case was a resounding success for the Division, ultimately resulting in *AU Optronics* being fined US$500 million.

In the course of its overall victory in *AU Optronics*, the Division lost one important battle. The district court held that if the Division sought an alternative fine in excess of US$100 million, under the rule established in *Apprendi v. New Jersey*, it would have to prove to the jury, beyond a reasonable doubt, the amount of gross gain or loss. The Northern District reached this ruling despite the Division’s argument that *dicta* in *Oregon v. Ice* had carved out a space in which the *Apprendi* rule does not apply: namely, sentencing choices that traditionally fall within the purview of the judge rather than the jury. The Northern District distinguished *Ice* on several grounds, including the fact that the criminal antitrust fine in this case was ‘the primary form of punishment the government seeks and

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146 See *US v. Andreas*, 96-cr-762 (N.D. Ill. 2 June 1999) (refusing to apply the alternative fine statute when the Division did not comply with the court’s order to provide certain pricing information to the defendants); *US v. O’Hara*, 90-cr-26, 1991 WL 286176, at *3 (D. Me. 13 September 1991). (‘The alternative for calculating the bid-rigging fine – twice the gross pecuniary gain or twice the gross pecuniary loss – cannot be calculated without unduly prolonging or complicating the sentencing process and is, therefore, not considered.’)


148 530 US 466 (2000). (‘[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’)

149 Order Denying United States’ Motion for Order Regarding Fact Finding for Sentencing Under 18 USC Section 3571(d), *US v. AU Optronics Corp*, 09-00110 (N.D. Cal.18 July 2011).


151 See footnote 149. The First Circuit had followed this logic a year earlier, affirming a district court’s imposition of an US$18 million criminal fine even though the jury had made no finding with respect to how many days the defendant had stored hazardous waste illegally. *United States v. Southern Union Co*, 630 F3d 17 (1st Cir. 2010).
could amount to as much as $1 billion’.\textsuperscript{152} By contrast, the Supreme Court’s \textit{dicta} in \textit{Ice} was prompted by a trial court’s decision that a criminal defendant should serve consecutive rather than concurrent jail terms, which decision the Supreme Court characterised as an ‘acoutrement’ to the primary sentencing decisions.\textsuperscript{153}

The Antitrust Division’s loss on this issue ultimately proved to be a long-term win, as a contrary result would have potentially jeopardised the greater than US$100 million fine in \textit{AU Optronics}. Shortly after that case, the Supreme Court decided \textit{Southern Union Co v. United States}. Although this case involved the appeal of a sentence for a charge of storing hazardous waste without a permit under the Resource Conservation and Recovery Act, the question presented to the Court, as in \textit{AU Optronics}, was whether \textit{Apprendi} applies to the imposition of criminal fines such that a jury must find all issues of fact necessary to determine the amount of the fine.\textsuperscript{154} The Court answered this question in the affirmative.\textsuperscript{155} Accordingly, it is fair to say the Antitrust Division dodged a bullet in \textit{AU Optronics} and that, in the future, the Division will be prepared to plead and prove the amount of gross gain or loss to a jury beyond a reasonable doubt in any case where it plans to seek an alternative fine under Section 3571.

The \textit{AU Optronics} sentencing was also notable because the court calculated the alternative sentence based on the aggregate gain or loss caused by the conspiracy. That is, the relevant figure for application of the alternative fine statute was the total loss or gain caused by all conspirators, as opposed to the gain or loss attributable to the individual defendant. Although other courts had previously calculated gain or loss for the purpose of applying Section 3571 on an aggregate or conspiracy-wide basis, the \textit{AU Optronics} court was the first to do so when sentencing a defendant in an antitrust cartel case. The US$500 million fine imposed on AU Optronics was recently affirmed by the Ninth Circuit. Ruling on an issue of first impression, the court of appeals held that the alternative fine statute does not prevent the imposition of a fine based on the collective gains by all members of the conspiracy, nor does it require holding them jointly and severally liable.\textsuperscript{156}

Since then, the Division has secured several fines exceeding the Sherman Act statutory maximum. In 2015, the Division imposed four of the largest fines to date for a criminal violation of the Sherman Act against banks for manipulation of the foreign exchange markets: Citicorp (US$925 million, which also is the largest fine to date imposed on a single entity), Barclays PLC (US$650 million), JPMorgan Chase & Co (US$550 million) and Royal Bank of Scotland PLC (US$395 million).\textsuperscript{157} In previous investigations, the Division imposed two fines of US$300 million on participants in the \textit{Air Cargo and Passenger} conspiracy (2007), a US$350 million fine in the \textit{Air Cargo} conspiracy (2008), fines of

\textsuperscript{152} Order Denying United States’ Motion for Order Regarding Fact Finding for Sentencing Under 18 USC Section 3571(d), \textit{United States v. AU Optronics Corp}, 09-00110 (N.D. Cal. 18 July 2011).
\textsuperscript{153} ibid.
\textsuperscript{155} ibid.
\textsuperscript{156} \textit{US v. Hui Hsiung}, 758 F3d 1074, 1088, 1095-1096 (9th Cir. 2014). The case was appealed to the Supreme Court, but cert was denied in 2015. \textit{Hsiung v. US}, 135 S. Ct. 2837 (2015).
US$470 million and US$425 million against participants in the *Auto Parts* conspiracies (2012 and 2014, respectively), and a US$500 million fine against a participant in the *LCD Panel* conspiracy (2012).158

### iii Discounts

A number of potential sentencing discounts are available to both corporate and individual cartel defendants. Among the most important are sentencing discounts for second-in corporate cooperators and downward adjustments for individuals under Section 5K of the Sentencing Guidelines.

A first-in corporation that applies for and obtains leniency receives full immunity from sentencing: successful applicants receive no criminal convictions, no criminal fines and no jail sentences for employees. The position of a second-in cooperator – that is, a company that offers to cooperate with the Antitrust Division after the Division has already granted leniency to another participant in the conspiracy – is substantially less advantageous, but a second-in cooperator still stands to receive a significant sentencing discount; how large a discount rests largely on the discretion of the Division. In exercising this discretion, the Division attempts to balance the value of the company's cooperation against the disproportionality in sentencing between defendants that results from discounts.159 Of course, any discount offered by the Division and embodied in a plea agreement must pass through review by the court and may be rejected (type C) or modified (type B).160

There are a number of mechanisms through which second-in cooperators might enjoy sentencing discounts. First, the Division might move the court for a downward departure from the requirements under Section 8C4.1 of the Sentencing Guidelines;161 the Division

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159 See Scott D Hammond, ‘Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations’, address to the 54th Annual American Bar Association Spring Meeting, Washington, DC (29 March 2006), available at https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations. The Division has since clarified that the extent of any discount will not merely be reflective of the timing of cooperation, but also the nature, extent and value of that cooperation to the Division. It is essential that the company's cooperation fully and truthfully assists the Division's attempts to hold other corporate and individual conspirators accountable. See Brent Snyder, 'Individual Accountability for Antitrust Crimes', address to the Yale Global Antitrust Enforcement Conference, New Haven, Conn. (19 February 2016), available at https://www.justice.gov/opa/file/826721/download. This shift in emphasis is consistent with a trend that places increasing weight on the value prong of the discount consideration and marks a change from the Division's prior practice. William J Baer, 'Prosecuting Antitrust Crimes', remarks as prepared for the Georgetown University Law Center Global Antitrust Enforcement Symposium, 10 September 2014, available at https://www.justice.gov/atr/file/517741/download.

160 The Federal Rules of Criminal Procedure offer three potential forms for plea agreements. In an 'A' agreement under Rule 11(c)(1)(A), the government agrees to dismiss some of the counts in the indictment in return for a guilty plea to one or more of the other counts. The 'A' agreement may also include a sentencing recommendation. In a 'B' agreement under Rule 11(c)(1)(B) (the most common form of plea), the government agrees to recommend, or at least not to oppose the defendant's request for, a particular sentence. A 'C' agreement under Rule 11(c)(1)(C) seeks to provide certainty to the defendant by taking sentencing discretion away from the district court. The court is not, however, obliged to accept a 'C' agreement and may insist that the plea be entered under Rule 11(c)(1)(A) or Rule 11(c)(1)(B).

161 USSG Section 8C4.1 allows the government to move for a downward departure when the corporate defendant has provided 'substantial assistance' in the investigation. The Guidelines further provide that
often recommends discounts to second-in cooperators in the range of 30 to 35 per cent.\(^{162}\) Second, the Division will generally apply the Section 8C4.1 discount to a starting point that is the minimum of the range recommended in the Guidelines – although the Division will choose a higher starting point if it determines either that the second-in cooperator played a lead role in the cartel or that the cooperator merits Penalty Plus treatment.\(^{163}\) Third, the Division often agrees to fewer carve-outs for high-ranking employees when the defendant is a second-in cooperator.\(^{164}\) Fourth, second-in cooperators may stand a better chance of enjoying credit under the Division’s Amnesty Plus or Affirmative Amnesty programmes.\(^{165}\) Finally, although it is not strictly speaking a sentencing discount, the Division’s practice is not to include in the volume of commerce affected for a second-in cooperator any commerce the Division discovered solely as a result of information provided by the second-in cooperator.\(^{166}\)

Under Sections 5K1.1 and 8C4.1 of the Sentencing Guidelines, the Antitrust Division may move the court for a downward departure from the Guidelines for an individual or corporation who provides ‘substantial assistance’ to the investigation or prosecution; the Division has often done so in antitrust cartel cases.\(^{167}\) The Division may include a promise to request downward departure, subject to certain conditions, in a plea agreement.\(^{168}\) In determining the appropriate discount sought both for individuals and corporations as defendants, the court may consider various factors, including the significance and usefulness of the defendant’s assistance, the nature and extent of that assistance, as well as its timeliness.\(^{169}\) Solely for individual defendants, the court may also consider the ‘truthfulness, completeness, and reliability’ of the defendant’s testimony, and any danger or injury to the defendant caused by the assistance.\(^{170}\)

While it does not qualify as an explicit discount, it is worth noting that individual foreign defendants in international cartel cases often receive jail terms that are significantly shorter than those of US defendants. The disparity in sentencing was much larger in the early 2000s than it is now, but it is still substantial. From fiscal year 2010 to 2017, the average

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\(^{162}\) See Scott D Hammond, footnote 159, at 5.

\(^{163}\) id., at 6–7; see Section IV.iii of this chapter for a discussion of Penalty Plus for corporations.

\(^{164}\) id., at 7; see Section V.iii of this chapter for a discussion of carve-outs for individuals.

\(^{165}\) See Scott D Hammond, footnote 159, at 9–11.

\(^{166}\) id., at 3–4.


\(^{169}\) USSG Sections 5K1.1 and 8C4.1.

\(^{170}\) USSG Section 5K1.1.
prison sentence imposed against all individual cartel defendants – both foreign and US nationals – was 20 months, whereas the average sentence imposed against the 49 foreign defendants sentenced between fiscal years 2010 and 2015 was 15.5 months.

Companies that have ‘effective’ compliance programmes, or demonstrate a dedication to implementing an effective compliance programme post-conduct, may also receive a discount in the sentencing calculus and thus lower fines. In May 2015, the Antitrust Division recommended for the first time that a company receive sentencing credit for implementing and maintaining an effective compliance programme following the initiation of an investigation. In a May 2018 speech, the Antitrust Division clarified that compliance credit was most likely to come from ‘extraordinary prospective compliance measures’ undertaken after problematic conduct was identified. By contrast, though the Sentencing Guidelines contemplate providing credit to companies for pre-existing compliance programmes, the Division expressed scepticism about offering such credit reasoning that a violation would not have occurred if the compliance programme was effective – but continues to assess under what circumstances credit for an existing programme may be appropriate.

Three recommendations for compliance credit reflect confirmation of the Division’s willingness to credit effective compliance programmes in certain circumstances. On 29 September 2015, the Antitrust Division recommended that Kayaba Industry Co Ltd receive a discount on its fine for its participation in the Auto Parts price-fixing conspiracies because it adopted an effective compliance programme following the initiation of the investigation. In February 2018, the Division recommended no probation for BNP Paribas for its involvement in the FX conspiracy, due to its ‘substantial efforts’ towards compliance and remediation to prevent future violations.

173 In a plea deal Barclays PLC entered into in the investigation into the alleged conspiracy to manipulate the price of US dollars and euros sold in the foreign exchange (FX) spot market, the language notating the credit for an effective compliance programme states: ‘The parties further agree that the Recommended Sentence is sufficient, but not greater than necessary to comply with the purposes set forth in 18 USC Sections 3553(a) and 3572(a), in considering, among other factors, the substantial improvements to the defendant’s compliance and remediation program to prevent recurrence of the charged offense’. United States v. Barclays PLC, Plea Agreement Section 13, available at www.justice.gov/file/440481/download.
175 ibid.
176 United States Sentencing Memorandum and Motion for a Downward Departure at 7, United States v. Kayaba Industry Co, No. 1:15-cr-00098-MRB (S.D. Ohio 5 October 2015). (Recommending a discount in fine because ‘KYB’s compliance policy has the hallmarks of an effective compliance policy including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy’.)
The Division has refrained from imposing a ‘one size fits all’ criterion for an effective compliance programme, but has set out a number of basic tenets of such a programme. First, the compliance programme must be combined with ‘a real commitment by senior management’ – that is, top officials of the company must lead by example and support, participate in and take seriously the compliance programme. Second, the company should educate and train the entire organisation (particularly executives, managers and employees with sales and pricing responsibilities) to ensure their full commitment with its compliance efforts. Third, the compliance programme should be proactive in re-evaluating, monitoring and auditing risk activities regularly. Finally, the company should have disciplinary procedures in place for individuals who run afoul of the compliance programme and violate antitrust laws.

**iv Restitution and probation**

Restitution to victims who were injured by the cartel is available as a punishment in cartel cases but the Antitrust Division rarely pursues it. There are at least two reasons for this reluctance. First, criminal cartel convictions are often followed by private civil suits, which generally allow parties injured by the cartel to recover treble damages from the cartel participants, while restitution would serve only to make the injured parties whole. Second, determining the amount of loss suffered by particular victims is difficult and complex, and may unduly complicate and delay the sentencing process. This concern is sharpened by the availability of private civil suits as a mechanism to determine the amount of money owed to particular victims. Leniency applicants are not required to pay restitution to victims whose antitrust injuries are independent of, and not proximately caused by, an adverse effect on (1) trade or commerce within the United States, (2) import trade or commerce, or (3) the export trade or commerce of a person engaged in such trade or commerce in the United States.

The Division may also recommend, and the court may impose, a period of probation upon a corporate defendant in a cartel case. Probation may include a variety of conditions, including that the corporation does not commit another federal, state or local crime during the term of probation, pays restitution if required, and implements an antitrust compliance programme or addresses deficiencies in an existing compliance programme. Notably, the Antitrust Division now seeks the imposition of compliance monitors, which can prove to be a costly and time-consuming constraint on corporate defendants. This measure was first taken in **AU Optronics**, in which the Division argued that such an educational or correctional treatment

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178 US DOJ, speech by Deputy Assistant Attorney General Brent Snyder, ‘Compliance is a Culture, Not Just a Policy’ (9 September 2014), available at www.justice.gov/atr/file/517796/download.

179 See USSG Section 8B1.1; see, e.g., United States’ and Defendant Polo Shu-Sheng Hsu’s Joint Sentencing Memorandum at 3, *US v. Polo Hsu*, No. 11-cr-0061 (N.D. Cal. 15 March 2011). (The government did not seek restitution because a follow-on private civil suit ‘potentially provide[s] for a recovery of a multiple of actual damages’.)

180 See USSG Section 8B1.1; see, e.g., United States’ Sentencing Memorandum at 5–6, *US v. UCAR Intl Inc*, No. 98-177 (E.D. Pa. 21 April 1998). (‘Given the remedies afforded [antitrust victims] and the active involvement of private antitrust counsel . . . the need to fashion a restitution order is outweighed by the difficulty [in determining losses] and the undue complication and prolongation of the sentencing.’)


182 See USSG Section 8D1.1 (listing the circumstances in which a court should impose probation).

183 id., at Section 8D1.3.
was necessary, considering the defendant refused to admit the illegality of its conduct and had been engaged in anticompetitive conduct since its creation. The Division subsequently recommended the appointment of an external monitor more generally as a condition of probation. Recently, Deutsche Bank AG agreed to hire an ‘independent compliance and ethics monitor’ for three years as part of a deferred prosecution agreement relating to the LIBOR investigation, and Höegh Autoliners, a participant in the roll-on, roll-off cargo conspiracy, agreed to a three-year compliance monitor as part of a plea agreement.

In addition, if a company violates the terms of its probation, the court may impose a variety of punishments, the harshest of which is revocation of probation and resentencing of the company.

v  Extradition

The Division has focused increasingly on prosecuting international cartels. In accordance with its position that punishing individuals is essential to effective cartel enforcement, the Division often indicts foreign nationals who either led or were involved in a conspiracy. Until the extradition of Ian Norris, the Division had never successfully obtained formal extradition of an individual defendant from any foreign jurisdiction. There are no universal rules of extradition. Whether a defendant may face extradition depends on the particular terms of the bilateral extradition treaty between the two countries involved. Most of the bilateral treaties to which the United States is a party provide that the other country will only extradite a defendant when the conduct underlying the offence charged is a crime under the laws of both countries (a concept referred to as dual criminality). Most foreign jurisdictions do not criminalise price-fixing by individuals, hence the Division’s historical difficulty in securing formal extradition from other countries.

Even in the Norris case, which was the first time a foreign jurisdiction extradited a defendant to the United States after he had been indicted for criminal price-fixing, the

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187 See Belinda A Barnett, Senior Counsel, Antitrust Division, US DOJ, ‘Criminalization of Cartel Conduct – The Changing Landscape’, address in Adelaide, Australia (3 April 2009), available at https://www.justice.gov/sites/default/files/atr/legacy/2009/07/10/247824.pdf. (‘[T]he Division has long advocated that the most effective deterrent for hard-core cartel activity, such as price-fixing, bid-rigging, and allocation agreements, is stiff prison sentences [for individuals].’) See also more recently, DOJ: Sally Quillian Yates, Memorandum Re Individual Accountability for Corporate Wrongdoing, footnote 100. (‘One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.’)
188 See I A Sheeret, Extradition in International Law, 137 (1971).
189 See Daryl A Libow and Laura K D’Allaird, ‘Recent Developments and Key Issues in US Cartel Enforcement’, presentation before the American Bar Association (28 October 2009). However, some foreign jurisdictions, especially Commonwealth countries, have adopted or have considered adopting criminal punishments for price-fixing activity by individuals. See Belinda A Barnett, footnote 188
United Kingdom extradited Norris only after a lengthy and contentious appeals process, and then only on the grounds that Norris should face trial on his obstruction of justice charge rather than the price-fixing charge. Even so, the Division touted Norris’ extradition as a sign that ‘the safe harbors for offenders are rapidly shrinking’ given the ‘increased willingness [of foreign governments] to assist the United States in tracking down and prosecuting cartel offenders’. In fact, it was not long before the Antitrust Division announced the first successfully litigated extradition on an antitrust charge. In April 2014, Romano Pisciotti, an Italian national and an executive of Parker ITR SRL, was extradited from Germany for his involvement in the Marine Hose conspiracy.

As a practical matter, whether a foreign defendant travels to the United States to face price-fixing charges may have more to do with the defendant’s interest in unobstructed international travel than with the possibility of formal extradition. Many defendants in international cartel cases are high-ranking executives in companies with an international scope. The existence of an outstanding arrest warrant that effectively bars their entry into the United States often provides an unacceptable crimp on their ability to conduct business.

Of course, the defendant has no motive to subject himself or herself to the jurisdiction of a US court if his or her trial or plea agreement would result in a felony conviction that bars his or her entry into the country. Recognising this dynamic, the Division entered into a memorandum of understanding in 1996 with what was then the Immigration and Naturalization Service (now the Department of Homeland Security). Under the terms of that memorandum, the Antitrust Division may petition the immigration authority to waive deportation or inadmissibility for aliens who have been convicted of an antitrust offence, and who have provided or will provide ‘significant assistance’ to the Division in prosecuting an antitrust case. In practice, this means that foreign nationals convicted in cartel cases for whom the Division seeks an immigration waiver can continue to travel to and through the United States to conduct business.

Follow-on class actions

Private plaintiffs often bring private antitrust suits in the wake of a criminal prosecution by the Antitrust Division. Plaintiffs’ attorneys frequently seek to bring these claims as class actions on behalf of a class of all direct or indirect purchasers who were harmed by the cartel. When a price-fixing conspiracy covers a long period of time, as with the LCD cartel, or a very large product market, as with the Vitamins cartel, defendants’ follow-on exposure can be considerable. Counsel for companies in cartel investigations must therefore be cognisant from the beginning of the downstream civil litigation effects of the decisions they make.

in the investigation, leniency and cooperation processes. While much of the information submitted pursuant to a criminal investigation may receive some form of protection from public disclosure, such information is potentially discoverable in civil litigation. Thus, counsel are well advised to closely consider the potential civil ramifications of each step taken in a criminal investigation, including considering the nature and extent of written submissions made to the government, as well as the handling of documents and witness statements.

Law Business Research publishes a comprehensive book dedicated to follow-on private actions entitled *The Private Competition Enforcement Review*. We recommend referring to that publication for further details about the intricacies of the private antitrust enforcement regime in the United States and those developing elsewhere around the world.

vii Debarment

In addition to their criminal and civil Section 1 risk, federal contractors face a significant collateral consequence of cartel violations: debarment from participation in future bids as contractors and subcontractors. The General Services Administration maintains the Excluded Party List System, a list of contractors debarred by any federal agency. Debarment policies differ from agency to agency, but a company barred by one agency is generally ineligible to participate in future bidding with any federal agency. Cartel violations in the contracting context may also trigger other criminal statutes, including 18 USC Section 1001, which criminalises false statements to federal officials. The Antitrust Division has been charging defendants under these ‘companion’ statutes with increasing frequency.

The Antitrust Division’s Leniency Program does not provide any specific protection for leniency applicants with respect to debarment, but if an agency’s rules are triggered only by a criminal conviction, then the applicant perforce will not face debarment. As to agencies that debar contractors based on evidence of wrongdoing that does not result in a conviction, the Division will not request specific relief from that agency on behalf of the applicant and cannot guarantee a particular outcome, but it will often agree to inform the agency of the applicant’s cooperation.

Some jurisdictions, including the United Kingdom and Australia, also have debarment procedures for individuals implicated in cartel activity. In the United States, the Food and Drug Administration has similar procedures for executives involved in fraudulent conduct before the agency, as does the Securities and Exchange Commission. At present, however, the United States does not debar individuals convicted of or implicated in antitrust violations from serving as an officer or director of a public company. In 2016, the UK’s Competition and Markets Authority applied a debarment sanction for the first time against Daniel Aston, a director of the company Trod Ltd, for his direct involvement in an agreement with a competitor not to undercut each other’s prices. Aston was disqualified from serving as a director of any UK company for five years.

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VII PROSECUTORIAL DISCRETION

The Antitrust Division has wide scope to exercise its discretion not to prosecute a particular defendant or to charge that defendant with less than all the crimes for which he or she may be prosecuted. The Division has long restricted its exercise of this discretion to grants of leniency pursuant to the Leniency Program and to cooperating witnesses. The Division’s reluctance in this regard reflects its strong belief in the deterrent value of corporate prosecutions to the prevention of cartel activity, as well as its interest in protecting the primary incentive that drives the success of the Leniency Program – namely, leniency for only the first conspirator to come forward and self-report. However, the Division’s position has softened as it has become more involved in heavily consolidated and regulated industries, such as the financial services industry, and as a result of the increasingly crowded global cartel enforcement environment.

i Non-prosecution agreements

The Antitrust Division’s policy does not favour the use of non-prosecution agreements (NPAs) or deferred prosecution agreements (DPAs) in criminal cartel investigations. This is consistent with the Division’s general view that the criminal sanction is essential as a deterrent.

Although the Antitrust Division did employ NPAs with respect to a number of corporate defendants in the municipal bond investigation in 2011 and 2012, counsel should not draw the conclusion that the Division did this out of solicitude for the defendants.

The cases against the municipal bonds corporate defendants predominantly involved fraud violations, as opposed to antitrust violations, and thus required unique consideration by the Antitrust Division of the Principles of Federal Prosecution of Business Organizations. Under the Principles, the Division was required to evaluate and balance, among other factors, the ‘collateral consequences’ of a prosecution on the municipal bond corporate defendants and their shareholders and employees. In this instance, guilty pleas to criminal charges by the corporate defendants might have resulted in them being barred from working as underwriters for municipal bonds, and given the number and significance of the firms


196 See Scott D Hammond, ‘Charting New Waters in International Prosecutions’, 2 March 2006, available at www.justice.gov/atr/public/speeches/214861.pdf. (‘It is indisputable that the most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them.’)


199 ibid.
implicated in the conspiracy, the debarment of these firms could have had a serious negative collateral impact on the viability and efficiency of the overall market for municipal bonds. Note that individual defendants were not offered NPAs, and more than a dozen former financial institution employees entered guilty pleas.\textsuperscript{200}

In February 2013, the Antitrust Division entered into a DPA with the Royal Bank of Scotland (RBS) for its admitted involvement in the LIBOR conspiracy and in recognition of the valuable information provided by RBS.\textsuperscript{201} Under the DPA, the Department of Justice dismissed the wire fraud and antitrust charges against RBS, subject to the bank cooperating with the LIBOR investigation, paying a criminal penalty of US$150 million and implementing an enhanced compliance programme.

In May 2015, in a rather exceptional move, the Department of Justice voided the NPA reached by the Antitrust Division and Fraud Section in December 2012 with UBS AG (UBS) for its involvement in the LIBOR conspiracy.\textsuperscript{202} The Department determined that UBS breached the LIBOR NPA, in which it had agreed to ‘commit no further crimes’, by engaging in fraudulent and anticompetitive conduct in relation to the FX rates market. As a result of the breach, UBS agreed to plead guilty to one count of wire fraud for involvement in the LIBOR conspiracy, and also agreed to pay a criminal penalty of US$203 million. This result was particularly surprising in light of the fact that it was UBS that self-reported its FX-related conduct to the Department under the Division’s leniency programme.

For the same policy reasons as those discouraging the use of NPAs or DPAs in criminal cartel investigations, the Antitrust Division also does not favour the use of \textit{nolo contendere} pleas, in which the defendant agrees to be punished but does not acknowledge the underlying wrongdoing. \textit{Nolo contendere} pleas may be entered at the discretion of the court, however, and in \textit{United States v. Florida West International Airways}, a \textit{nolo contendere} plea was accepted despite the objection of the Antitrust Division.\textsuperscript{203} The facts of that case were highly unusual, however, and counsel should not expect to be able to enter such a plea on behalf of either a corporate defendant or an individual except in similarly unusual circumstances.

\textsuperscript{200} e.g., three General Electric executives were convicted in a jury trial after the company entered into a non-prosecution agreement [NPA] with the Antitrust Division. See \textit{United States v. Carollo}, No. 1:10-cr-00654-HB (S.D.N.Y. 11 May 2012). Although the three executives were accused of conspiring to manipulate the bidding process, they were charged with wire fraud, rather than Sherman Act violations. However, the judgments of conviction of all defendants were reversed on statute-of-limitations grounds – \textit{United States v. Carollo}, 738 F3d 498 (2nd Cir. 2013).


\textsuperscript{202} See US DOJ press release, ‘Five Major Banks Agree to Parent-Level Guilty Pleas’ (20 May 2015), www.justice.gov/opa/pr/five-major-banks-agree-parent-level-guilty-pleas. The Antitrust Division also found that in engaging in collusive conduct in relation to the FX market, Barclays PLC violated a principal term of its own June 2012 NPA resolving the department’s investigation of the manipulation of LIBOR and other benchmark interest rates. ibid. The Division did not invalidate the NPA, as it had with the UBS NPA. Barclays agreed to pay a US$60 million criminal penalty based on its violation of the NPA.

\textsuperscript{203} \textit{United States v. Florida West Int'l Airways}, 2012 WL 3000250 (S.D. Fla. 20 July 2012).
ii Parallel foreign enforcement

The globalisation of cartel enforcement is slowly shifting the way the Antitrust Division and other cartel enforcers around the world approach the prosecution and punishment of defendants in international cartel investigations. The globalisation of cartel enforcement has led to increased international cooperation and coordination among authorities designed to enable and facilitate cross-border investigations. Through the efforts of multilateral organisations such as the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD) and the International Bar Association (IBA), guidelines and best practices have been developed with the aim of harmonising antitrust enforcement actions. Moreover, numerous bilateral agreements have been concluded to govern the level of assistance and the exchange of information in the case of joint investigations. In addition, as evidenced by numerous antitrust investigations, such as Air Cargo and Auto Parts, dawn raids are routinely taking place with close coordination between multiple enforcement agencies.

Coordination among cartel enforcers is now expanding into the post-investigative phases of prosecution and punishment. The demand for such coordination is on the rise because of the long list of interested enforcers in any given antitrust investigation. The growing demand for international coordination is further enhanced by the fact that certain legal concepts, such as double jeopardy and successive prosecution, do not apply across borders. The overriding concern is that in the absence of global coordination, defendants in international cartel cases may risk potential over-punishment as several enforcement authorities seek to redress the effects of the same cartel offence.

As it has been present throughout the evolution of cartel enforcement, the Antitrust Division has emerged as a thought leader in developing the guiding principles it will employ when confronting the question of whether to exercise discretion in response to a parallel foreign enforcement action.

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205 See, e.g., the cooperation agreements of the US Antitrust Division with its counterparties in Australia, Brazil, Canada, Chile, China, Colombia, the European Union, Germany, India, Israel, Japan, Mexico and Russia, available at https://www.justice.gov/atr/antitrust-cooperation-agreements.

206 See, e.g., Antonio Cassese et al., International Criminal Law: Cases and Commentary, OUP, Oxford: 2011, p. 100; Robert Cryer at al., An Introduction to International Criminal Law and Procedure, CUP, Cambridge: 2010, p. 80; Yitha Simbeye, Immunity and International Criminal Law, Ashgate, Burlington: 2005, p. 85. Notably, for EU Member States, the application of the ne bis in idem principle in criminal cases (at least) extends to the European Union under the now binding Charter of Fundamental Rights of the EU, Article 50. For the United States, the notion of double jeopardy is complicated by the existence of multiple sovereigns (i.e., the state and the federation). The DOJ has developed the ‘Petite Policy’ to establish guidelines on determining whether to bring a federal prosecution based on the same acts involved in a prior state proceeding. See Justice Manual, Title 9, Chapter 9-2.000 Authority of the United States Attorneys in Criminal Division Matters, 9-2.031 Dual and Successive Prosecution Policy (‘Petite Policy’), www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.031.
Recently, the Division has articulated the following four-step analysis for determining whether to exercise discretion in response to a parallel foreign enforcement action:

a. Is there a single, overarching international conspiracy?
b. Is the harm to US business and consumers similar to the harm caused abroad?
c. Does the sanction imposed abroad take into account the harm caused to US businesses and consumers?
d. Will the sentence imposed abroad satisfy the deterrent interests of the United States?\(^{207}\)

According to the Antitrust Division, the result of this analysis is not an all-or-nothing proposition. That is to say, depending upon how these factors stack up, the Division may consider reducing the scope of the activities under investigation, reducing the penalties applicable to the violation or waiving prosecution of the matter altogether.\(^{208}\)

While it predates the development of the analysis, the Antitrust Division’s resolution of the cases against the ‘UK3’ in the Marine Hose investigation reflects how the Division’s analysis may work in action. In the context of this global cartel of all major suppliers of marine hoses, both the US Antitrust Division and the UK’s Office of Fair Trading (OFT) wanted to criminally prosecute three UK executives for their involvement in the cartel. To avoid over-punishment of the individuals, the Antitrust Division coordinated its sentencing approach with its British counterpart. As a result, the Division entered into plea agreements that allowed the three defendants to return to the United Kingdom for prosecution by the OFT and provided for reductions of the imposed US jail sentences by the length of any UK sentence.\(^{209}\) The practical result of these agreements was that none of the ‘UK3’ had to return to serve prison time in the United States.

The need for global coordination was further highlighted in the July 2017 decision by the US Court of Appeals for the Second Circuit in US v. Allen, which held that the prohibition of the use of compelled testimony applied even when a foreign regulator compelled the testimony.\(^{210}\) In US v. Allen, the Second Circuit overturned the conviction and dismissed indictments against two defendants in the LIBOR bid-rigging scandal because the evidence of a key witness was tainted when he reviewed statements by the defendants that were compelled by UK regulators. The Antitrust Division, and all other US enforcement bodies, are now wary of how foreign evidence is obtained, particularly when building a case against cartel participants using voluntary statements by leniency applicants.

**VIII EMERGING TRENDS**

There is a persistent tension between the Antitrust Division’s interest in seeking greater penalties for cartel offenders on the one hand, and the need for more careful consideration and exercising prosecutorial discretion on the other. Further complicating the picture, there

\(^{207}\) John Terzaken, Director of Criminal Enforcement, Antitrust Division, US DOJ, ‘Judicial Activism in Cartel Cases: Trend or Aberration’, ABA Antitrust Spring Meeting 2012.


\(^{209}\) The plea agreements of Bryan Allison, David Brammar and Peter Whittle can be found on the Antitrust Division’s website, at www.justice.gov/atr/cases/allison.htm.

appears to be no end to the continuing trend towards hotly contested litigation regarding the appropriate bounds of the extraterritorial reach of US antitrust laws. All these trends reflect the globalisation of the practice of cartel enforcement and defence, a phenomenon born of worldwide developments in the increased criminalisation of cartel offences, proliferation of leniency programmes, greater cooperation and coordination among authorities, and more aggressive enforcement policies.

Despite a downturn in enforcement statistics in recent years, the risk for companies and individuals who participate in cartels affecting US commerce remains high. Fines for corporations continue to rise, both in terms of the total amount of the fines imposed and the maximum fines imposed against particular corporations. Fiscal year 2015 was a record-breaking year, with nearly US$3.6 billion in fines imposed, owing in large part to the fines levied in the foreign exchange investigation. That amount was more than the combined total of fines imposed in two prior record-breaking years: fiscal years 2013 (US$1 billion) and 2014 (US$1.3 billion). Prison terms for individuals have also increased dramatically since the turn of the century. The total prison days the Antitrust Division imposed on individuals more than doubled from eight months in 1990–1999 to 20 months in 2000–2009, an average term that remained consistent between 2010 and 2017.

The Antitrust Division seems determined to continue to push for longer prison sentences and higher fines, especially for defendants who insist on a jury trial rather than admitting guilt. Although the court did not agree to the Division’s request for 10-year prison terms for individual defendants or a US$1 billion fine for the corporate defendant in the AU Optronics case, the mere fact of the request for such extraordinary penalties sends a strong signal to the defence bar regarding the Division’s intentions. The Division has also succeeded in securing significant prison sentences, including a five-year term, which remains the longest imposed to date for a single Sherman Act violation. There is also a rejuvenated focus on individual culpability and accountability in the wake of the Yates memorandum. The Division’s tough stance, combined with the Eighth Circuit’s affirmation of the district court’s upward departure from the Sentencing Guidelines in VandeBrake, and the AU Optronics finding on aggregated gain and loss under Section 3571, suggests that we are likely to see even longer prison terms and higher fines for cartel defendants going forward. The Antitrust Division believes strongly that such a trend would contribute to appropriate deterrence.

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212 ibid.
213 ibid.
215 See Brent Snyder, ‘Individual Accountability for Antitrust Crimes’, footnote 159 (‘[C]orporate prosecutions and fines have their place in our enforcement toolkit. They punish firms that are in business to make money by taking money away from them. Fines divest corporate offenders of at least some of the ill-gotten gains that they would otherwise enjoy – gains from conduct that undermines the competition on which we should be able to depend. And word of corporate prosecutions and big fines travels fast, showing there is a real cost to the bottom line from bad behaviour. That promotes deterrence.’)
The trend towards increasing penalties may be tempered, at least in part, by separate trends indicating a willingness by the Division to consider more consistently exercising prosecutorial discretion in international cartel cases and to recognise effective compliance programmes as part of its sentencing considerations. On 13 January 2017, the Department of Justice and the Federal Trade Commission issued revised Antitrust Guidelines for International Enforcement and Cooperation to replace the similar guidelines they issued in 1995, which provide guidance to businesses engaged in international activities.\(^{216}\) The revised Guidelines acknowledge the increased trade between the United States and other countries, and the increased role of US federal antitrust laws in protecting US customers and businesses from anticompetitive conduct when they are engaged in the purchase of US import commerce or the sale of US export commerce. The revised Guidelines also recognise the increased action by foreign authorities to investigate anticompetitive conduct, particularly conduct that is multi-jurisdictional. To this end, the Guidelines articulate the guiding principles that will be employed when confronting the question of whether to exercise discretion in response to a parallel foreign enforcement action. Aimed at ‘building and maintaining strong relationships with foreign authorities’, the revised Guidelines’ goals are to (1) increase global understanding of different jurisdictions’ respective antitrust laws, policies, and procedures, (2) contribute to procedural and substantive convergence towards best practices, and (3) facilitate enforcement cooperation internationally.\(^{217}\) The application of these principles could result in the Antitrust Division reducing the scope of the activities it may investigate against a particular defendant, reducing the penalties applicable to a violation, waiving the prosecution of a defendant or waiving a matter altogether. The Division is also advocating that other authorities take steps to adopt similar principles to ensure consistency in international investigations. However, the Guidelines’ newly added commentary on the FTAIA and the illustrative examples included demonstrate the many ways that foreign commerce may still fall within the reach of the Sherman Act and the Federal Trade Commission Act.

The Antitrust Division is likely to continue to give credit in sentencing to corporations that implement and maintain effective compliance programmes. The trend seems to be in favour of awarding such credit\(^{218}\) where a compliance programme has been implemented or augmented following the initiation of an investigation as the Division ‘almost never recommends that companies receive credit at sentencing for a pre-existing compliance program’.\(^{219}\) The Division has also provided unique insight into what it will consider to be an ‘effective’ antitrust compliance programme. A key factor is that senior management is engaged in and models the compliance programme. The Division fully credited the compliance policy in Kayaba, noting that the policy ‘has the hallmarks of an effective compliance policy,


\(^{217}\) id., at 2.

\(^{218}\) To obtain a sentencing discount, a company must qualify for credit under the conditions of the Sentencing Guidelines.

\(^{219}\) US DOJ, speech by Deputy Assistant Attorney General Brent Snyder, ‘Compliance is a Culture, Not Just a Policy’ (9 September 2014), available at www.justice.gov/atr/file/517796/download.
including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy.220

Our experience reinforces the fact that the extraterritorial reach of the Sherman Act will continue to be a hotly litigated issue in both public and private enforcement cases for years to come. In the criminal context, the agreement around the FTAIA’s substantive nature imposes additional hurdles in criminal cases, requiring the government to plead and prove the elements of the FTAIA to bring a criminal prosecution. In the civil arena, courts do not appear to be interpreting the FTAIA to permit plaintiffs to obtain relief from US courts, either where the pleaded impact on US commerce was merely an indirect result of a foreign conspiracy to fix prices in a global market, or where the immediate harmful effects of the conspiracy take place abroad. The Seventh Circuit made use of the extraterritorial application of the Sherman Act in the civil antitrust suit brought by Motorola against members of the LCD cartel.221 The relevance of the Seventh Circuit’s opinion in Motorola is threefold. First, it supports the Division’s contention that integrated products subject to collusion can still have a direct, substantial and reasonably foreseeable effect on US commerce under the FTAIA. Second, it addresses the concerns raised in the amicus curiae briefs filed by Taiwan, Japan and Korea regarding the potential harm to international comity that an exorbitant extraterritorial application of US antitrust law may involve. Third, it hints at a distinction in the extraterritorial reach of the Sherman Act for civil and criminal cases, so that a higher degree of self-restraint and consideration towards other nations’ sovereign authority in the former do not jeopardise the Division’s enforcement efforts beyond US borders in the latter. Despite the growing tension in lower courts, the Supreme Court denied certiorari in Motorola and Hsiung.222 As the intricacies of international services and global manufacturing chains continue to test the courts’ application of the FTAIA, this will remain an area to watch closely.

Finally, the Antitrust Division continues to stretch the bounds of criminal antitrust enforcement into new areas. In October 2016, it announced its intention to investigate naked ‘no-poach’ and wage-fixing agreements among companies as criminal violations, regardless of whether those companies were competitors for the same goods or services, and issued guidance for human resources professionals.224 Although the Division resolved its first post-guidance no-poach case as a civil settlement,225 leadership has indicated that they are pursuing multiple active investigations relating to no-poach agreements. The Division has also become increasingly focused on the use of algorithms to set prices, as businesses continue to shift to online platforms. Following an enforcement action in 2015 against competitors

221 ibid.
222 See Motorola Mobility LLC v. AU Optronics Corp, 135 S Ct 2837 (2015); Hui Hsiung v. United States, 135 S Ct 2837 (2015).
223 A no-poach agreement is an agreement between companies not to compete for each other’s employees, e.g., by not soliciting or hiring them.
who agreed to use the same pricing algorithm.\textsuperscript{226} the Division has continued to investigate the use of pricing algorithms to execute or facilitate illicit agreements, although it has expressed caution with regard to labelling pricing algorithms as inherently suspicious.\textsuperscript{227}

\section*{IX CONCLUSION}

In many ways, the United States remains the world's leading jurisdiction for cartel enforcement, and counsel for companies that may have engaged in wrongdoing must keep their clients' potential US exposure at the front of their minds. However, the Antitrust Division's sustained effort to export the US model has succeeded to such a degree that the rest of the world is now rapidly catching up in its commitment to enforcement and in the sophistication of its methods of investigation, detection and punishment. The European Union in particular has built a robust enforcement mechanism, and Canada, the United Kingdom, Japan, Korea, Brazil and China,\textsuperscript{228} among others, are close behind. In addition, the US agencies have formalised their cooperative relationships with countries such as Peru, South Korea and Colombia, and have bolstered relationships by discussing enforcement roles and developments at high-level meetings.\textsuperscript{229} The United States need not, indeed cannot, go it alone. Its bilateral and multilateral relationships will play an increasingly important role as the globalisation of cartel enforcement continues.

When leniency is available in the United States, it is generally a good idea for counsel to move expeditiously to seek a marker. The benefits of leniency are compelling. However, the decision to cooperate with the US investigation is likely to raise collateral risks that must be considered at the outset, including criminal liability for individual employees,\textsuperscript{230} and the potential for information disclosed to the Antitrust Division being used by the Criminal Division\textsuperscript{231} and discovered in follow-on litigation. Fortunately, the Antitrust Division aims to be transparent and predictable in its dealings with cooperators, whom it views as furthering

\begin{thebibliography}{99}
\bibitem{230} If the company successfully obtains leniency, leniency may extend to certain individuals. See Section IV.i of this chapter.
\bibitem{231} Information sharing between the Antitrust and Criminal Divisions, through joint investigations, has become an important part of the Antitrust Division’s investigative tools as it has sought to prosecute complex cartels, such as those involving market manipulation. In some situations, information sharing between the Antitrust and Criminal Divisions has resulted in charges from the Criminal Division but not the Antitrust Division when a company has received leniency. See, e.g., Plea Agreement, \textit{United States v. UBS Securities Japan Co Ltd}, No. 12-cr- (D. Conn. 19 December 2012). (UBS’ Japanese subsidiary pleaded guilty to one count of wire fraud charges in connection with manipulation of LIBOR but did not face charges under the Sherman Act due to corporate parent’s participation in the Antitrust Division's Leniency Program.)
\end{thebibliography}
US enforcement goals. Thus, counsel should be able to manage the leniency process with a measure of certainty regarding the terms of the agreement the corporation or individual is entering into, and the Antitrust Division’s expectations regarding cooperation.

While the general trend in public enforcement is strongly towards convergence, the United States remains something of an outlier in the scope and complexity of its private enforcement regime. Many jurisdictions continue to treat cartel enforcement entirely as a matter for public enforcement. Those jurisdictions that have moved towards a private right of action for damages are largely still trying to work out the scope of that right. Two significant features of the US model (treble damages and the class action mechanism) have not been widely adopted. These features may not map easily onto the institutional traditions of other jurisdictions. In the United States, however, private plaintiffs are confronted by several obstacles to recovery, including the FTAIA, the pleading demands of *Twombly* and a measure of judicial hostility to class actions. Nonetheless, the risk of follow-on litigation remains very substantial, especially when plaintiffs have the benefit of a guilty plea by the corporation.

In the end, cartel enforcement in the United States will no doubt remain a priority regardless of changes in administration or in the leadership of the Antitrust Division. The Division’s efforts will continue to be marked by transparency in policy and predictability in results, themes that both fit with traditional US notions of due process and create the kind of environment in which the Division’s Leniency Program is likely to function best. In its dealings with its partners abroad, the Division will continue to try to lead by example and advocate its policy views while remaining cognisant of the comity considerations that are essential to what is increasingly a cooperative regime of global enforcement.
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Timothy Atkins is an associate in the antitrust and regulatory group in Jones Day’s Sydney office. He has assisted on a range of regulatory matters under Australia’s competition, anti-dumping, therapeutic goods and consumer law frameworks. In these matters, he has amassed experience acting for private parties seeking regulatory approval from Australian and other international government statutory bodies, including the Office of Drug Control and the Anti-dumping Commission.

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He has handled a large number of difficult merger clearances in Russia and other CIS countries.

As part of M&A transactions and corporate reorganisations, Maxim advises foreign investors on Russian merger control requirements and obtaining merger clearance in relation to the acquisition of companies and assets located in Russia and the CIS.

He has also successfully represented corporate clients in various administrative proceedings, inspections and dawn raids by the antitrust authorities, and has worked on projects related to antitrust compliance.

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Mr Buretta returned to Cravath in November 2013 following 11 years of service in the DOJ, where he most recently held the position of principal deputy assistant attorney general and chief of staff, which is ranked number two in the Criminal Division. In this role, he oversaw nearly 600 prosecutors on complex matters, including joint investigations between the Criminal and Antitrust Divisions of alleged market fraud and price-fixing.

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Elsa Chen is co-head of the firm’s competition and antitrust practice. She regularly assists clients on complex antitrust matters, including merger control, global cartel and abuse of dominance investigations.

Elsa was recognised by _Who’s Who Legal_ as ‘the top merger control practitioner in Singapore’ and ‘a leading name in the Singaporean market’, and was one of the only two economists named as a thought leader in North America and the rest of the world. Featured in the 100 elite women globally by Global Competition Review (GCR) in multiple Women in Antitrust peer-nominated surveys, Elsa was also named as one of the 10 competition economists globally in GCR’s _Women in Antitrust 2016: Economists_.

A pioneer member of the Competition Commission of Singapore, now known as the Competition and Consumer Commission of Singapore (CCCS), Elsa has assisted on close to 90 per cent of complex CCCS merger reviews requiring commitments, including the first foreign-to-foreign merger with commitments (Thomson/Reuters) and the first CCCS conditional merger clearance requiring local commitments (SEEK/JobStreet).

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Carl Arthur Christiansen, partner, is head of the firm’s competition law group. Carl has been retained in a number of cartel cases, for example in the construction sector. In addition to his competition law practice, Carl has extensive experience in providing advice in connection with acquisitions, financing and various forms of commercial cooperation. Carl has particular experience in the construction industry, information technology and oil services, and the retail and service sectors.
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Cecil Saehoon Chung is a senior foreign counsel at Yulchon. As vice chair of the antitrust practice group and head of the international antitrust team, Mr Chung handles all aspects of antitrust, consumer protection and trade regulation matters, with a particular emphasis on international antitrust. Mr Chung has the rare distinction of being ranked as both a US antitrust law expert based abroad (in Seoul) and a foreign (US-licensed) expert on Korean antitrust law by Chambers Global. He is also individually ranked as a leading antitrust lawyer by numerous publications such as Who's Who Legal: Competition, Who's Who Legal: Thought Leaders – Competition, Euromoney's Expert Guides, Chambers Asia, IFLR1000 and Asia Business Law – Korea’s Top 100 Lawyers. In addition, since 2018, Mr Chung has been a member of Global Competition Review's new editorial board, and since 2019, he has been a vice chairman of the International Chamber of Commerce (ICC) Commission on Competition.

Mr Chung has practised law for almost 30 years. Before joining Yulchon in 2012, he was an antitrust partner at two global law firms (Pillsbury Winthrop and Greenberg Traurig) in Washington, DC. From 1988 to 1995, Mr Chung was a litigation attorney at the US Federal Trade Commission.

Mr Chung has written and lectured extensively on various antitrust, consumer protection and other legal issues. He regularly provides antitrust compliance counselling and training to clients in various industries. Furthermore, since 1997, he has advised and assisted the Korea Fair Trade Commission in modernising its antitrust and consumer protection enforcement programme.

He is currently co-chair of the American Bar Association (ABA) Section of International Law’s International Intellectual Property Committee and vice chair of the International Antitrust Law Committee. He is also vice chair of the ABA Section of Antitrust Law’s International Committee and on the Procedural Transparency Task Force. He is also a member of the ICC Task Force on Premerger Control Regimes and served on the ICC Compliance Task Force that published the ICC Antitrust Compliance Toolkit in April 2013. Furthermore, he is a member of the International Bar Association Antitrust Committee’s Merger Working Group and is a member of the competition subcommittee of the Business and Industry Advisory Committee for the Organisation for Economic Co-operation and Development.

Mr Chung received his BS in economics from The Wharton School, University of Pennsylvania in 1985 and his JD from Cornell Law School in 1988. He is a member of the California and District of Columbia Bars.

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Scott Clements is a competition law specialist whose experience spans nearly 11 years in Singapore.

With extensive experience in relation to contentious and non-contentious competition law matters, he was involved in the first set of appeals made to the Competition Appeal Board in respect of a cartel matter, and in the appeal of the very first abuse of dominance case.

He has also assisted on several leniency filings made to the Competition and Consumer Commission of Singapore (CCCS), and has assisted clients during dawn raids by the CCCS.
Recognised as a leading competition lawyer by *Chambers Asia-Pacific, The Legal 500 Asia Pacific* and *Who’s Who Legal*, a client notes that Scott ‘brings out the perspective of a former competition regulator to the table, which is very valuable’, while another source singles him out for his ‘detailed understanding of economics in the market’ (*Chambers Asia-Pacific*). Scott was also named as one of Singapore’s 40 most influential lawyers aged 40 and under in 2015, by the *Singapore Business Review*.

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He was appointed as a non-government adviser to the former Federal Competition Commission during the International Competition Network Annual Conferences held in The Hague (2011), Rio de Janeiro (2012), Warsaw (2013) and ICN-Cartel Workshop (Ottawa 2017).
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Mr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and more than 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish by various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

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Mr Han is a frequent speaker at antitrust conferences, including most recently at the 2018 Asia Competition Association Annual Conference. He has been selected as a Future Leader (competition) under 45 by Who’s Who Legal: Competition and as a Recognised Practitioner (TMT) by Chambers Asia annually since 2017.

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He has extensive experience, having served for many years as vice president and commissioner-rapporteur of the Hellenic Competition Commission, as well as an official at DG Competition of the European Commission. Previously, Dimitris worked for several years as a lawyer in leading firms based in London, Brussels and New York, where he advised on matters of competition law and represented clients before enforcement agencies in a wide variety of product and services markets. His private practice focused on mergers and acquisitions, restrictive agreements, abuse of dominance, the internal market, state aid, litigation before the EU courts, and other regulatory procedures before administrative authorities, and government and public affairs.

Dimitris was a member of the EU Council’s negotiation team for the adoption of the new Directive on antitrust damages actions, of the legislative committee for the revision of the Greek Competition Act and of the EU Commission’s working group for the revision of the vertical agreements block-exemption regulation and guidelines, as well as a regular
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Dr Marcel Meinhardt is a leading expert in competition law and is renowned for his broad, first-rate practice. He specialises in all areas of Swiss and European merger control work and competition law, particularly in postal services, insurance, banking, motor car, energy, media, retail, construction, pharma, ticketing and information technology. He also advises on regulatory issues in connection with the electricity and gas industry. Marcel Meinhardt has been responsible for a large number of merger notifications to the Swiss Competition Commission and has coordinated multi-jurisdictional merger filings. He advises in contentious and non-contentious matters and has acted in high-profile cases on alleged abuses of dominant positions, vertical restraints and cartels. He heads the competition and regulated market practice group of Lenz & Staehelin.

In April 2017, the Swiss business magazine Bilanz named Marcel Meinhardt as competition lawyer with the most recommendations of general counsels and colleagues in Switzerland. Chambers and Partners has recognised his many years as a leading lawyer in the field of competition and antitrust. He is described as a ‘brilliant lawyer’ and clients attest that ‘he impresses with his first-rate theoretical and practical knowledge of competition law, and is a very quick and smart thinker, who is pragmatic as well as thorough. He tailors his advice to our individual needs and to the specific requirements of each situation, and I appreciate his incredibly fast response times’ (2018). He is commended as a ‘dedicated litigator who is very supportive and has good business sense’ (2017). Marcel Meinhardt is ‘outstanding in what he does, what he writes and how he handles searches’ (2016). The Legal 500 lists him in the latest ‘Legal 500 Hall of Fame’ as one of only four Swiss competition lawyers who has received constant praise from his clients for continued excellence and for being ‘at the pinnacle of the profession’. He is ‘one of the top leading experts in competition and antitrust law’, who ‘focuses on results and the specific requirements of each situation’ and possesses ‘first-rate theoretical and practical knowledge’ (2018). Who’s Who Legal 2018 lists Marcel Meinhardt as a ‘most highly regarded’ lawyer and he is considered a ‘top partner at the firm and in Swiss competition law’. According to Who’s Who Legal 2017, he has the ‘ability to analyse complex circumstances and provide advice on both the legal and business aspects’. He also qualifies as ‘absolutely brilliant’ and as ‘a counsel you desperately want to have, especially on hard-core abuse of dominance, cartel and other horizontal agreements’ (Who’s Who Legal 2016).
BENOÎT MERKT

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Dr Benoît Merkt is a leading expert in competition law and is renowned for his first-rate practice. He specialises in all areas of Swiss and European merger control work and competition law, notably in the banking and finance, energy, high-tech, infrastructures (electricity), consumer goods, chemical, luxury goods, motor-car distribution, public broadcasting and retail sectors. He has been responsible for a large number of merger notifications to the Swiss Competition Commission and has coordinated multi-jurisdictional merger filings. Benoît Merkt advises in contentious and non-contentious matters and has acted in high-profile cases on alleged abuses of dominant positions, vertical restraints, cartels and public procurement.

Benoît Merkt is also one of the leading Swiss law practitioners in the field of tax-exempt and non-profit organisations. He heads the firm’s practice in this field. He has incorporated major foundations and associations of international scope and regularly advises clients with respect to the structuring and implementation of charitable projects in Switzerland and abroad.

Considered as ‘one of the best’ and ‘recognised for his first-rate competition law practice’ (Who's Who Legal 2017), ‘the superb Benoît Merkt is noted by sources for his expertise in competition law and his particular skill in complex cross-border cases’ (Who's Who Legal 2018). Clients laud his ‘excellent knowledge and relationship with clients, clarity and precision’, also adding that he is ‘well connected with relevant authorities’ (Chambers and Partners 2018).

MARTÍN MICHAUS FERNÁNDEZ

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Martín Michaus Fernández is an associate at Hogan Lovells (Mexico) focusing on government regulatory and litigation matters with a particular focus on antitrust, competition and economic regulation, and administrative and public litigation.

He joined Barrera, Siqueiros y Torres Landa (now Hogan Lovells (Mexico)) in 2011 and obtained his law degree from the Iberoamerican University in 2013, where he was a recipient of the Academic Excellence Scholarship. He also did postgraduate studies on competition matters from Mexico Autonomous Institute of Technology (ITAM). Mr Michaus Fernández is currently pursuing an LLM degree at the University of Chicago.

LESLEY MORPHET

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Lesley Morphet heads the Johannesburg antitrust and competition practice. As a leading competition lawyer in South Africa, she advises on all aspects of competition law, including merger notifications, leniency applications, exemption applications, managing dawn raids and compliance. She also assists clients with cartel and other prohibited practice investigations.

Having been involved in many multi-jurisdictional mergers in Africa, she has considerable knowledge of the competition laws of many African countries. Her extensive experience spans a range of sectors, including mining, forestry, manufacturing, power and electricity, media, liquid fuels, aviation, banking and information technology.

Lesley has been recommended in Chambers Global, IFLR1000, The Legal 500 and Who’s Who Legal for competition law and antitrust. She has been the South Africa contributing editor to the Australian Journal of Competition and Consumer Law since 2013.
Chambers Global says of her: ‘Lesley Morphet continues to draw high client praise. One source says: “Her advice is always sound. She has a good working knowledge of our company and we’ve always found her very reliable, both in terms of the advice she gives, and in her ability to turn things around quickly and be available when needed.”’

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Farid Fauzi Nasution is co-head of the firm’s competition practice group. He worked at the Indonesian Competition Commission (KPPU) for more than seven years. He was head of the Prosecution Division and then head of the Merger and Acquisition sub-directorate. During his time at the KPPU, he also led the drafting of the Indonesian Merger Regulation and the first KPPU Merger Guidelines.

In addition to his role at AHP, Farid serves as secretary general of the ASEAN Competition Institute and chairman of the Education and Training Division in the Indonesian Competition Lawyers Association. Since 2016, he has been an instructor of competition and trade law at the Indonesian Institute of Corporate Directorship. He was also a lecturer on competition law at Sahid University. Farid represented Japfa Group in the Chicken and Beef cartel cases before the KPPU, their appeal to the district court and cassation to the Supreme Court. He also represented Yamaha in the Automatic scooter cartel case.

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Felix KH Ng is a partner at Haldanes who heads the firm’s competition law practice. He specialises in competition law, complex white-collar crime and securities regulations. He is admitted in Hong Kong, England and Wales and Dubai International Financial Centre and holds practice certificates in all three jurisdictions.


Mr Ng frequently advises listed companies, multinational corporations and their senior management in cross-border investigations concerning cartels, abuse of dominance, anti-trust matters, bribery and corruption, commercial fraud and market misconduct, and frequently represents clients at various levels of the regulatory tribunals and criminal courts.

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Wojciech Podlasin is a senior associate in Linklaters’ Warsaw competition practice. He specialises in antitrust, merger control and state aid cases and gained extensive practical experience as a member of Linklaters’ Warsaw and Beijing competition teams. Wojciech has a broad sector expertise, including IT, energy, financial services and chemicals. He is the co-author of a leading commentary to the Polish Competition Act in the part concerning merger control.

Wojciech read law at the University of Warsaw and the London School of Economics, and finance at the Warsaw School of Economics.
VINCENT POWER

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Vincent Power is a partner at A&L Goodbody and head of the firm’s EU, competition and procurement group. He has been described as ‘outstanding, hugely experienced and arguably the top competition lawyer in Ireland’.

Dr Power has been involved in most of the leading competition, merger control, EU, cartel and state aid cases in Ireland for over 20 years. He has a BCL from University College Cork, a BL from King’s Inns Dublin, and an LLM and a PhD from the University of Cambridge. He is an Irish solicitor.

In 2017, he won the ILO Client Choice Award in the category of EU Competition and Antitrust, which is awarded by The International Law Office in recognition of a partner from the entire 28 Member State European Union who excels across the full spectrum of client service. In 2018, he won the same award for Ireland. He received the ‘Irish Commercial Lawyer of the Year’ award at the Inaugural Irish Law Awards in 2012. He has been recommended by all the international legal guides: ‘one of the market’s most accomplished practitioners and celebrated for his breadth of knowledge and excellent advice. He is able to link his technical advice to the commercial realities; ‘an authority on competition law, equally adept at state aid and merger control; ‘applauded for his analytical ability and strong understanding of commercial imperatives; an ‘acknowledged guru’ with an ‘encyclopaedic knowledge; ‘a potent force’; and ‘has a great record in competition work’. He is said to do ‘an incredible job’ with ‘high levels of commitment’.

Dr Power is the author or editor of seven books, including Competition Law and Practice, Irish Competition Law and the award-winning EC Shipping Law. He was the first law graduate to be awarded the Distinguished Alumnus award from University College Cork. He is adjunct professor of law at University College Cork and visiting professor of EU law at Dalhousie University in Canada. He has chaired, been a member of and advised four government commissions and bodies.

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Anastasia Pritahayu RD specialises in competition, regulatory and corporate restructuring. A cum laude economist graduate from the University of Indonesia, Anastasia was the lead economist for several national and international cartel cases as well as antitrust audits, advisories and merger notifications, and training in aviation, infrastructure, personal care, automotive, telecommunications, digital content, leasing, pharmaceutical, energy, oil and gas, utility, banking, shipping, property and broadcasting. She was also entrusted to lead a multi-jurisdictional compliance assessment in aviation. She is an avid trainer and leads antitrust workshops for both business practitioners and law students.
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Stefaan Raes is a partner in the Brussels law firm Liedekerke Wolters Waelbroeck Kirkpatrick, which is one of the largest independent Belgian law firms offering a full service to business clients. He specialises in competition law, European law and litigation.

Before joining Liedekerke in April 2015, he was a judge at the Brussels Court of Appeal. During a leave of absence as a judge, he was the president of the Belgian Competition Authority (2004–2013). Before being elevated to the Court of Appeal, he was a judge at the Brussels Court of First Instance (1994–1998). He started his legal career as an attorney at the Brussels law firm De Bandt van Hecke Lagae and as an assistant professor at the Faculty of Law of the University of Leuven. He studied law in Antwerp and Leuven, and obtained an LLM at the University of Chicago Law School (1981).

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Asep Ridwan is a partner in the dispute resolution practice group at Assegaf Hamzah & Partners. His main focus is on commercial litigation with special emphases on the competition, employment and bankruptcy fields. Asep has played the leading role in several major competition law cases, namely defending Indosat, Indonesia’s second largest telecommunications provider, Salim Ivomas Pratama, Goodyear Indonesia, Yamaha Indonesia and Japfa Group regarding cartel allegations before the Indonesian Competition Commission (KPPU) up to appeal to the district court or Supreme Court, whenever applicable. He has also handled a number of merger and acquisition notifications to the KPPU in relation to competition issues. His dedication to competition law in Indonesia has led to his appointment as chairperson of the Indonesian Competition Lawyers Association.

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Alberto Saavedra is a senior associate at the law firm Sérvulo & Associados in the European and competition department. He has vast experience in representing and advising international and domestic companies and public authorities in the areas of merger control, restrictive practices, market dominance, state aid, and services of general economic interest, both at national and EU level. He also advises clients on EU law, in particular the internal market rules, structural funds and the Common Agricultural Policy. He has experience in a wide range of industries, such as banking, trade and distribution, construction and real estate, energy, pharmaceutical, telecommunications and transport. As an aide to the Secretary of State for the Treasury of the XIX Constitutional Government, he was responsible for matters relating to privatisations, concessions, state-owned companies and implementation of the Economic and Financial Assistance Programme in close collaboration with the European Commission, the European Central Bank and the International Monetary Fund (‘troika’). He concluded the LLM master of laws in European and competition law at University College London.
CATHERINE SANDVIG

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Catherine Sandvig, senior attorney, has extensive experience particularly in competition law and public procurement. Catherine also has extensive litigation experience, both in her primary disciplines and within more general contract law, torts, etc. Catherine holds a master of business and economics degree and a master of laws degree, and has worked at the Norwegian Competition Authority.

Catherine provides assistance particularly in connection with mergers and acquisitions, and processes towards the competition authorities in connection with cases of breach of competition law, as well as general counselling and litigation.

DAREN SHIAU

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Daren Shiau, PBM, is a leading regional competition law specialist whose practice covers antitrust litigation, international cartels and merger control. He is co-head of the firm’s corporate and commercial department and competition and antitrust practice.

A pioneering competition law specialist in Singapore and ASEAN with unparalleled antitrust experience in Southeast Asia, Daren has been cited as ‘the most highly nominated practitioner’, ‘Singapore’s top competition lawyer’, ‘a real expert according to rivals’ and one of the ‘finest lawyers in the region’ by *Who’s Who Legal*.

He has successfully advised on more than 70 per cent of Singapore’s merger control cases, acted for the successful amnesty applicant of Singapore’s first global cartel decision, the successful leniency applicant to its second one, and defended parties in 100 per cent of Singapore’s international cartel decisions to date.

Daren has also worked on several landmark abuse of dominance cases, including the first appeal to the Competition Appeal Board.

A commissioned trainer of the high-level ASEAN Experts Group on Competition, Daren is a principal examiner on competition law for the Singapore Institute of Legal Education’s Foreign Practitioners Examinations, and the Singapore Bar Examinations. He is also Singapore’s first appointed non-government adviser at the International Competition Network.

PRUDENCE J SMITH

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Prudence Smith is a partner in Jones Day’s Sydney office. Prudence is a highly experienced competition law practitioner who advises clients on a full range of competition regulatory law issues. Prudence’s background includes more than 14 years at the Australian competition regulator (the ACCC), much of the time as a senior ACCC internal lawyer. She has extensive experience in merger clearance, cartel and anticompetitive conduct investigations and litigation, ACCC immunities, authorisations and notifications of contracts affecting competition.
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Farhad Sorabjee, partner, is an experienced trade lawyer and litigator, and heads the firm’s competition law team in Mumbai. He acted in the very first cartel activity investigation filed before the Competition Commission of India, and continues to advise and act on matters pertaining to competition law. He has appeared and argued before various tribunals, high courts and the SC. He has been part of the India task force of the American Bar Association (ABA) Antitrust Section involved in the representations made by the ABA to the Competition Commission of India from time to time.

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She is highly acclaimed for her command of a wide range of competition matters and is a recognised leader in her field by both foreign and Polish law firm rankings (Chambers Europe, The Legal 500 EMEA, Polityka Insight and Rzeczpospolita).

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Athanasios advises clients in relation to cartels, abuse of dominant position and state aid and has undertaken merger control filings both with the Hellenic Competition Commission and the European Commission. He also advises on issues pertaining to the business regulation of the internal market, including on public procurement.

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Yuhki Tanaka is a partner at Anderson Mōri & Tomotsune. He advises a variety of domestic and foreign multinational companies in Japanese antitrust and competition matters, including those relating to international cartels, mergers and acquisitions, joint ventures, distribution agreements, licence agreements and other cooperation agreements.
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John Terzaken is a partner in Simpson Thacher & Bartlett LLP’s litigation department. He advises US and international clients involved in domestic and cross-border antitrust and other regulatory investigations and litigation. His practice spans government enforcement and private litigation of cartel and other antitrust infringements, market sector investigations and general antitrust compliance, across all industry sectors.

Previously, John was director of criminal enforcement at the US Department of Justice (DOJ), Antitrust Division, where he had management responsibility for the Division’s criminal investigations and litigation nationwide. During his tenure with the Antitrust Division, John investigated, litigated and presided over some of the largest global cartel investigations undertaken by the DOJ. He also served as the Division’s primary liaison with state, federal and foreign law enforcement authorities, and as the Division’s financial fraud coordinator for inter-agency prosecutions, investigations and information sharing. John’s DOJ service earned him awards of distinction from the Attorney General of the United States and the Assistant Attorney General for the Antitrust Division.

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Wisnu Wardhana focuses his practices primarily on antitrust litigation and advisory work. Some of the cases he has worked on recently relate to cartel allegations in the pharmaceutical, horticulture, automotive, tyre, livestock and poultry industries. He frequently advises on antitrust issues in a wide variety of industrial sectors, provides due diligence reviews and acts as a facilitator at antitrust litigation training events.

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Dr Astrid Waser is a leading expert in competition law with an excellent reputation in the Swiss market. She specialises in all aspects of competition (antitrust) law, public procurement law and media and telecoms law. Astrid Waser also advises on regulatory issues in connection with the gas and electricity industries. She advises in non-contentious matters and represents clients before Swiss authorities and courts, in particular in merger filings, cartel investigations and infringement procedures of the Swiss Competition Commission as well as in public procurement procedures. She also has long-standing experience in the field of internal and regulatory investigations and compliance matters. Astrid Waser publishes on Swiss and European competition law and public procurement law, and is a regular speaker at conferences and seminars.
Chambers and Partners 2018 recognises Astrid Waser as a leading antitrust lawyer with an excellent reputation in the Swiss market. Clients report that ‘she is an experienced competition lawyer with excellent analytic skills and very good business sense’. She has also been described as ‘a very bright person’ and her ‘experience and quality’ was praised by clients (2017 edition). Astrid Waser is featured in Who’s Who Legal 2018 as a ‘very intelligent and bright’ lawyer with a wealth of expertise in the field. She is described as ‘a true antitrust lawyer’ and is commended as ‘a bright practitioner’ (Who’s Who Legal 2017). She also qualifies as ‘a prominent purebred competition lawyer’ (Who’s Who Legal 2016).

MATTHEW WHITAKER
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Matthew Whitaker is an associate at Jones Day in the antitrust and competition practice group in the Sydney office. In his time at Jones Day, he has gained exposure to a wide range of transactional and litigation matters in the competition and antitrust, trade law, anti-dumping, mergers and acquisitions, and energy practice areas. His main focuses are in the areas of competition and consumer law and anti-dumping, and he has acted for clients in matters involving extensive interaction with both the Australian Competition and Consumer Commission and the Anti-Dumping Commission. Matthew holds a bachelor of laws degree and a bachelor of science degree (advanced mathematics) from the University of Sydney.

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Stephen Wu is the partner leading the competition law practice group of Lee and Li. He is also the founding chair and an active member of the competition law committee of the Taipei Bar Association. He has successfully represented domestic and international clients in handling numerous antitrust filing, cartel investigation and unfair competition cases. He was recognised as being one of the world’s leading competition lawyers by Who’s Who Legal in 2012 and 2013. He keeps abreast of the latest developments in global antitrust and competition law, and regularly contributes briefings and articles to Global Competition Review, AntitrustAsia.com and many competition law publications.

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Wei-Han Wu is an associate partner at Lee and Li. She joined the firm in 2008 and is a core member of the competition law practice group of Lee and Li. Ms Wu advises clients on the full range of competition law, focusing on merger control, cartel work, restrictive practice and unfair trade matter. She has extensive experience of representing international corporations in major deals relating to her practice areas before the Taiwan Fair Trade Commission. Ms Wu is also frequently involved in various cases at the intersection of antitrust and intellectual property laws. Ms Wu regularly writes and speaks on a variety of competition law topics. She is listed in Who’s Who Legal: Competition Future Leaders 2017 and 2018.
SAI REE YUN

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Sai Ree Yun, a founding partner of Yulchon, is the managing partner of the firm. Mr Yun practises in the areas of corporate (with an emphasis on M&A), antitrust, tax and government relations. Before founding Yulchon, Mr Yun was a prosecutor with the Pusan District Prosecutor’s Office, an associate with the law firms Lee & Ko and Baker McKenzie (Chicago and New York), and a partner at Yoon & Partners.

Mr Yun has written many articles for various publications, including ‘Regulation of Business Combinations under the Antimonopoly and Fair Trade Act with Emphasis on Case Law’, Journal of Korean Law (2002).

Mr Yun has given lectures at both the Judicial Research and Training Institute and Seoul National University Law School. He has served as outside legal adviser to various government agencies, such as the KFTC and the Ministry of Trade, Industry and Energy, and was a member of the Competition Policy Advisory Board for the Korea Fair Trade Commission. Mr Yun has also served on the Legal Advisory Committee of the Korean Broadcasting Commission and was a technical adviser for the Tax Policy Review Council for the then Ministry of Finance and Economy.

In recent years, Mr Yun has been selected as a Global Competition Review leading (competition) lawyer and as one of Asia’s leading (competition) lawyers by AsiaLaw. He has been selected by Who’s Who Legal as a leading competition lawyer every year since 2004. Additionally, Mr Yun has received a Prime Minister’s Award for antitrust administration and a Deputy Prime Minister’s Award for tax administration.

Mr Yun holds LLB and LLM degrees from Seoul National University, an LLM from Harvard Law School and a JD from the University of California, Hastings College of Law. He is admitted to practise in Korea, New York, Illinois and Washington, DC.
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