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Practical cross-border insights into cartels & leniency

Cartels & Leniency

2022

15th Edition

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Preface

Dear Reader,

Welcome to the 2022 edition of *ICLG – Cartels & Leniency*. As contributing editors, we are delighted to introduce this comprehensive *Guide* to the world of cartels and leniency on behalf of Shearman & Sterling LLP.

In an increasingly globalised economy where regulatory compliance is at the forefront, this *Guide* will serve as a valuable practical tool for companies faced with national and cross-border cartel investigations. It will also be a useful source for companies and legal advisors considering applications for leniency as part of such investigations or considering whether to enter into a settlement procedure with the EU Commission and other national authorities operating similar regimes. This *Guide* will also assist companies in understanding the potential scope and ramifications of private damages actions brought by claimants as a result of alleged cartel conduct. In a time where companies across multiple industries are adapting to considerable structural and economic change as a result of a global pandemic, clarity on legal enforcement in this area is needed now more than ever.

This *Guide* provides a comprehensive overview of cartel and leniency enforcement regimes across 18 jurisdictions worldwide, encompassing Europe, the Americas and Asia. It draws on the practices in these regimes from the perspectives of leading and experienced practitioners in each of the relevant jurisdictions. We thank the authors for sharing their knowledge and expertise in this area and trust that the *Guide* will be a useful and engaging source for readers on global enforcement practices in the sphere of cartels and leniency.

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Recent Landmark Judgments in Cartel Cases: *Pometon* and *Printeos*


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In the last year, the Court of Justice of the European Union ("**ECJ**") has issued two important judgments in cartel cases. The first, in *Pometon*,[1] relates to the hybrid settlement procedure adopted in the *Steel Abrasives* cartel, as well as fine calculations. The second, in *Printeos*,[2] examines the European Commission's ("**Commission**") obligation to pay certain interest amounts upon repayment of fines annulled by the Court. Both judgments have the potential to create far-reaching impacts in practice.

1 *Pometon*: Calculating Commission Cartel Fines

On the basis of the Guidelines on the method of setting fines ("**Fine Guidelines**"), the Commission imposed a fine of EUR 6,197,000 on Pometon.

This fine amount was fixed at a sum corresponding to: (i) 16% of the value of Pometon's sales in the European Economic Area ("**EEA**") in 2006, the last full year of Pometon's participation in the infringement at issue; (ii) a fixed additional deterrence uplift amount of 16%; (iii) a 10% reduction of that amount on account of mitigating circumstances, since Pometon had participated to a lesser extent than the other undertakings in the second limb of the cartel; and (iv) a further reduction of 60% that the Commission made pursuant to point 37 of the Fine Guidelines (under which the Commission may, on account of the particularities of a given case or the need to achieve deterrence in a particular case, depart from the general methodology set out in those guidelines).

The General Court ("**GC**") endorsed the Commission's fine calculation, except in respect of its application of point 37 of the Fine Guidelines. While comparing Pometon's situation with that of the other cartel participants, the GC examined: (i) Pometon's individual liability for participating in the cartel; (ii) the actual impact of its unlawful conduct on price competition; and (iii) Pometon's size as indicated by its total turnover. Under these circumstances, the GC granted Pometon an exceptional reduction of 75% on the basic amount of the fine, which was identical to the reduction granted to another participant, Winoa, despite Pometon having a more limited role overall in the cartel than Winoa – in particular, Pometon had less influence in the infringement and its turnover was less than one-third of Winoa's. Overall, the GC reduced the fine amount imposed on Pometon to EUR 3,873,375.[3]

On appeal, the ECJ found that the GC should have set out the reasons why, despite the differences between Pometon and Winoa, it was consistent with the principle of equal treatment to grant Pometon a rate of reduction identical to that granted to Winoa. Such reasons were not, according to the ECJ, sufficiently evident from the GC's judgment.[4]

The ECJ therefore annulled the relevant part of the GC's decision reducing the fine imposed on Pometon, and set the amount of the fine as follows:[5]

- Using the Commission's assessment of the basic amount of the fine, of EUR 15,493,500 (established in light of the duration and gravity of the infringement committed by Pometon).
- Applying point 37 of the Fine Guidelines on the basis that first, the application of this provision was not challenged at all by the Commission, and second, its application was necessary in order to ensure equal treatment of Pometon with regard to the other cartel participants.
- Finding that Pometon's situation was comparable overall to that of another cartel participant, MTS, on the basis that both undertakings played a relatively limited role in the cartel and had similarly low "weight" in the cartel given their proportionately low values of sales in the EEA. This applied despite the fact that Pometon and MTS's total revenues were different, with Pometon's total turnover for 2006 at EUR 99,890,000 and MTS's at just EUR 25,082,293 for 2009. Pometon and Winoa, however, were in different situations with regard to their participation in the infringement, meaning the same percentage reduction factor could not be applied to both participants.
- On that basis, the ECJ applied a reduction of 84% to the basic amount calculated by the Commission, consequently reducing the amount of the fine imposed on Pometon to EUR 2,633,895.

The ECJ therefore found that while it is permissible for the purpose of setting the fine to have regard both to the *total* turnover of the undertaking (which gives an indication of its size and economic power), and to the *proportion* of that turnover which the revenues for the goods in question relate (which gives an indication of the scale of the infringement), the Commission must not place disproportionate significance on the total turnover by comparison with other relevant factors.[6] The Commission must therefore give due consideration to this factor when calculating fines in cartel cases.

This applies in addition to the Commission's general obligation to provide a sufficient statement of reasons when calculating fines, as upheld by the Court in multiple recent cases, including *HSBC*.[7] Following the GC's judgment in September 2019 annulling the fine imposed on HSBC due to the Commission's failure to provide a sufficient statement of reasons, the Commission issued an amended decision in June 2021 updating its reasoning and reducing the fine imposed on HSBC from EUR 33.6 million to EUR 31.7 million, claiming in its press release that the amended decision "*explains in further detail how this fine was calculated*".[8]

According to a public regulatory filing by HSBC, the Commission has since dropped its appeal against this portion of

the GC's judgment (however, HSBC's appeal against the GC's findings as to the substantive infringement, in respect of which it sided with the Commission, is still pending).[9] Whether HSBC will challenge the Commission's changes to the decision, and if they still meet its obligations as regards providing sufficient reasoning for the fine calculation, remains to be seen.

2 *Pometon*: Procedural Issues

The ECJ judgment in *Pometon* also examined the procedural issues behind ensuring preservation of the rights of defence of non-settling parties in hybrid settlement cases.

In general, settlement and non-settlement decisions can be "staggered". In a hybrid procedure, which involves the adoption of both a contested and settlement decision in the same case, it may be objectively necessary for the Commission to address, in the settlement decision terminating the settlement procedure, certain facts and behaviour concerning participants in the alleged cartel which are the subject of the standard contested procedure. Nevertheless, much like in complex criminal proceedings involving several persons who cannot be tried together, the Commission must ensure the settlement decision preserves the presumption of innocence of undertakings which have refused to enter into a settlement and which are subject to the ordinary contested procedure.

Non-settling parties can be identified in an earlier settlement decision provided that the decision does not contain any explicit reference to the absence of their guilt. In this context, if facts related to the involvement of a non-settling party must be introduced in a settlement decision, the Commission cannot give more information than necessary for the assessment of the legal responsibility of the settling parties. Furthermore, the Commission's reasoning must be worded in such a way as to avoid potential pre-judgment of the non-settling party.

In *Pometon*, the ECJ ruled that:[10]

- The GC had not erred in law in finding that the Commission had taken sufficient drafting precautions in referencing Pometon as a non-settling party in the settlement decision.
- The GC was correct to hold that the references to Pometon in the settlement decision were necessary to clarify the development of the cartel over time.

On the first point confirming that the Commission had taken sufficient drafting precautions in order to avoid a premature judgment as to Pometon's participation in the cartel, the ECJ focused on footnote 4 of the settlement decision, which stated as follows:

> "*[Another undertaking] did not submit a formal request to settle pursuant to Article 10a(2) of Regulation (EC) No 773/2004. Therefore, this Decision is not addressed to [another undertaking]. This Decision is based on matters of fact as accepted by Erwin, Winoa, MTS and Würth in the settlement procedure. In sections 3 and 4, the conduct referred to involving the non-settling party […] is exclusively used to establish liability of the settling parties for an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement. The administrative proceedings under Article 7 of Regulation (EC) No 1/2003 against the non-settling party […] are pending.*"[11]

The ECJ concluded that in this footnote, the Commission had expressly excluded Pometon's guilt, emphasising that that decision was addressed exclusively to the four undertakings which had agreed to settle and that the file concerning Pometon would be dealt with subsequently in a separate adversarial procedure. This was the case even despite the fact that the footnote did not *expressly* state that Pometon cannot be held liable for participation in the alleged cartel – it was sufficient for the purposes of upholding Pometon's rights of defence that the footnote unequivocally stated that Pometon is not an addressee of the settlement decision and that the references to Pometon in the settlement decision are used exclusively to establish the liability of the other participants in the cartel.[12]

Furthermore, the ECJ held that the reasoning in the settlement decision did not contain any legal classification of the facts relating to Pometon, which was mentioned only in the "[d]escription of the events" section, and which was designated as an undertaking subject to the investigation procedure initiated in respect of the participants in the alleged cartel (not as a party to the settlement procedure and addressee of that decision). The Commission did not in any way categorise Pometon's conduct as anti-competitive in the settlement decision. On the contrary, the Commission confined itself to referring to Pometon's conduct in the context of the description of the facts and avoided using the term "cartel" in such context.[13]

The ECJ also found that the references made to Pometon in the settlement decision may prove to be objectively relevant to the description of the origin of the cartel as a whole in light of the nature of the case as a hybrid settlement. Nevertheless, the GC did not draw any conclusion from the assessment of the objective relevance of those references. In addition, the references to Pometon in the settlement decision explained how the conduct alleged against the other cartel participants who were party to such decision evolved. In other words, the references were intended solely to clarify the development over time of the cartel in which the four undertakings party to the settlement procedure admitted to having participated.[14]

Pometon had also sought to draw a comparison of its case with the *Icap* judgment, where the GC rejected arguments brought by the Commission that the efficiency of the settlement procedure demanded reference to the conduct of non-settling parties in settlement decisions, instead holding that the Commission must take all necessary measures to uphold the presumption of innocence of non-settling parties.[15] The ECJ rejected Pometon's argument on this point and simply recalled that the question of whether the Commission disregarded the presumption of innocence depends on the settlement decisions specific to each case, including their reasoning and the particular circumstances in which those decisions were adopted.

The findings in *Pometon* suggest that the Commission is still able to utilise its hybrid settlement procedure in practice, provided it gives due regard to the rights of defence of non-settling parties. The judgment suggests this is achieved by unequivocally confirming the non-settling parties are not party to a settlement decision, and limiting any reference to such party to the purely factual portions of a settlement decision without giving any indication as to the legal characterisation of such party's conduct. Given the Commission's statement when issuing the *Forex* settlement decisions in May 2019 that it "*will continue pursuing other ongoing procedures concerning past conduct in the Forex spot trading market*",[16] hybrid settlement cases may continue to arise and the Commission may therefore be put to the test in ensuring maintenance of non-settling parties' procedural rights in future cases.

3 *Printeos*: Interest Repayments on Annulled Cartel Fines

In January 2021, the ECJ issued its judgment in *Printeos* setting out the parameters for the Commission's repayment of certain interest amounts upon repayment of annulled fines. The judgment followed the December 2014 decision of the Commission issued against Printeos, which imposed a total fine of EUR 4,729,000 that Printeos paid in full. This decision was subsequently annulled in full by the GC in December 2016.

In line with the GC judgment and the Commission's obligations under Article 266 of the Treaty on the Functioning of the

European Union ("**TFEU**"), the Commission repaid the principal amount of the fine in full but refused to pay any additional amount, stating that no additional return had been generated from the fund in which Printeos's fine amount had been invested.

Printeos lodged an application before the GC, claiming that additional interest amounts were owed to it. On this basis, the GC found that Printeos was owed:[17]

- A default interest amount on the principal amount of the fine paid, at the rate set by the European Central Bank ("**ECB**") for its principal refinancing operations on the first day of the month in which the Commission's decision against Printeos was adopted ("**ECB Refinancing Rate**") + 2% *p.a.*, for the period from the date on which Printeos paid the fine amount until the date on which the Commission repaid such amount ("**Default Interest**").
- A compound interest amount on the Default Interest, at the ECB Refinancing Rate + 3.5% *p.a.* for the period from the date of the GC's judgment until the date of the Commission's repayment of the Default Interest ("**Compound Interest**").

The ECJ subsequently rejected the Commission's appeal of the GC's judgment, finding that Printeos was entitled to the above interest amounts and further that Printeos was in fact entitled to payment of the Compound Interest for the period from the date on which Printeos brought its action before the GC, until the date of delivery of the GC's judgment.[18] In reaching these findings, the ECJ set out the parameters of the Commission's legal obligations upon repayment of annulled fines, as follows:[19]

- Where the EU Courts annul an action involving the payment of an amount to the EU, the payment of Default Interest constitutes a measure giving effect to such judgment for the purposes of Article 266 TFEU. This is a primary legal obligation on the Commission, and any regulations on which the Commission relies to invest fine payments are secondary legislation that must be interpreted in line with such provision.
- The Commission's obligations in this regard flow directly from Article 266 TFEU, and the Commission does not have discretion as to whether it would be appropriate to pay such Default Interest in any particular case.

On this basis, the ECJ concluded that Printeos was in fact entitled to payment of the Default Interest and the Compound Interest.

The ECJ's finding in *Printeos* has potentially wide ramifications. It suggests that the Commission cannot rely solely on its usual procedures of investing fine payments and repaying principal fine amounts and guaranteed returns upon annulment. Instead, the Commission must also pay any shortfall between such guaranteed returns and the Default Interest amount to which the relevant party is entitled, as well as further Compound Interest on such Default Interest amount. Otherwise, the Commission runs the risk of breaching its primary legal obligations to give effect to Court judgments annulling Commission fines, pursuant to Article 266 TFEU.

In practice, a number of recipients of Commission cartel fines that have since been annulled have lodged actions for damages before the Court claiming such interest amounts, including five airlines in the Commission's *Airfreight* case and four companies in the Commission's *Steel Bar* case.[20] The outcomes of such appeals will be instructive as to the exact circumstances in which the Commission is obliged to pay Default and Compound Interest amounts upon repayment of annulled fines, and is likely to factor into applicants' future appeals of Commission cartel decisions. The judgment may also potentially result in broader policy ramifications within the Commission's cartel enforcement practices.

Endnotes

1. Judgment of the ECJ of 18 March 2021 in Case C-440/19 P – *Pometon v Commission* ("***Pometon***").
2. Judgment of the ECJ of 20 January 2021 in Case C-301/19 P – *Commission v Printeos* ("***Printeos***").
3. Judgment of the GC of 28 March 2019 in Case T-433/16 – *Pometon v Commission*, paragraphs 365 to 396.
4. *Pometon*, paragraph 152.
5. *Pometon*, paragraphs 155 to 166.
6. *Pometon*, paragraph 164.
7. See, for example, judgment of the GC of 24 September 2019 in Case T-105/17 *HSBC Holdings plc and Others v Commission* and judgment of the ECJ of 10 July 2019 in Case C-39/18 P – *Commission v NEX International Limited and Others*.
8. Antitrust: Commission amends and readopts decisions in the *Euro Interest Rate Derivatives* cartel, Commission press release, 28 June 2021.
9. Case C-883/19 P – *HSBC Holdings and Others v Commission* (pending).
10. *Pometon*, paragraphs 76 and 84.
11. Commission Decision in Case AT.39792 – *Steel Abrasives*, 2 April 2014, footnote 4.
12. *Pometon*, paragraph 73.
13. *Pometon*, paragraph 75.
14. *Pometon*, paragraphs 81 to 83.
15. Judgment of the GC of 10 November 2017 in Case T-180/15 *Icap and others v Commission*, paragraphs 268 and 270 to 278.
16. Antitrust: Commission fines Barclays, RBS, Citigroup, JPMorgan and MUFG €1.07 billion for participating in foreign exchange spot trading cartel, Commission press release, 16 May 2019.
17. Judgment of the GC of 12 February 2019, in Case T-201/17 *Printeos SA v Commission*, paragraphs 75 and 76.
18. *Printeos*, paragraph 124.
19. *Printeos*, paragraphs 68, 70 and 104.
20. Cases: T-291/21, *Cathay Pacific Airways v Commission*; T-292/21, *Singapore Airlines Cargo v Commission*; T-310/21, *Air Canada v Commission*; T-313/21, *SAS Cargo Group and Others v Commission*; T-80/21, *Cargolux Airlines v Commission*; T-410/21, *Ferriera Valsabbia and Valsabbia Investimenti v Commission*; T-411/21, *Alfa Acciai v Commission*; T-413/21, *Feralpi v Commission*; and T-414/21, *Ferriere Nord v Commission* (all pending).

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The prohibition of cartels has been a long-standing concern in Argentine law. Since the enactment of the Criminal Code in 1921, coalition between competitors to increase/decrease the price of goods in order to sell them at certain prices, or to not sell them at all, has been punishable by imprisonment. The first Argentine antitrust laws, passed a few years later, did not prohibit cartels but rather aimed to repress monopolies, criminalising them. It was not until 1980, through the Argentine Antitrust Law No. 22,262, that the focus was placed on cartels. In 1999, a new Argentine Antitrust Law (Law No. 25,156) set out coalition between competitors among its prohibited conducts.

Since 2018, the prohibitions of cartels has been provided for by the Argentine Antitrust Law No. 27,442 ("AAL"), which establishes an administrative sanctioning regime. Hence, cartels are currently sanctioned by the AAL as well as the Criminal Code.

1.2 What are the specific substantive provisions for the cartel prohibition?

Section 1 of the AAL sets out a general provision by prohibiting agreements between competitors that can be detrimental to the general economic interest.

Section 2 of the AAL identifies four forms of collusive agreements in which damage to the general economic interest is presumed (anti-competitive practices *per se*). These agreements are those that have the following purposes or effects:

a) Arrange directly or indirectly the sale or purchase price of goods or services at which they are offered or demanded in the market.
b) Establish obligations to (i) produce, process, distribute, purchase or market only a restricted or limited quantity of goods, and/or (ii) provide a restricted or limited number, volume or frequency of services.
c) Distribute, divide, assign or impose horizontally zones, portions or segments of markets, clients or sources of supply.
d) Establish, arrange or coordinate positions or abstention in bids, contests or auctions.

These four practices are regarded as absolutely restrictive of competition. These agreements will be void, so they will not produce any effect.

Section 3 of the AAL describes several anti-competitive practices, among which other types of agreements between competitors are mentioned (such as arranging the limitation of technical development or investment); however, these cartels differ from the hard-core cartels (Section 2 of the AAL) since damage to the general economic interest is not presumed.

On the other hand, Section 300 subsection a) of the Criminal Code punishes coalition between competitors to increase/decrease the price of goods in order to sell them at certain prices, or to not sell them at all, with imprisonment, and Section 309 of the Criminal Code prohibits certain cartels in financial instruments.

1.3 Who enforces the cartel prohibition?

The AAL establishes the enforcement authority as the National Competition Authority (*Autoridad Nacional de la Competencia*), an independent administrative body. However, said authority has not yet been incorporated. Hence, the agency that currently investigates cartels is the CNDC (for its Spanish acronym, *Comisión Nacional de Defensa de la Competencia*), with the Secretary of Domestic Trade resolving matters.

Furthermore, cartels that fall within the Criminal Code's scope of application will be analysed by Criminal Courts. However, cartels are usually analysed by the Antitrust Authority applying the AAL and reach the Court only afterwards. Consequently, there are practically no investigations within the scope of the Criminal Code.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

An investigation can be initiated as a result of a complaint filed by a third party or *ex officio*.

When an investigation is open, the defendants shall be subpoenaed and shall be served with a description of the investigated facts. The defendants have the opportunity to file their respective defence brief called "*Brinda Explicaciones*" ("Provides Explanations"). If the CNDC considers that the explanations provided were not sufficient, then the "*sumario*" is open; otherwise, the investigation is closed. Once the *sumario* is open, evidence is produced by the CNDC, and then the CNDC and the Secretary of Domestic Trade must decide whether to close the investigation or to press charges. If charges are pressed, the defendants have the opportunity to file their respective "*Descargo*" (a complete defence brief) and to offer proof and evidence. After an evidence-producing period and permitting

the defendants to file their respective "*Alegato*" (analysis of the evidence served brief), the CNDC must decide whether to issue an opinion suggesting the Secretary of Domestic Trade sanction the defendants. The Secretary of Domestic Trade is the body which decides whether defendants should be sanctioned. Such resolution can be challenged by an Appeal Brief with the Court.

1.5 Are there any sector-specific offences or exemptions?

There are no sector-specific offences or exemptions.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Cartel conduct outside Argentina is covered by the prohibition, insofar as the acts, activities or agreements may produce effects in the national market.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The enforcement authorities have the power to initiate cartel investigations *ex officio* as well as investigations as a result of a complaint filed by a third party. As regards the means of proof, they are entitled to conduct searches, collect documentary evidence, conduct testimonial hearings, make requests for information addressed to the defendants or third parties and obtain technician evidence as well as request dawn raids and search orders to the Court, in accordance with the right of defence as well as with the *nemo tenetur* principle (set out in Section 18 of the National Constitution).

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

There are no specific or unusual features of the investigatory powers in Argentina.

2.3 Are there general surveillance powers (e.g. bugging)?

The enforcement authorities have no general surveillance powers.

2.4 Are there any other significant powers of investigation?

There are no other significant powers of investigation.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The enforcement authorities carry out searches of business and/or residential premises; however, the assistance of the security forces is usually requested. They may access those places with the consent of the occupants or with a judicial order.

The enforcement authorities are not required to wait for legal advisors to arrive before conducting a search.

2.6 Is in-house legal advice protected by the rules of privilege?

Whether in-house legal advice is protected by the rules of privilege is a matter of debate. Judicial precedents indicate that the law does not protect the communications that a defendant maintains with any lawyer. Only the communications that the defendant maintains with his/her defence lawyer for the purpose of his/her defence will be of protection, since that lawyer is the only one he/she has entrusted with his/her defence, and the law actually protects the full exercise of defence in Court.

That said, scholars consider that if the in-house lawyer is admitted by a Bar, there are no reasons for him/her to be treated differently from outside counsel.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

In Argentina, the National Constitution sets out the *nemo tenetur* principle (Section 18) so that the defendant has the right to remain silent and not incriminate him/herself. Hence, the enforcement authorities cannot force any investigated party to provide information/documents that could be incriminating. Otherwise, it could be argued that the information provided as a result of a mandatory request for information cannot then be used against them.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Yes, daily fines may be imposed for obstruction of an investigation as well as for refusing to collaborate (i.e. not supplying the required information, or supplying incomplete, incorrect or misleading information, rejecting a search, not attending hearings, not supplying the required documents in the course of a search, or doing so in an incomplete, incorrect or misleading way).

It is not common for the enforcement authorities to apply fines for obstruction of investigation against the investigated party since it may be considered to contradict the *nemo tenetur* principle (please refer to the answer provided under question 2.7).

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The sanctions for companies are as follows:

a) cessation of conduct;

b) fines of (i) up to 30% of the business volume in the last economic exercise associated with the products or services involved in the anti-competitive act, multiplied by the number of years the illicit act lasted (a fraction of more than six months but less than a year would be considered a whole year for multiplication purposes), limited to 30% of the national business volume in the last economic exercise of the offenders' economic group, or (ii) up to double the economic profit caused by the illicit act, whichever is higher. If a value cannot be determined in accordance with the criteria set forth in either (i) or (ii), the fine would be up to 200 million mobile units (currently, the value of a mobile unit is AR$55.29, approximately US$0.54). The amount of the fine is duplicated for those already condemned for anti-competitive infringements in the last 10 years;

c) if a monopolistic or oligopolistic situation is consolidated or acquired as a consequence of the cartel, the enforcement authorities may require (together with a competent Court's order) the companies' division, deconcentration, liquidation or dissolution;
d) inability to exercise commerce for one to 10 years; and/or
e) suspension on the State's Providers Registry for up to eight years.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The sanctions for individuals are as follows:
a) Controlling individuals, directors, managers, administrators, trustees or members of the companies' supervisory board, legal representatives or proxies may be severely and jointly liable with the infringing companies for the fines imposed, if their acts or omissions of their control, supervision or vigilance duties contribute, encourage or permit the infringement.
b) They could also be sanctioned with inability to exercise commerce for one to 10 years.
c) In addition, Section 300 of the Criminal Code provides for the penalty of imprisonment of six months to two years for certain cartels of goods. On the other hand, Section 309 provides for the penalty of imprisonment of one to four years for certain cartels of financial instruments. However, these criminal sanctions were never applied within the context of infringements to the AAL.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The AAL does not provide for such an exception. Nonetheless, Section 67 of the AAL indicates that if the application of the fine is at risk due to the offender's possible insolvency, a precautionary measure could be requested to prevent it.

3.4 What are the applicable limitation periods?

The AAL prescribes a limitation period of five years.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

The AAL does not provide for such a situation. Therefore, in accordance with Section 19 of Argentina's National Constitution, provided it is not prohibited, it is a permitted act.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Please see the answer to question 3.2.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

According to Section 58 of the AAL, a parent company can be held liable for cartel conduct of a subsidiary only if it, by its acts or omission of its control, supervision or vigilance duties contributes, encourages or permits the infringement.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Yes. However, please note that the programme is not yet fully regulated.

The leniency programme permits companies and individuals, prior to being formally accused of any infringement, to request: (i) full exemption from any sanction provided they are the first to provide, to the enforcement authority's discretion, proof of the existence of a cartel, and the enforcement authorities have not yet initiated an investigation on the matter or do not have sufficient evidence of the cartel, among other requirements, such as continuous cooperation; (ii) a reduction of 20–50% of the maximum fine they would otherwise be sanctioned with if, even though they do not meet the requirements set forth above, they still provide other useful evidence; (iii) a reduction of one-third of the fine they would be otherwise sanctioned with if they reveal another cartel and comply with the requirements indicated in (i) above, as well as full exemption from any sanction related to this second cartel; and (iv) confidentiality, if they qualify for any of the benefits indicated in (i), (ii) and (iii), or even if their leniency programme application is rejected.

The exemption or reduction benefits could only apply to one company and its directors, managers, administrators, trustees or members of the companies' supervisory board, legal representatives or proxies, jointly.

The programme beneficiaries will also be exempted from any criminal sanction.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes, Decree No. 480/2018, regulating the AAL, created the "Markers Registry", which shall register all marker applications, indicating their order of precedence in accordance with their date and order.

Decree No. 480/2018, however, indicates that the criteria and parameters to determine the submissions' order of precedence will be established by the National Competition Authority (*Autoridad Nacional de la Competencia*), which have not yet been set out (please refer to question 1.3 above). These criteria and parameters have not been formally and generally established. Nonetheless, Decree No. 480/2018 permits the applicant to make general consultation regarding the leniency programme and the marker's availability before its leniency application.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

While the AAL does not expressly exclude oral submissions, Decree No. 480/2018 provides for a "formal" application and the possibility of the enforcement authorities to require all the documents they may deem necessary. Therefore, although it may be required, an oral application would most likely be rejected.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The AAL grants confidentiality of the applicant's identity. It also prohibits judges, within the context of a damages action,

to request the exhibition of any evidence provided by the applicants to the enforcement authorities. Furthermore, rejected applications can neither be used as evidence nor disclosed.

There is no time limit for this confidentiality obligation, nor any provision with regard to disclosure to private litigants. Nonetheless, the enforcement authorities may request the applicants' confidentiality waivers in order to share the information with other government agencies or foreign or international entities.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

In order to obtain the leniency programme benefits, full, diligent and continuous cooperation is required from the application submission until the procedure is closed, i.e. when the benefit is granted. Decree No. 480/2018 provides that the National Competition Authority (*Autoridad Nacional de la Competencia*) will further establish the scope of this cooperation duty. However, this has not yet been set out.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Yes, please see the response to question 4.1 (point (iii)).

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Section 60 of the AAL establishes that the leniency programme is available for companies as well as individuals. Hence, even though the case has not been specifically contemplated, nothing prevents individuals from reporting cartel conduct independently of their employers.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Until the issuance of the final resolution by the Antitrust Authority, the investigated party may offer to commit to the immediate or gradual cessation of the investigated conduct or to the modification of aspects related to it. The commitment will be subject to the approval of the Antitrust Authority and, once approved, will produce the proceedings' suspension. After three years of full compliance with the commitment, the proceedings will be terminated and filed.

7 Appeal Process

7.1 What is the appeal process?

The AAL indicates that the following resolutions can be challenged by a direct appeal to the Federal Civil and Commercial Chamber of Appeals: (i) resolutions imposing a sanction; (ii) resolutions imposing a cessation of or abstention from certain conduct, either as a final resolution or as an interim measure; (iii) resolutions that reject or consider a certain economic concentration; (iv) resolutions that reject a complaint; and (v) resolutions that reject a request to enter the leniency programme. However, judicial case law has established that all resolutions that cause irreparable harm can be challenged by a direct appeal.

The Appeal Brief must be filed with the Antitrust Authority within 15 business days of notification of the resolution. The Antitrust Authority has 10 business days to respond to it and send the file to the Court.

Resolutions related to proof mechanisms can be challenged by a "*recurso de reconsideración*" to be filed (within three business days) and resolved by the same Antitrust Authority.

7.2 Does an appeal suspend a company's requirement to pay the fine?

The appeal filed against imposition of the fine suspends the company's requirement to pay it; however, a surety insurance must be obtained. However, appeals filed against daily sanctions imposed for late notification of economic concentrations and/or due to the infringement of an order to cease certain conduct (even imposed as an interim measure) have no suspension effects.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Parties can request the Court to open a new proof-producing period in which cross-examination of witnesses can be conducted. However, whether this proof-producing period will be granted depends on the Court (i.e. if the Court sustains that proof was correctly granted and collected in the administrative proceedings, it may reject the opening of a new proof producing period).

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

It is specifically stipulated that under the AAL, physical persons or legal entities harmed by antitrust conduct may claim for compensation. To that end, a judicial proceeding must be initiated. Competition damages actions can take the form of "follow-on" cases or "stand-alone" cases.

In stand-alone cases, the party seeking damages must first establish the breach of the AAL before showing that the infringement caused him/her harm. Hence, follow-on cases are simpler, since the infringement of the AAL has already been established by an Antitrust Authority that acts *res judicata*, and so the damaged party only has to prove that said antitrust infringement caused him/her harm. That is why in a follow-on case, the rules of the abbreviated procedure apply.

Moreover, the party seeking damages can also request punitive damages that will be escalated according to the seriousness of the case.

8.2 Do your procedural rules allow for class-action or representative claims?

Yes; however, this is not specifically stipulated in the AAL. Hence, general judicial case laws that delimitate the class action and representative claims apply.

8.3 What are the applicable limitation periods?

According to Section 72 of the AAL, the limitation period, as appropriate, will be:

a) three years from when (i) the infraction was committed or stopped, or (ii) the harmed party becomes aware of it or it may be reasonable for the harmed party to have knowledge of the antitrust conduct; or

b) two years from the issuance of the sanctioned resolution by the Antitrust Authority.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

There are no precedents invoking the passing-on defence; however, nothing prevents the defendant to invoke it if applicable.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Cost rules for civil damages follow-on claims in cartels cases do not differ from other claims for civil damages; hence, the "loser pays" principle applies. However, if the party searching for damages is a consumer or consumer association, said party can invoke the benefit of litigating without expenses.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

There have been neither many cases decided in Court, nor substantial out-of-court settlements as of yet. In fact, the most relevant precedent consists of a follow-on class action against cement factories which was rejected by the National Supreme Court, since the claimant (a consumer association) did not comply with class action requirements set out by the National Supreme Court ("*Asociación Protección Consumidores del Mercado Común del Sur c/ Loma Negra Cía Industrial Argentina S.A. y Otros S/ Ordinario*", File No. 566/2012).

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Since the enactment of the AAL in 2018, a new type of cartel was created: the "hard-core" cartel. In this sense, and as it was described in question 1.2 above, Section 2 of the AAL identifies four types of cartels in which damage to the general economic interest is presumed (anti-competitive practices *per se*). These agreements are those that have the following purposes or effects:

a) Arrange directly or indirectly the sale or purchase price of goods or services at which they are offered or demanded in the market.

b) Establish obligations to (i) produce, process, distribute, purchase or market only a restricted or limited quantity of goods, and/or (ii) provide a restricted or limited number, volume or frequency of services.

c) Distribute, divide, assign or impose horizontally zones, portions or segments of markets, clients or sources of supply.

e) Establish, arrange or coordinate positions or abstention in bids, contests or auctions.

These practices are regarded as absolutely restrictive of competition. These agreements will be void, so they will not produce any effect.

The leniency programme was also formally introduced in the AAL (2018), and this benefit refers to the above-mentioned hard-core cartels.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

According to Section 29 of the AAL, parties may request the Antitrust Authority issue a permit for the execution of contracts, agreements or arrangements that contemplate conduct included under Section 2 of the AAL (for information regarding hard-core cartels, please refer to questions 1.2 and 9.1 above). In order to obtaining such a permit, parties must demonstrate that the general economic interest is not harmed.

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Additionally, most partners and senior associates have postgraduate degrees from universities in Argentina, the US or Europe and/or have been associated with major law firms in the US or Europe. Moreover, all attorneys are fluent in English, and some are also fluent in other languages (including French, German, Italian and Portuguese).

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis for Cartel Prohibition in Austria is the Cartel Act (*Kartellgesetz* 2005), as amended – most recently in 2019. Sec. 1 paras 1 to 3 of the Cartel Act correspond to Art. 101 paras 1 and 2 of the Treaty on the Functioning of the European Union (TFEU). Sec. 2 para. 1 of the Cartel Act corresponds to Art. 101 para. 3 TFEU. Furthermore, the Austria-specific *de minimis* exception widely corresponds to the "*De minimis* Notice" of the European Commission. Accordingly, cartel agreements of competing undertakings with an aggregate market share not exceeding 10 per cent of the market share or of non-competing undertakings not exceeding 15 per cent of the market share on any of the relevant markets affected by the agreement are exempted from the cartel ban, unless the agreement in question aims to fix prices, limit production or sales, or share markets. The notion of the cumulative foreclosure effect has not been included in the Cartel Act.

The Minister of Justice is empowered to issue ordinances to exempt certain groups of cartels from the Cartel Prohibition. Those ordinances can refer to the ordinances issued according to Art. 101 para. 3 TFEU. As Austria is an EU Member State, Council Regulation 1/2003 permits the authorities to enforce the Cartel Prohibition under Art. 101 TFEU.

The Cartel Prohibition under the Cartel Act is addressed to entrepreneurs (companies and individuals). Regarding the specific area of tendering procedures, Sec. 168b of the Austrian Criminal Code (*Strafgesetzbuch*) still provides for up to three years' imprisonment ("bid rigging"). Further, cartel collusion, in particular bid rigging, could also be prosecuted as serious fraud, carrying a maximum sentence of 10 years' imprisonment. Very few convictions on that basis have occurred so far.

1.2 What are the specific substantive provisions for the cartel prohibition?

Sec. 1 of the Cartel Act prohibits – with wording very close to Art. 101 TFEU – agreements between entrepreneurs, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition (i.e. cartels). Sec. 1 para. 2 of the Cartel Act states typical cases which restrict competition, such as: (i) price-fixing; (ii) limitation or control of production, markets, technical development, or investment; (iii) share markets or sources of supply; (iv) application of dissimilar conditions to equivalent transactions with other trading parties; and (v) conclusion of contracts subject to acceptance of supplementary obligations by other parties which have no connection with the subject of such contracts. Sec. 1 para. 3 of the Cartel Act declares agreements or decisions violating the Cartel Prohibition to be void.

The Cartel Act prohibits so-called "recommendation cartels" (*Empfehlungskartelle*), which are unilateral practices providing recommendations such as the usage of fixed prices. However, there is an explicit exemption for such recommendations if they are explicitly marked as non-binding, and for the implementation of which neither economic nor social pressure is applied.

1.3 Who enforces the cartel prohibition?

The Higher Court of Vienna as the Cartel Court (*Kartellgericht*), and in second instance the Supreme Court as the Higher Cartel Court (*Kartellobergericht*), are the Courts with jurisdiction to decide on violations of the Cartel Act or other antitrust regulations.

The Cartel Court does not decide *ex officio*. The Federal Competition Authority (FCA), Federal Cartel Prosecutor (FCP), regulators of certain economic branches, Chamber of Commerce, Chamber of Labour, Presidential Conference of the Austrian Chamber of Agriculture and any other undertaking or association of undertakings with legal or economic interest in a decision can file petitions to the Cartel Court.

The FCA is Austria's independent investigating authority and, therefore, files most of the petitions. The FCP represents the public interest in competition matters and is accountable to the Minister of Justice. The FCA and the FCP together are referred to as "Official Parties" in the law and in the Cartel Court's proceedings. Only these Official Parties may move for fines to be imposed or a merger to be prohibited; these and the other bodies may move to petition to stop infringements or to establish the existence of (past) infringements under certain circumstances.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The opening of an investigation is usually conducted by the FCA, Austria's investigating authority. The FCA has been quite active and has opened investigations in various industries, including retailers and suppliers for food, electronic appliances, transport and construction. In many cases, the FCA started the investigations with unannounced on-site inspections ("dawn raids"). The FCA – or any of the other authorised parties – can file a petition to the Cartel Court. This petition can aim towards

a decision for fines (if filed by the FCA or the FCP) or towards the determination of an infringement or a judicial order to cease an infringement. The Cartel Court then conducts the proceedings and files a judicial order or dismisses the petition. Against this decision, parties may appeal to the Supreme Court acting as the Higher Cartel Court.

1.5 Are there any sector-specific offences or exemptions?

Sec. 2 para. 2 of the Cartel Act lists sector-specific exemptions from the cartel ban. The following are exempted from the cartel ban: (1) agreements with retailers of books, art prints, music, journals and newspapers, fixing the retail price and further agreements necessary for a widespread and non-discriminatory distribution of newspapers and journals; (2) certain restrictions of competition among members of cooperative societies as well as between cooperative societies and their members; and (3) certain agreements, decisions and attitudes between producers of agricultural products or their interest groups.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The Austrian Courts decide on violations of the Cartel Act with an impact on the Austrian market irrespective of whether the infringement against the cartel ban was conducted in Austria or abroad.

The definition of the relevant market is not limited to Austrian territory. The relevant market may also be defined as European or even worldwide, thus including the Austrian market. This is of great importance regarding the abuse of a market-dominant position as well as in merger control.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The FCA has the powers to:

- Order the production of specific documents or information.
- Carry out compulsory interviews with individuals.
- Carry out an unannounced search of business premises.*
- Carry out an unannounced search of residential premises.*
- "Image" computer hard drives using forensic IT tools.*
- Retain original documents.*
- Require an explanation of documents or information supplied.*
- Secure premises overnight (e.g. by seal).*

Please note: * indicates that the investigatory measure requires authorisation by a Court or another body independent of the FCA. In criminal cases, these powers are vested in the criminal prosecutors and are only partly applicable (please see question 1.1).

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The right of the parties to object to the access or seizure of documents is limited. Such is possible only if recognised confidentiality obligations and rights to refuse to give evidence as listed in the Criminal Procedure Act (*Strafprozessordnung*) could be violated. These are the privileges to refuse the testimony of attorneys-at-law, notaries, or medical specialists such as psychiatrists or psychologists.

Further, the person claiming a violation of the right to refuse to give evidence must identify each specific document concerned. If this is not possible (e.g. because it would unreasonably delay the search), the person may identify respective categories of documents which will then be separately stored by the FCA in a way to protect them from any unauthorised inspection. Following this, within a period set by the FCA and not shorter than two weeks, the person concerned may identify the specific documents.

In addition, during a house search, the FCA has the right to request from all employees and representatives of the undertaking concerned information on all documents and matters connected to the subject matter of the investigation.

In respect of dawn raids, the Supreme Court ruled that if a company or individual voluntarily permits the FCA to conduct inspections, e.g. not demanding any "search warrant", and only on that basis tolerates the search as imposed by law, it will not be protected under the Cartel Act provisions, as a "voluntary inspection" (*freiwillige Nachschau*) does not affect the legally protected positions of those searched (16 Ok 7/11 *et al.*).

2.3 Are there general surveillance powers (e.g. bugging)?

Surveillance powers are only granted for violations of criminal offences. The Cartel Act contains no criminal law provisions. Excluding violations of Sec. 168b of the Austrian Criminal Code (bid rigging), which qualifies certain violations regarding tendering procedures as criminal offences, and Sec. 146 *et seq.* of the Austrian Criminal Code (fraud, serious fraud), it is unlikely that there are any competition-related infringements justifying surveillance activities.

2.4 Are there any other significant powers of investigation?

The FCA is empowered to examine potential restraints on competition on a case-by-case basis and undertake general examinations of entire business sectors if impediment of competition is suspected. During its investigations, the FCA may also call upon and question companies or individuals and examine relevant business documentation. The investigation of the FCA is not limited to information relating to the requirements of a specific cartel law offence, but may also include legal and economic information relevant to the evaluation of the alleged infringement (16 Ok 7/11 *et al.*). The investigatory powers of the FCA are not hierarchical – that is, e.g., an information request by the FCA is not a prerequisite for conducting a house search. Rather, these two investigation instruments are independent of each other, such that the possibility to receive documents by way of an information request does not preclude the FCA from obtaining an (extended) search warrant. Further, upon accidentally discovered documents, it is up to the FCA to decide whether it should request a new search warrant for a new proceeding or an extension of the current search warrant (16 Ok 1/13).

The Cartel Court's permission is needed to authorise the FCA to carry out dawn raids.

There also exists the possibility to conduct "competition monitoring" even without suspicion of competition distortion in a business sector. The intention is to collect relevant data from public sources as to the development of competition intensity in specific markets, which may then provide a basis for further decision-making and courses of action, e.g. to undertake a more detailed examination of an entire business sector.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of business and/or residential premises are generally carried out by employees of the FCA. If necessary, and requested by the FCA, they are assisted by experts and/or the police. The undertaking concerned has the right to ask for legal advisors or other confidants to attend; however, the FCA is not obliged to wait for their arrival to start the search.

2.6 Is in-house legal advice protected by the rules of privilege?

No; legal professional privilege under Austrian law is regulated differently than under European law. However, according to both laws, in-house legal advice is not protected by rules of privilege. In contrast to European law, Austrian law also does not explicitly provide for legal professional privilege covering correspondence between the client and his external (EU) lawyer outside the immediate possession of the lawyer. Under Austrian law, a lawyer need not testify against his client unless so authorised by the client, which includes the protection of any lawyer-client communication as stored in the lawyer's office. The protection of the confidentiality of the correspondence between a client and his lawyer is a European standard, obviously to be observed when Austrian authorities act for the European Commission. European law may also imply such protection for Austrian cartel proceedings enforcing European cartel law. The FCA seems to follow that view.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Excluding general limitations, such as domestic authority, which may be ignored under certain circumstances, there are no other material limitations on investigatory powers.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Without an order by the Cartel Court, the FCA can – by way of a respective decision – order an undertaking or an association of undertakings to present documents (including such stored on off-site servers but normally accessible from the searched site) provide information and copy files for further investigations. In case of disobedience of such an order, the FCA can impose penalty payments at a maximum of five per cent of the average daily turnover of the undertaking or the association of undertakings in the last business year for each day of delay with the ordered measures. In case the information provided is incorrect, incomplete, misleading or was not provided at all, the FCA can impose a fine of up to EUR 75,000 (Sec. 11a of the Competition Act).

The FCA can also request the owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, or the persons authorised to represent them by law or by their constitution, to provide information, unless they would risk a criminal prosecution thereby. Such a request can be made with or without a respective decision by the FCA (a so-called "simple request"). In the absence of a formal decision, a delay or refusal to provide information is not sanctioned. However, incorrect or misleading information can be sanctioned with a fine of up to EUR 25,000. If a formal decision is passed, it can be enforced (please see question 8.1). The FCA is not obliged to first request the relevant information by way of a simple request.

Generally, the extent or lack of cooperation will be regarded by the FCA and the Cartel Court in moving for, and in deciding on the amount of, a fine imposed for infringing cartel law.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

According to Sec. 1 para. 3 of the Cartel Act, agreements and decisions that infringe the cartel ban and that are not exempted are void. Apart from that, the Cartel Court can impose fines of up to a maximum of 10 per cent of the undertaking's, or the association of undertakings', turnover of the last business year. The highest fine to date was EUR 75.4 million for an entire case (five elevator companies) and EUR 30 million for a single company (16 Ok 2/15b.) With this decision, relating to a food retail group and in which the Higher Cartel Court increased the fine by a factor of 10, an important change as to fine calculation in Austria was introduced. The maximum of 10 per cent of the global group turnover achieved during the last business year no longer constitutes a cap, rather – contrary to European practice – the basis for the calculation of the fine. In this respect, the Court explicitly deviated from the Fining Guidelines of the European Commission, which have also had quite a practical impact in Austria so far. This view was also repeated in later cases (6 Ok 7/15p). Several other fine decisions were rendered; however, fines tend to remain lower as most defendants cooperate and settle. Additionally, third parties can claim compensation for damages incurred due to cartel infringements in Civil Courts. Under certain conditions, criminal sanctions may be imposed on companies for bid rigging (please see question 1.1) or other criminal infringements by employees under the Act on Responsibility of Legal Entities for Criminal Acts (*Verbandsverantwortlichkeitsgeset*), which so far has rarely been applied.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

If the individual is an entrepreneur violating cartel law, the Cartel Act is applicable to him as it is to any other undertaking. If the individual is a representative of an undertaking, such as a director or general manager, there is no specific sanction against the individual according to the Cartel Act. Criminal sanctions against individuals are only possible in cases of bid rigging or fraud (please see question 1.1).

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

These arguments could play a role in determining the amount of fines. However, there is no case law demonstrating clear tendencies. In the case 16 Ok 4/18a, even a request for payment in instalments was refused.

3.4 What are the applicable limitation periods?

The Cartel Court can impose sanctions when applications referring to violations of the Cartel Act were filed within five years after the termination of the violation. The end of a continuous

infringement is considered to occur when the last infringing action is completed. Under criminal law, different limitation periods, also depending on the type of damage caused, may apply. For further information, please see question 8.3.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

As stated above, costs/penalties imposed on employees can only occur within the limited area of criminal infringements (please see question 1.1). In this respect, it is questionable whether a company can pay those costs/penalties. An *ex ante* agreement to do so may be void and tax questions could arise. Generally, cartel fines are not tax-deductible.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Under general rules, yes. However, there are special privileges for employees limiting their liability towards their employer.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

While this has been discussed controversially in literature and case law, the answer is most likely yes. The Cartel Court (29 Kt 132, 133/07; 29 Kt 5/09), and the Supreme Court acting as the Higher Cartel Court (16 Ok 2/15b), have also ruled to this effect, although earlier decisions ruled to the contrary.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Austria has introduced regulations for a leniency programme in line with the (older) European model. Under the regulations of the leniency programme (Sec. 11b of the Competition Act), the FCA can refrain from demanding the imposition of a fine against enterprises which, coming first: (i) provide to the FCA information and evidence enabling the FCA to move for a search warrant, or – if the FCA already has enough information for such warrant – request a fine; (ii) have ceased their participation in an infringement of the cartel ban (violations of Art. 101 para. 1 TFEU or Sec. 1 para. 1 of the Cartel Act); (iii) cooperated with the FCA to fully clarify the facts of the case and supplied all the evidence available to them; and (iv) have not forced any other undertaking to participate in the infringement. Additionally, for undertakings not coming first but still providing useful information and/or evidence, the FCA may demand a significantly reduced fine, provided that the other prerequisites have been met.

The FCA has set forth the procedure for gaining leniency in the so-called "Leniency Handbook" published on the FCA's website, according to which a full reduction of a fine will only be granted to the first applicant notifying a violation to the FCA. In any case, the extent of a potential reduction of fines depends significantly on the time of the application. The timing of a leniency application is, therefore, of the essence.

Together with the Leniency Handbook, the FCA has published a "notification form".

The Cartel Court decided, as confirmed by the Supreme Court (16 Ok 5/10), that it has no jurisdiction to evaluate the application of the law by the FCA; however, the Court may use its own discretion in determining the amount of the fine, though it cannot be higher than requested by the FCA.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes, the Leniency Handbook provides for the possibility to obtain a "marker" upon submitting certain essential information on the infringement. This information includes: the name and address of the undertaking seeking the marker as well as of the undertaking participating in the alleged infringement; information on the products and area concerned, the duration and the type of the alleged infringement; and information on whether it is intending to apply for leniency with other competition authorities or which competition authorities have been already contacted. In this regard, the FCA recommends using the form attached to the Leniency Handbook.

The FCA sets a period of a maximum of eight weeks to provide the additional information necessary to fulfil the requirements for leniency according to Sec. 11b para. 1 of the Competition Act (as stated in question 4.1). If the undertaking provides the additional information within this time period, it will be considered submitted at the time of setting the marker.

In "Network Cases", i.e. in cases in which the European Commission is particularly well placed to deal with the case and the leniency applicant intends to apply or has already applied for leniency with the European Commission, the FCA may grant the leniency applicant a so-called "Summary Application Marker". The Summary Application Marker confirms that this leniency applicant will be given a time limit to complete its application in case the FCA should become active in this case.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

As mentioned above, leniency applications are generally made by using the notification form published by the FCA, which must be filed with the FCA via fax or email. According to the Leniency Handbook, however, the information required in the notification form can also be provided orally at the FCA (minutes will be taken by the FCA).

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

As the leniency application procedure is an administrative procedure, the respective administrative law principles apply. Based on these principles, the FCA is fundamentally obliged to keep information confidential to the extent that access to such information by third parties would interfere with the parties' interests. In past leniency cases, the FCA has kept this confidentiality to the extent known. As soon as the FCA has applied to the Cartel Court to fine the members of a cartel, the parties of the Court proceeding (i.e. the FCA, the FCP and the members of the cartel) will have access to the files of the Cartel Court.

However, it is important to know that if criminal behaviour is suspected (e.g. bid rigging), the Official Parties are obliged by law to notify the public criminal prosecutor of such suspicion. This notification, along with supporting documents, may

be quite easily accessible to third-party victims in the Court files during a criminal investigation/procedure. The Supreme Court ruled (16 Ok 3/10) that the Cartel Court is obliged to provide its files (which could include leniency documents as presented by the FCA or the parties to the Court) to the Public Prosecutor, if so requested. This may also apply to other Courts requesting a file, based on rules regulating assistance amongst Courts and administrative authorities, respectively.

The law provides for quite a differentiated system on the disclosure of documents from the files of competition authorities, including leniency documents, upon a respective order by a national Civil Court, typically ruling in a cartel damages case.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

According to the Competition Act and the Leniency Handbook, the entrepreneur or association of undertakings must cooperate with the FCA until the end of its investigation. According to the letter of the law, this would mean that the obligation to cooperate ends with the beginning of the Court procedure. However, since it is standard practice that the FCA only states the exact amount of the fine requested during a later stage of the Court procedure, until then, a certain amount of cooperation would be required or is practically recommended.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No, there is no "leniency plus" or "penalty plus" policy in Austria. The rules on damage actions (please see section 8) provide for certain limited privileges for leniency applicants (Sec. 37e para. 3 of the Cartel Act) in respect of the otherwise joint liability of cartel members being defendants in "follow-on" damage claims.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Based on some amendments to the law in 2017, the FCA installed an internet whistle-blower system for anonymous information on competition law infringements. Otherwise, any information provided by an individual to the FCA may and will be considered under the general rules on evidence. Employees are not subject to individual fines, except under criminal law (please see question 1.1). Rules on leniency in criminal procedure, relating to infringements of cartel law, were introduced in 2010 and are (still) marked to expire on December 31, 2021.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

There are no explicit early resolution, settlement or plea-bargaining procedures foreseen in the Cartel Act and the Competition Act. However, in recent years, the FCA has extensively used, and further promotes, negotiated settlements which may be combined with leniency applications. In response to widespread criticism on settlements, in particular regarding a lack of information and transparency of settlement decisions, the FCA published guidelines on its settlement policy in 2014. The benefit of such settlement is seen in the reduction of procedural costs for the FCA and the defendant(s) and a low PR profile, as well as in reduced fines and less detailed reasoning in published decisions. The latter could have a significant impact on civil follow-on damage claims.

A different situation may occur in a criminal procedure, where certain possibilities exist to close the procedure without a formal conviction by paying a fine proposed by the public criminal prosecutor ("*Diversion*"). For criminal leniency, please see question 5.1.

7 Appeal Process

7.1 What is the appeal process?

Decisions of the Cartel Court can be appealed to the Supreme Court acting as the Higher Cartel Court. The Higher Cartel Court is the highest instance in cartel matters and its decision is legally final. Normally, the Higher Cartel Court will only consider questions of law. The amendments to the law in 2017 have tried to provide a basis for a limited review of important questions of fact by the Supreme Court. However, the Supreme Court is traditionally reluctant to do so.

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes, it does.

7.3 Does the appeal process allow for the cross-examination of witnesses?

As the procedure at the Higher Cartel Court is a written procedure on questions of law, the cross-examination of witnesses is not possible. Despite some amendments to the law in 2017, the Higher Cartel Court can and will only to a very limited extent consider questions of fact. Only if the Higher Cartel Court believes that the taking of evidence was faulty or incomplete, and thus remands the procedure to the Cartel Court, will (further) cross-examination of witnesses be permitted. However, the rules and traditions of witness questioning may considerably differ from the practices in the US or UK.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Austrian cartel law provides for specific rules as to limitation periods, passing-on of damage, interest, and binding effects of decisions by competition authorities in follow-on actions.

The Cartel Act clarifies that there is a claim for compensation for the resulting damage and states a legal presumption that a cartel causes damage. The Cartel Act also specifies that interests for the damage start to run from the time of the occurrence of the damage.

Moreover, the Cartel Act clarifies that the Civil Courts are bound to the Cartel Court's, the European Commission's, or the FCA's final decision that an undertaking culpably and

illegally infringed the provisions specified in the respective decision. However, the burden of proof as to whether the plaintiff suffered damage by the defendant's infringement, and to what extent, remains with the plaintiff. The Court can estimate the damage caused by a cartel infringement.

Furthermore, the Court can order – subject to complex rules – parties of the case or third parties, including competition authorities, to disclose documentary evidence and shall act to protect confidential information contained therein. If parties fail to follow such Court orders, the Court can impose fines of up to EUR 100,000.

8.2 Do your procedural rules allow for class-action or representative claims?

The Austrian procedural rules do not explicitly provide for class action or representative claims such as, for example, US class proceedings. However, Austrian law knows of ways by which claims of several injured parties can be brought together in one Court proceeding:

- The injured parties can assign their individual claims to a collective plaintiff, which then opens the Court proceeding against one and the same defendant.
- Under certain preconditions, the injured parties can join their claims for damages in one single Court procedure. A precondition therefor is, amongst others, that the claims of the injured parties result from the same set of facts or are based on the same legal title.

8.3 What are the applicable limitation periods?

The generally applicable limitation period for damages is three years. The period starts to run as soon as the injured party has gained enough knowledge of the damage which occurred and the injuring party. Different rules may apply in cases of criminal behaviour relating to natural persons.

However, the limitation period is regulated differently for antitrust law. Compensation for damages becomes time-barred five years after knowledge of the damage, damaging party, damaging activities, and the fact that these activities are in violation of competition law. It is not possible to claim damages 10 years after the occurrence of the damage; the time limits only run from the end of the infringement. These limitation periods are paused during proceedings for (1) a decision of a competition authority, (2) investigation measures of a competition authority, or (3) settlement negotiations until one year after a final legally binding decision or the end of negotiations.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The law now explicitly permits the passing-on defence. In addition, as a logical balance, indirect customers are stated to have a claim against the cartelists.

Cases under the old legal situation, where these questions may be dealt with in some detail, are currently under trial. We note that the German Federal Supreme Court has generally accepted the defence (KZR 75/10, June 28, 2011), and a certain reference to this decision was made by the Austrian Supreme Court (4 Ob 46/12m). Furthermore, the Austrian Supreme Court has explicitly accepted the standing of the indirect purchaser to sue for damages (7 Ob 48/12b) and has implied certain acceptance of the passing-on defence in additional cases.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The cost rules for civil damages follow-on claims in cartel cases are based on the general cost rules of the Code of Civil Procedure. Thus, the losing party of the civil procedure must pay its own costs and the costs of the winning party. If one party is only partially successful, such party's legal costs will only be reimbursed by the other party in proportion to its success. The amount of the costs is based on the (statutory) lawyers' tariff. The assessment base of the costs is the amount in dispute.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

In Austria, only one (very minor) successful follow-on civil damages claim for cartel conduct resulted in a damages award. In 2006, the Cartel Court identified some driving schools as cartel members and imposed a total fine of EUR 75,000 on them. The driving schools had identical prices for the most popular driving courses. After the fines became final, cartel damage claims (which were very low, with the individual claim not reaching EUR 500) against the cartel members were assigned by potentially injured parties to the Austrian Federal Chamber of Workers and Employees.

Currently, several big cases following up on the Cartel Court's decision in a banking cartel, an elevator cartel case (please see question 3.1) and the trucks cartel are under trial. Several complex questions of law are being discussed at different levels of the Court system. If and what settlements were concluded is kept confidential, for obvious reasons.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Each final decision (whether to grant, dismiss or overrule the claim) on the prohibition or establishment of infringements and the adjudication of fines, on a merger and further measures imposed after clearance of a merger, as well as action for an injunction, shall be published by the Cartel Court via the respective public medium of communication of the Court (the so-called "*Ediktsdatei*") and on the FCA website. Such publication shall include the names of the parties and the essential content of the decision, including the imposed sanctions whereas at the same time, the justified interest of the undertakings to protect their business secrets shall be observed. Under certain circumstances, the Courts can determine an obligation to pay for future damages, even if the damage has not yet occurred. As to the extent of publication, Austrian Courts follow European practice that business secrets will be protected (16 Ok 6/14i).

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

The FCA has – even in 2020 and as inhibited by the COVID-19 pandemic – conducted raids and fined several companies following settlement procedures, mostly concentrating on vertical infringements. Several big cartel damage cases are still under trial, and the follow-up of the trucks cartel has unfolded in Austria. The

Cartel Court files, including any leniency documents that may be included there, are not protected as final in case an administrative authority (e.g. Public Prosecutor) or a (Criminal) Court requests to receive a file based on rules on assistance amongst Courts and administrative authorities (please also see question 4.4).

The FCA has some history in researching specific industries ("*Branchenuntersuchungen*") and has recently developed a tendency for competition monitoring. In the past, the affected areas were energy, gasoline, food retailers, construction, mobile phone services and taxi services. For future areas besides the monitoring of banks, the healthcare sector was named, as well as ATMs, undertakers and airlines.

Currently, amendments to the Cartel Act are under public discussion. While this primarily concerns merger control, questions of market dominance and cartel enforcement may also be affected, e.g. by addressing aspects of sustainability in cartel law. Furthermore, the Europe-wide cooperation of competition authorities and the Austrian leniency regime may be affected.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Canada's *Competition Act*, a federal statute, establishes a two-track regime for agreements between competitors. Agreements between competitors to fix prices, allocate markets or restrict output are *per se* criminal offences, as is bid rigging. Other agreements between competitors that lessen or prevent competition substantially are not treated criminally, but can be annulled by a special court, the Competition Tribunal.

1.2 What are the specific substantive provisions for the cartel prohibition?

The conspiracy provision (s. 45) makes it an offence for competitors, or potential competitors: to agree to fix, maintain or control prices for the supply of a product; to allocate customers, territories or markets; or to fix, maintain, control, prevent or lessen the production or supply of a product.

Agreements that are (i) ancillary to a broader agreement that does not itself offend the main part of s. 45, and (ii) directly related to, and reasonably necessary to, giving effect to that broader agreement are exempt. The ancillary agreements defence has not yet been tested in Canada.

Penalties for violations of s. 45 are severe; the offence is an indictable offence punishable by up to 14 years in jail, a maximum fine of C$25 million or both. Furthermore, s. 36 permits private parties that suffer losses due to cartel conduct to bring a civil damage claim for recovery. These claims often take the form of a class action and can be extremely costly; one recent settlement exceeded C$500 million.

Bid rigging is dealt with in a separate provision (s. 47) and also carries stiff penalties; up to 14 years in jail or a fine at the discretion of the court.

Other agreements between competitors can be prohibited by the Competition Tribunal if they substantially lessen or prevent competition (s. 90.1). The *Competition Act* mandates the same competitive effects employed in merger review. This analysis includes factors such as foreign competition, barriers to entry, removal of a renegade competitor and the extent of change and innovation in the market. As with mergers, efficiency gains that outweigh any competitive harm provide a complete defence. No penalties or damages can be imposed on parties to such anti-competitive agreements; the only remedy is an injunction.

Both individuals and corporations can be held criminally responsible for cartel offences. Canada has codified the rules for attributing criminal liability to corporations. The *Criminal Code* provides that a corporation is criminally responsible where one of its "senior officers" (essentially, a manager) is a party to the offence.

1.3 Who enforces the cartel prohibition?

Canada's legal system divides responsibility for investigating, prosecuting and adjudicating in criminal cases. The Competition Bureau (Bureau), led by the Commissioner of Competition (Commissioner), is responsible for investigating suspected cartel activity and other matters under the *Competition Act*. The Director of Public Prosecutions (DPP) is responsible for prosecuting criminal offences, through lawyers of the Public Prosecution Service of Canada (PPSC).

Criminal prosecutions can be brought before the superior courts in each province, as well as the Federal Court.

The Commissioner has the authority to bring applications under the civil provisions of the *Competition Act*, including the anti-competitive agreements provisions. The Competition Tribunal has exclusive jurisdiction to hear cases under this provision.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The Commissioner can commence a formal inquiry under the *Competition Act* if (among other things) he or she has reason to believe that a person has violated the *Competition Act* or is engaging in conduct that could be the subject of an order under the *Competition Act*.

The Commissioner uses both informal and formal investigative tools. Formal investigative powers, including search warrants, production orders, orders for the examination of witnesses under oath and wiretaps, require judicial authorisation. Additionally, the Commissioner can seek judicial authorisation to obtain phone and text records.

Once an inquiry under the *Competition Act*'s criminal provisions are complete, the Commissioner may refer the matter to the PPSC. The PPSC has the discretion to determine whether to prosecute. The PPSC applies a two-fold test: (1) is there a reasonable prospect of conviction; and (2) does the public interest require a prosecution to be pursued?

If criminal charges are laid, the accused or the prosecutor can request that a preliminary inquiry be held before a provincial court judge to determine whether the case should proceed to a

full trial. If the accused is committed for trial, the matter then proceeds to trial before a judge of a superior court in a province or of the Federal Court.

At trial, the prosecution must prove the charges beyond reasonable doubt. If the accused is found guilty, a sentencing hearing will then be held.

Proceedings under s. 90.1 are not criminal in nature. The Commissioner has the power to commence an application under s. 90.1 in the Competition Tribunal. There, the ordinary civil standard of proof on a balance of probabilities is applied.

1.5 Are there any sector-specific offences or exemptions?

The *Competition Act* contains two sector-specific offences:

(1) Conspiracies relating to professional sport: it is an offence to conspire to limit unreasonably the opportunities for a person to participate as a player or to negotiate with and play for a team or club.

(2) Conspiracies between federal financial institutions: it is an offence for federal financial institutions (including banks) to conspire on things, including interest rates on deposits or loans.

The *Competition Act* contains three sector-specific exemptions:

(1) Collective bargaining between trade unions and employers.

(2) Underwriting of securities.

(3) Agreements relating to amateur sport.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

S. 46 of the *Competition Act* makes it an absolute liability offence for a corporation to implement a foreign conspiracy in Canada.

Neither s. 45 (conspiracy) nor s. 47 (bid rigging) expressly extend Canadian jurisdiction to foreign conspiracies. The Bureau and PPSC have consistently taken the position that Canada can take jurisdiction over foreign conspiracies that have effects in Canada. Courts have yet to rule on whether this assumption of jurisdiction is valid.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The Bureau has a range of investigatory powers at its disposal. There are three main formal investigative powers exercised by the Bureau:

- Section 11 Orders.
- Search warrants.
- Wiretaps.

S. 11 of the *Competition Act* provides that the Commissioner can apply to the court for three kinds of orders:

- Production of documents (including documents in the possession of affiliates).
- Written responses to requests for information.
- Examination of a witness under oath.

The requirements for obtaining Section 11 Orders are relatively easy to meet: the Bureau must have commenced a formal inquiry; and the target of the order must be likely to have relevant information.

These orders are not limited to the target of an inquiry; they can be used against anyone with relevant information.

Search warrants permit Bureau officers to enter and search a premises and seize relevant records, including records from computer systems.

In order to obtain a search warrant, the Bureau must establish that there are reasonable grounds to believe that (i) an offence under the *Competition Act* has been committed, and (ii) the premises to be searched contain relevant records.

The Bureau can also make use of a variety of warrants that are available under the *Criminal Code*. The most important of these is a warrant to intercept private communications (wiretap). Wiretaps are available where other investigative procedures are unlikely to obtain the evidence needed.

Table of General Investigatory Powers

Investigatory power	Civil/ administrative	Criminal
Order the production of specific documents or information	Yes*	Yes*
Carry out compulsory interviews with individuals	Yes*	Yes*
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
Right to "image" computer hard drives using forensic IT tools	Yes*	Yes*
Right to retain original documents	Yes*	Yes*
Right to require an explanation of documents or information supplied	No	No
Right to secure premises overnight (e.g. by seal)	Yes*	Yes*
Wiretaps	Yes*	No

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

All of the investigative powers referred to in the above table require prior judicial authorisation.

The Bureau has no right to require an explanation for documents or information supplied during the execution of a search warrant (dawn raid). Explanations of documents or information can be obtained through the use of orders to examine witnesses under oath or to require written returns under oath (essentially interrogatories) under s. 11 of the *Competition Act*. Witnesses are not excused from answering questions that may incriminate themselves; however, their answers cannot be used in criminal proceedings instituted against the individual.

Warrantless searches are permitted only in exigent circumstances that make it impracticable to obtain a search warrant.

The "plain sight" doctrine permits Bureau officers to seize documents during a search that are not described in a search warrant but contain evidence of other crimes and are in plain sight. The plain sight doctrine also applies to searches of computer systems.

2.3 Are there general surveillance powers (e.g. bugging)?

Yes, ss 184.2, 184.3 and 188 of the *Criminal Code* permit the Bureau to obtain a warrant from the court to intercept private communications using wiretaps.

2.4 Are there any other significant powers of investigation?

Canada can seek investigative assistance from 54 countries under bilateral Mutual Legal Assistance Treaties, including the US and the UK, as well as the *Inter-American Convention on Mutual Assistance in Criminal Matters*.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Bureau officers carry out searches typically during business hours (although a search warrant can be executed any time between 6am and 9pm). In special circumstances, police officers may assist.

While the search team is under no obligation to wait until legal counsel arrive before they commence the search, they will typically wait for a reasonable period of time if asked. The search team may take immediate steps to secure the premises and to ensure that no records subject to the search are concealed or destroyed in the meantime.

2.6 Is in-house legal advice protected by the rules of privilege?

Yes, communications with in-house counsel containing legal advice, or for the purpose of obtaining legal advice, are subject to solicitor-client privilege.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Canadian law provides for a number of limitations that safeguard the rights of defence of companies and individuals under investigation:

- **Judicial authorisation**: to obtain a search warrant, the Commissioner must satisfy a judge that there are reasonable grounds to believe that someone has committed an offence under the *Competition Act*. The test for obtaining orders for the production of documents, examinations under oath and written returns is less stringent; however, courts require the Commissioner to explain the basis for believing that an offence has been committed.
- **Solicitor-client privilege**: the *Competition Act* contains procedures for dealing with records over which privilege is claimed. Typically, an agreement is reached between the Bureau and counsel on claims of privilege. If no agreement is reached, a judge will make the determination.
- **Privilege against self-incrimination**: s. 11 of the *Canadian Charter of Rights and Freedoms* and s. 5 of the *Canada Evidence Act* protect individuals from being forced to incriminate themselves. Witnesses cannot refuse to answer a self-incriminatory question; however, their answer cannot be used against them in any criminal proceedings.
- **Inspection and copying of seized documents**: parties whose documents are seized are entitled to inspect them. In practice, copies are typically made either during the search or afterwards.
- **Confidentiality**: the *Competition Act* requires the Bureau to conduct inquiries in private and to keep the information it receives confidential. The Bureau may, however, disclose information for the purpose of enforcing the *Competition Act*.
- **Updates from the Commissioner**: targets of an inquiry are entitled to receive an update on the progress of the inquiry upon request.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The *Competition Act* makes it a criminal offence to obstruct investigations. Obstruction is punishable by up to 10 years in jail, a fine at the discretion of the court, or both. It is also an offence to fail to produce documents in response to a production order, to fail to appear in response to an order for oral examination or to fail to answer questions in an order for written returns.

The Bureau warns that it takes obstruction seriously and has laid obstruction charges in the past.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Companies found guilty of conspiracy (s. 45) can be fined up to C$25 million for each count. Fines for bid rigging (s. 47) and implementing foreign conspiracies (s. 46) are at the discretion of the court. The highest fine imposed to date for bid rigging is C$30 million.

Prohibition orders prohibiting the continuation or repetition of the offence can also be imposed on companies. These orders can include a provision for paying money to the Crown (essentially, a fine).

Recovery of damages through private litigation is also possible, through a statutory cause of action found in the *Competition Act*, as well as economic torts (principally, civil conspiracy and unlawful interference with economic relations).

Companies convicted of conspiracy offences under the *Competition Act* are ineligible to carry out business with the federal government under federal government procurement policies.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Individuals convicted of conspiracy or bid rigging can be sentenced to jail for up to 14 years and fined up to C$25 million in addition to, or instead of, jail. Debarment sanctions may also be applied to individuals under federal government procurement policies.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Claims of financial hardship or inability to pay are factors considered by the court in determining the amount of the fine.

In the case of an organisation, the *Criminal Code*'s sentencing provisions require the court to consider the impact that a fine would have on the economic viability of an organisation and the continued employment of its employees (s. 718.21). In the case of individuals, the court can only impose a fine if it is satisfied that the individual is able to pay it.

3.4 What are the applicable limitation periods?

There are no limitation periods for criminal prosecution of cartel offences under the *Competition Act*.

A two-year limitation period applies to actions to recover damages under the *Competition Act*'s statutory cause of action. This limitation period begins to run from the time that the claim is discovered (or discoverable) by the plaintiff.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Corporate statutes typically provide that a corporation can only indemnify a director or officer who has been convicted of an offence if the director or officer was acting honestly and in good faith, with a view to the best interests of the corporation, and had reasonable grounds for believing that the conduct was lawful.

There are no restrictions on corporations indemnifying employees for legal costs or financial penalties and, in certain circumstances, an employee may even be entitled to indemnification.

It is common for corporations to pay the legal costs of directors, officers and other employees for whom independent counsel is retained.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

There are no reported cases of corporations holding an employee liable for legal costs or financial penalties imposed on the corporation as a result of conduct of an employee contrary to the *Competition Act*. The defence of *ex turpi causa* may block claims by companies that are convicted of a conspiracy offence against their employees who were responsible for the wrongdoing. As a practical matter, employees rarely have the resources to pay the employer's legal costs or financial penalties.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Corporations cannot be held liable for the actions of their subsidiaries based solely upon the parent-subsidiary relationship, even if the subsidiary is a wholly owned subsidiary. The test for determining when a corporation is a party to an offence, set out in the *Criminal Code* (s. 22.2), would likely be applied to determine whether a parent corporation should be considered a party to an offence committed by its subsidiary. Generally speaking, that test would require the involvement of a "senior officer" of the parent corporation in the offence (the term "senior officer" is given an expansive definition in the *Criminal Code* and caselaw).

The *Competition Act* creates an offence where a Canadian corporation implements directives from a foreign parent that give effect to foreign conspiracies in Canada, even if the Canadian company does not know about the conspiracy (s. 46).

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

There are two programmes under which a cooperating individual or company may obtain protection: an immunity programme; and a leniency programme. The leniency programme is for those individuals or companies that do not qualify for full immunity. Additionally, the PPSC has negotiated prohibition orders involving a monetary payment to the Crown to settle cases without admissions of liability.

Immunity programme: the immunity programme offers full immunity from criminal prosecution to the first individual or company to both admit involvement in criminal activity and agree to cooperate with the Bureau's investigation and subsequent prosecutions. Generally, immunity is only available where the Bureau does not already know about the offence or is aware but does not have enough evidence to prosecute before the immunity applicant comes forward.

In order to be eligible for immunity, an applicant must end their participation in the illegal activity and must not have coerced others to join in the illegal activity. Throughout the course of the Bureau's investigation and any subsequent prosecution, the applicant must provide complete, timely and ongoing cooperation at its own expense.

In order to secure immunity, an applicant must request an immunity "marker" from the Bureau. There is only one immunity marker per offence under the *Competition Act*. The immunity applicant must thereafter, usually within 30 days, provide a detailed description of the criminal activity, known as the "proffer". The proffer is made on a without prejudice basis, and orally in order to avoid creating documents that must be produced in subsequent civil litigation. Increasingly, a number of proffers of information are made before the Bureau decides whether to recommend granting immunity.

While the Bureau determines whether an applicant qualifies for immunity based on the facts, the PPSC actually grants immunity following a recommendation from the Bureau.

The PPSC initially makes a grant of interim immunity. At that point, the applicant must complete the full disclosure process. This involves disclosure of all non-privileged relevant information. This will include production of documents and identification of witnesses. The Bureau will interview witnesses. Once the Bureau is satisfied that the applicant has satisfied its obligations under the grant of interim immunity, it recommends to the PPSC that the final grant of immunity be made. Applicants that fail to comply with their disclosure obligations and other obligations under the grant of interim immunity can lose their immunity.

Leniency programme: once a party has claimed an immunity marker, other parties that are willing to cooperate may receive leniency. As with immunity, the leniency programme requires full disclosure from the applicant, as well as a guilty plea. If they do so, participants in the leniency programme can expect to receive a "leniency cooperation credit" that will reduce the fine they would otherwise pay by up to 50%.

The Bureau will make a recommendation as to the fine to the PPSC. This amount consists of (i) a base fine, typically 20% of affected commerce (both direct and indirect), (ii) adjustments upwards or downwards to take into account aggravating and mitigating circumstances, and (iii) a reduction for the leniency cooperation credit. Assuming the PPSC accepts the recommendation, the PPSC and the accused (leniency applicant) will jointly propose this sentence to the court after the applicant has pleaded guilty. While the joint submission on

sentence is not binding on the court, the court will not depart from the proposed sentence unless it would bring the administration of justice into disrepute or is otherwise contrary to the public interest. Additionally, a court that proposes to depart from a joint submission on sentence may permit the accused to withdraw its guilty plea. It should be noted that the accused is not automatically permitted to withdraw its guilty plea in these circumstances.

Prohibition orders: s. 34 of the *Competition Act* permits a court to issue prohibition orders to prevent future conduct contrary to the *Competition Act*. In several recent instances, this provision has been used to settle cases without prosecution. While the corporations admitted the elements of the offence, they did not plead guilty to the offence. The corporations also agreed to make a payment to the government. These settlements are thus comparable to deferred prosecution agreements. There is no guidance on what criteria the PPSC will apply in determining whether to agree to a prohibition order instead of prosecution. That said, prohibition orders *in lieu* of a conviction will likely be available only in exceptional cases.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes. Typically, markers are obtained by counsel for the applicant by telephone. Counsel must identify the nature of the offence, and the product and geographic markets, but does not need to name the applicant.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes. As discussed in question 4.1 above, proffers are almost invariably made orally to minimise the risk that there will be subsequent disclosure of admissions in a civil case. However, given that full cooperation is required in order to obtain immunity (or leniency), an immunity applicant is usually required to provide all relevant documentary evidence to the Bureau for use in its prosecution of the other parties. Since parties to civil litigation, including follow-on damages claims, have an obligation to disclose all relevant documents to the opposing party, the provision of these documents to the Bureau does not materially change a party's civil disclosure obligations.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

While there are controls governing confidentiality, applicants must know that the information they provide will eventually be disclosed once charges are laid, as part of Crown disclosure. Crown disclosure may even include notes taken by Bureau officers during the proffer.

Before that time, however, the *Competition Act* effectively draws under its protection nearly all information that is provided to, or obtained by, the Bureau in the course of executing its mandate.

The Bureau has the discretion to communicate information in four circumstances:

(1) to a Canadian law enforcement agency;
(2) for the purposes of administration or enforcement of the *Competition Act*;
(3) where the information has been made public; or
(4) when it has been authorised by the person who provided the information.

Private litigants can obtain evidence collected by the Bureau, but they must seek a court order in order to do so. The Bureau's position, as stated in the *Information Bulletin on the Communication of Confidential Information under the Competition Act*, is that it will not voluntarily provide information to private litigants and will seek protective court orders to maintain the confidentiality of the information provided to it. As such, evidence will only be disclosed to private litigants where they obtain a court order compelling its disclosure.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The continuous cooperation requirement ceases to apply at the conclusion of the Bureau's investigation and the conclusion of criminal prosecutions and all appeals therefrom.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Leniency applicants can also obtain immunity for offences if they are the first to disclose information relating to another offence. This concept is known as "Immunity Plus". Immunity Plus encourages targets of ongoing investigations to consider whether they may qualify for immunity for other offences, or the same offence in other markets. While the target will not receive immunity for the first offence, it will receive an additional discount of 5–10% on top of the usual leniency discount for that offence.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes. Individuals can apply for immunity or leniency in the same manner as corporations. An individual who is the first-in leniency applicant receives special treatment; he or she will not be prosecuted for the offence.

Section 66.1 of the *Competition Act* requires the Bureau to keep the identity of whistle-blowers confidential, and s. 66.2 prohibits reprisals against whistle-blowers.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Plea bargaining is not formalised in Canada. Due to the division of responsibilities between the Bureau as investigator and the PPSC as prosecutor, negotiations toward a resolution are unlikely to be entertained before the Bureau's investigation is complete, except in the case of leniency applicants.

It is the PPSC that has the authority to negotiate and approve plea bargains. However, discussions will typically involve the Bureau.

A settlement involves a guilty plea in court followed by a joint submission on sentencing. While the court is not bound

to impose the proposed sentence, it can only depart from it if the proposed sentence would bring the administration of justice into disrepute or is otherwise not in the public interest.

Quite recently, the PPSC has negotiated settlements based on a prohibition order with no prosecution. While prohibition orders have been available for a long time, until very recently, the Bureau and the PPSC were not typically willing to consider them as an alternative to a prosecution and guilty plea. It is unclear under what circumstances this type of negotiated resolution will continue to be available in the future.

7 Appeal Process

7.1 What is the appeal process?

Both the offender and the DPP can appeal from the verdict of the superior court to the court of appeal for the province in which the trial was held, or to the Federal Court of Appeal if the trial was held before the Federal Court of Canada. The offender can appeal as of right from a conviction on questions of law and mixed fact and law, but needs leave to appeal on questions of fact or from the sentence. The DPP's appeal rights are more limited.

The decision of the court of appeal can be appealed to the Supreme Court of Canada. If there is a dissenting opinion in the court of appeal, the appeal is as of right. Otherwise, leave is required. The Supreme Court only grants leave in cases that it considers to raise issues of national importance.

Committal for trial following a preliminary inquiry is not appealable, but can be challenged by *certiorari* on very limited grounds relating to jurisdiction and fairness of the proceeding.

7.2 Does an appeal suspend a company's requirement to pay the fine?

There is no automatic suspension of the requirement to pay the fine. The appeal court can order the suspension of any obligation to pay fines, restitution, etc., pending the determination of the appeal.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Generally, no. Witnesses are cross-examined at the preliminary inquiry and then again at trial. In exceptional circumstances, the appeal court may permit an appellant to tender fresh evidence as part of an appeal, where the evidence was not previously available. Where the appeal court permits fresh evidence, it may also agree to cross-examination of witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Section 36 of the *Competition Act* permits anyone who has suffered a loss caused by criminal conduct under the *Competition Act*, including price fixing, to sue for damages sustained as a result of the conduct in question.

Plaintiffs frequently also plead various ancillary common law and equitable causes of action in bringing private actions under the *Competition Act*.

The *Competition Act* provides that proof of a criminal conviction can be used as proof of the offence in a subsequent private action. While this makes follow-on class actions easier in principle, plaintiffs have commenced numerous class actions where there was no prior conviction.

8.2 Do your procedural rules allow for class-action or representative claims?

Yes. Private actions can be structured as class actions in any of Canada's 14 legal jurisdictions (10 provinces, three territories and the Federal Court), although each jurisdiction has its own particular rules.

8.3 What are the applicable limitation periods?

Private actions under the *Competition Act* must be brought within two years of the later of when the conduct was engaged in or when criminal proceedings were finally disposed of. The limitation period that runs from the date of the conduct in fact starts to run when the conduct is discovered by the plaintiff.

Ancillary causes of action, such as the torts of civil conspiracy and unlawful interference with economic relations, are subject to provincial statutes of limitations, which in most provinces are two years from the date of discovery.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The Supreme Court of Canada has rejected the passing-on defence, but has permitted indirect purchaser claims based on the passing on of the overcharge. Courts can apportion the damages among the various distribution levels and make adjustments to avoid double recovery by plaintiffs.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Canada has a "loser pays" legal system, whereby a successful party in most cases is entitled to recover a portion of its legal costs from the unsuccessful party. The *Competition Act* also provides for recovery of the costs of the investigation. Some provincial class proceedings statutes limit the availability of costs in class proceedings.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

To date, no price-fixing class action has gone to trial. A few claims by individual plaintiffs for damages under the *Competition Act* have gone to trial. Most have been unsuccessful due to the high burden of proof under pre-2010 conspiracy provisions.

Price-fixing class actions are almost always settled before trial. Settlements tend to be substantial. The highest so far is the C$517 million paid by Microsoft.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Revisions to the *Competitor Collaboration Guidelines*

The Bureau revised its *Competitor Collaboration Guidelines* in 2021. The *Competitor Collaboration Guidelines* set out the Bureau's approach to both the conspiracy and the civil anti-competitive agreements provisions of the *Competition Act*.

The more significant revisions include the following:

- Hub-and-spoke conspiracies: the revised guidelines now recognise that a wholesale that facilitates a conspiracy amongst its retail clients may be a party to the offence.
- Market definition: the Bureau now recognises that it may need to conduct an analysis in order to confirm that parties to a price-fixing conspiracy are indeed competitors.
- Pricing algorithms: an agreement to use a common pricing algorithm would be an agreement to fix prices.
- Buyer-side agreements: in a very confusing passage, the Bureau suggests that while the conspiracy provisions apply to agreements to fix prices for the supply, not the purchase, of a product, an agreement amongst buyers could violate the provision if its purpose is to control prices for the supply of the product.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

Agreements between companies not to recruit each other's employees, known as "no-poach" agreements, may be a violation of US antitrust law; however, they almost do not violate the *Competition Act*, according to guidance released by the Bureau in 2020. The Bureau reached this position because Canada's conspiracy provision, s. 45 of the *Competition Act*, targets suppliers, not buyers, of a product. The Bureau thus concluded that it does apply to buyer-side agreements such as no-poach agreements.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The Anti-monopoly Law of China ("**AML**") regulates cartels. In addition, the *Interim Provisions on the Prohibition of Monopoly Agreements* issued by the State Administration of Market Regulation ("**SAMR**") in 2018 and *the Guidelines for the Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements* ("**Leniency Guidelines**") issued by the Anti-monopoly Committee of the State Council ("**AMC**") in 2019 provide more detailed provisions to regulate cartels and leniency.

Where an undertaking has violated the AML by entering into and implementing a cartel arrangement, SAMR or the market regulatory departments of the People's Governments of provinces, autonomous regions, and municipalities directly under the Central Government ("**Provincial Market Regulatory Department**" or "**PMRD**") may impose administrative penalties pursuant to the AML. An undertaking which has violated the AML by entering into and implementing a cartel arrangement and causes others to suffer losses may bear civil liability in a private antitrust litigation. Cartel arrangements do not attract criminal liability in China.

1.2 What are the specific substantive provisions for the cartel prohibition?

The concept of monopoly agreements under the AML

The monopoly agreements defined under the AML are agreements, decisions or other coordinated acts that eliminate or restrict competition.

1. Agreements:
   Agreements can be in written or verbal form.
2. Decisions:
   Decisions are not a multilateral legal act, but a unilateral legal act. Although many undertakings participate in the voting, the decision is made by a single entity, such as an association. The independence of individual undertakings does not exist, since their individual intentions are aggregated by the decision and become a single overall intention. While the decision is applicable to every member of the association, including the members who vote against the decision and do not participate in the voting, the legal consequences are different. The undertakings which voted against the decision and did not participate in the voting shall not be liable for the cartel arrangement in the decision.
3. Coordinated acts:
   To identify other coordinated acts, the following factors shall be considered:
   a. whether the market behaviours of undertakings are consistent;
   b. whether there is any intentional contact or information exchange between undertakings;
   c. whether undertakings can reasonably explain the consistency of the behaviours; and
   d. the market structure, competition status, market changes and other situations of the relevant markets.

Exchange of information between competing undertakings, by itself, is not prohibited under the AML, unless agreements, decisions or other coordinated acts can be found.

Cartel prohibitions under Article 13 of the AML

The following cartel arrangements between competing undertakings are prohibited under Article 13 of the AML. The *Interim Provisions on the Prohibition of Monopoly Agreements* provide detailed rules to identify the scope of the cartel arrangements:

1. Price fixing:
   a. fixing the price level, range, profit, discounts, handling fees and other expenses;
   b. adopting a standard formula for calculating prices; or
   c. limiting the discretion of the parties on pricing.
2. Restricting the production volume or sales volume:
   a. restricting or fixing the production volume, stopping production, or restricting the production volume of specific types or models of products; or
   b. restricting the volume of products launched in the market, or restricting the sales volume of specific types or models of products.
3. Dividing sales markets or procurement markets:
   a. dividing the sales area, market share, sales target, sales revenue, or sales profit;
   b. dividing the categories, volume, and timing of sales of products; or
   c. dividing the procurement area, category, volume, time or supplier of materials.
4. Restricting the procurement of new technology/equipment or restricting the development of new technology/products:
   a. restricting the purchase or use of new technology/processes;
   b. restricting the purchase, lease or use of new equipment/products;
   c. restricting the investment in, and research and development ("**R&D**") of, new technology/products; or
   d. refusing to use new technology/processes/equipment/products.

5. Joint boycott:
   a. jointly refusing to supply or sell products to a specific undertaking;
   b. jointly refusing to purchase or sell products of a specific undertaking; or
   c. jointly restricting a specific undertaking from trading with undertakings which are in competition with them.
6. Any other horizontal monopoly agreement as defined by the anti-monopoly enforcement agency of the State Council.

Exemptions

Under Article 15 of the AML, the cartel prohibition rules under the AML are not applicable if undertakings can prove the following:

1. At least one of the following public interests or efficiencies can be realised through the cartel arrangement:
   a. advancing technology or researching and developing new products;
   b. improving product quality, lowering cost, increasing efficiency, unifying specifications and standards, or implementing a division of labour based on specialisation;
   c. improving the operation efficiency and competitiveness of small and medium-sized undertakings;
   d. realising public interests such as energy conservation, environmental protection, and rescue and relief efforts;
   e. alleviating problems related to a serious drop in sales or obvious overproduction during an economic downturn;
   f. protecting legitimate interests during foreign trade or foreign economic cooperation; or
   g. other circumstances specified by laws or the State Council.
2. Causation:
   a. the specific form and effect of the cartel arrangement realise the public interests or efficiencies; and
   b. the causation between the cartel arrangement and the public interests or efficiencies, and whether the cartel arrangement is necessary in order to realise the public interests or efficiencies.
3. The cartel arrangements do not seriously restrict competition in the relevant market.
4. They enable consumers to share the benefits therefrom, such as lowering the price, improving the quality, or introducing new types of products into the market.

1.3 Who enforces the cartel prohibition?

SAMR and PMRD are the authorities which investigate cartel arrangements and render decisions of penalties independently without relying on the People's Court.

SAMR essentially regulates the following functions: antitrust; drug safety supervision; quality inspection; fair competition and commercial bribery; issuance of business registration; certification and accreditation; and management of intellectual property rights, etc. The Anti-monopoly Bureau under SAMR carries out antitrust investigations against cartel arrangements. More specifically, the Division of Monopoly Agreement Investigation of the Anti-monopoly Bureau under SAMR is in charge of cartel investigation.

According to the AML, AMC was established to organise, coordinate and supervise anti-monopoly-related activities. AMC generally serves as a policy-making body and is not involved in specific antitrust cases.

Cartel arrangements are not criminal violations in China. Therefore, except for bid rigging or obstructing law enforcement by means of violence or threat, the criminal prosecution authorities' role is very limited in China's cartel enforcement.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

A cartel investigation usually starts from a whistle-blowing or a leniency application by a member of cartel. SAMR or PMRD may at its discretion initiate an investigation if it has reason to believe that there has been a cartel infringement.

Pre-investigation

At this stage, SAMR or PMRD will conduct an external investigation to understand the background and verify the evidence obtained to determine whether to formally initiate the antitrust investigation. SAMR or PMRD may issue a Notice of Appointment for an Interview to the target by specifying the time, place, topics and relevant requirements for the interview. Usually, the case handler will produce an interview record for each interview. PMRD may communicate with SAMR before initiating the investigation.

Initiation of the investigation

Upon verification, a case shall be filed if: (1) there is *prima facie* evidence of AML violation; (2) an administrative penalty shall be imposed in accordance with the AML; (3) the case is under the jurisdiction of the authority; and (4) the case is within the statutory time limit for the imposition of an administrative penalty. If an antitrust investigation is decided to be filed, a Case Filing Examination and Approval Form shall be filled out, and at least two case handlers shall be appointed to investigate the case. PMRD shall, within seven working days after the initiation of an antitrust investigation, report the case to SAMR for its records. The Case Filing Examination and Approval Form cannot be released to the entity under investigation.

Upon verification, a case may not be filed in any of the following circumstances: (1) the illegal act is minor and is corrected in a timely manner, and no harmful consequence is caused; (2) it is a first-time violation with minor harmful consequences and is corrected in a timely manner; or (3) the parties concerned have adequate evidence to prove that they have no subjective fault.

Leniency applications

An undertaking under investigation may file a leniency application to SAMR or PMRD. SAMR or PMRD shall decide whether to give a mitigated penalty or exempt the undertaking from a penalty by considering factors including the time sequence of the voluntary reporting by the undertaking, the degree of importance of the evidence provided, and the relevant information on the conclusion or implementation of the monopoly agreement concerned.

Fact finding and dawn raids

SAMR and PMRD have broad investigative powers and may take the following measures during the fact-finding stage:

1. Dawn raid:
   After the initiation of the investigation, SAMR and PMRD may carry out a dawn raid on the place of business of the undertaking under investigation by conducting an on-site inspection to collect and fix evidence, conducting interrogations, and requesting the undertaking under

investigation to provide documents. In practice, the team leader of the dawn raid will show the undertaking under investigation a Notice of Antitrust Investigation, which states the undertaking under investigation, the starting date of the dawn raid, the leader of the investigation team, the team members, the obligation of cooperation, and the contact person. If a dawn raid is carried out in the venue of a third party, a Notice of Assistant in the Antitrust Investigation will be presented to the target by stating the target, the obligation of cooperation and the contact person.

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

2. Preserve electronic data:
   The case handlers shall produce a record after the collection of the electronic data by stating the time, place, object, producer, production method and process of the electronic evidence. The undertaking under investigation, witness, producer and case handler shall co-sign the record after the production.
3. Request for information ("**RFI**"):
   SAMR and PMRD could issue an RFI to collect certificates, agreements, accounts, correspondence, computer data and other documents belonging to the undertaking, interested parties, and other relevant entities and individuals. The RFI will specify the requested documents or information and the date of submission.
4. Check bank account:
   SAMR and PMRD have the authority to check the undertaking's bank account by identifying the undertaking under investigation and the period during which the bank account information is sought.

   The dawn raid could last for a few days or a week. The fact-finding process may last for several months, even years, and the scope of the investigation may be upstream, downstream or involve competitors of the undertaking under investigation.

Decisions on the cancellation, suspension, resumption or termination of the investigation

The investigation can be cancelled if no violation can be found. The investigation can be suspended if the undertaking which submits an application agrees to undertake certain specific measures that will lead to the elimination of the effect of the suspicious practices within a time limit designated by SAMR or PMRD. If such measures are well implemented in the agreed period of time, SAMR or PMRD may terminate the investigation. The investigation could be resumed if the measures are not implemented as promised.

Expert argumentation meeting

There is an Expert Committee under the AMC. Experts in the Expert Committee can be called on by SAMR to attend an expert argumentation meeting to give an expert opinion on the findings and preliminary decisions of SAMR. There are experts working for PMRD on certain cases to provide expert reports and analysis in order to back up the findings of PMRD.

Examination by the Department of Legal Affairs

When the investigation is completed, the case handler shall draft an investigation report and submit the report along with the case materials to the Department of Legal Affairs for examination. The Department of Legal Affairs will review whether:

1. there is jurisdiction;
2. the basic information of the parties concerned is clear;
3. the facts of the case are clear and the evidence is adequate;
4. the nature of the antitrust conduct is correctly determined;
5. the application of law is correct; and
6. the procedures are legitimate and the investigation is properly handled.

The Department of Legal Affairs may agree with the report, propose to correct it or to make a supplementary investigation, or issue other opinions/suggestions.

Oral notice for the finding of the case

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

Prior notice for administrative penalties

After communication between SAMR or PMRD and the undertaking under investigation, the authority will issue the Prior Notice for the Administrative Penalty. This is a notice in written form stating the facts, the violation found, the fine base and the rate of fine. It will state the right for the undertaking under investigation to make a statement, argument or apply for a hearing. The undertaking under investigation may challenge the legal finding, submit counterevidence, and calculate the fine base and the rate of fine to reduce the penalty.

Hearing

The undertaking under investigation has the right to request a hearing. Such request must be made within three working days from the date when the Prior Notice for the Administrative Penalty is received. There is no charge for the hearing. Hearings are organised by the legislative affairs offices of SAMR or PMRD. The case handler, the undertaking under investigation and the agent thereof will participate in the hearing. Third parties, witnesses, translators, and experts may also be permitted to join the hearing. A hearing shall proceed as follows:

1. the case handler provides the facts and evidence of the illegal acts committed by the undertaking under investigation, the advice on the imposition of an administrative penalty and the basis thereof;
2. the undertaking under investigation makes statements and presents its defence;
3. the third party makes statements (if applicable);
4. cross-examination and debate; and
5. the host consults the final opinions of the parties in the order of the third party, the case handler and the undertaking under investigation.

The undertaking under investigation may present evidence on the spot to prove its claim, and the host shall consider the evidence. The undertaking may seek a non-confidential version of the investigation files on the spot or prior to the hearing in order to conduct a cross-examination.

After the end of a hearing, the host shall write a hearing report stating its handling opinions and suggestions, and send the report to the case-handling agency together with the hearing records.

Final decision on the administrative penalty

After the undertaking under investigation provides the statement, argument and/or attends the hearing, SAMR or PMRD will consider the statement and argument provided by the undertaking under investigation. If there are factors that have not

been considered, or some factors have been considered but can be given a higher weight, SAMR or PMRD can lower the fine rate based on the statement and argument of the undertaking under investigation. If the facts of cartel act are not tenable, no administrative penalty shall be imposed. The wording of the decision could be negotiated if it contains a trade secret of the undertaking under investigation.

Publication

A decision on the administrative penalty, or a decision on the suspension or termination of the investigation, will be released to the public through SAMR's website: http://www.samr.gov.cn/fldj/tzgg/xzcf/.

Administrative review or administrative lawsuit

If the undertaking under investigation does not accept a decision made by SAMR or PMRD, it may apply for an administrative review or file an administrative lawsuit.

There is no statutory timeline for a cartel investigation. The duration of an antitrust investigation depends on the complexity of the case, the authority's internal priorities, the cooperation of the undertakings under investigation, etc.

1.5 Are there any sector-specific offences or exemptions?

The AML does not identify any sector-specific offences. Certain guidelines may provide more detailed rules regarding cartel offences; however, they are all within the scope of the AML. Exemptions, however, are available for certain sectors.

Agricultural

Article 56 of the AML provides that the AML shall not apply to cooperative or collaborative acts between agricultural producers and rural economic organisations in business activities such as the manufacture, processing, sale, transportation and storage, etc. of agricultural products. This article is only applicable to agricultural producers and rural economic organisations; the industrialised undertakings in the agricultural sector cannot enjoy this exemption. In addition, this article is only applicable to cartel activities; abusive conduct and resale price maintenance ("**RPM**") could still be caught under the AML. For instance, if farmers in several villages raise the prices of crops, meat, milk or eggs at the same time, such price fixing conduct is exempted under Article 56 of the AML.

- "Agricultural producers" refers to undertakings and individuals operating agricultural crop cultivation, forestry, animal husbandry, and fisheries in agricultural land and separate facilities.
- The rural economic organisation is the main body of rural collective asset management and is a special economic organisation. At this stage, the local government authorities above the county level can be responsible for issuing organisation registration certificates to the rural economic organisations, and the rural economic organisations can then go through the relevant procedures of bank account opening with the relevant departments in order to carry out business operation and management.

API

The *Guide to the Pricing Behavior of Undertakings Dealing in Drugs in Short Supply and Active Pharmaceutical Ingredients* ("**API Guideline**") issued in November 2017 regulates the cartel activities related to active pharmaceutical ingredients ("**API**"). According to the API Guideline, the conclusion of any of the following horizontal monopolistic price agreements by competing undertakings of API is prohibited under the AML:

1. fixing the price level or the range of price;
2. fixing the tender price;
3. fixing agency fees, distribution fees, market discounts and other expenses influencing the price;
4. fixing the benchmark price, profit rate, gross profit rate, etc. for transactions with any third party;
5. agreeing upon the standard formula of calculation of the price of API;
6. fixing the price by limiting the output or sales volume;
7. fixing the price by dividing the market;
8. fixing the price by restricting the purchase of new technology/equipment or the development of new technology/products;
9. fixing the price by boycotting transactions; and
10. fixing the price in any other disguised form.

Automobile

According to Article 5(1) of the *Antitrust Guidelines for the Automotive Industry* issued by the AMC in 2019, "certain types of horizontal agreements, for instance, research & development agreement, agreement on specialisation, technology standardization agreement, joint production agreement, and joint purchase agreement, would generally improve the efficiency and promote competition and are conducive to increasing the benefits of the consumers. For instance, the horizontal agreements during the R&D and production processes of the new energy automobile may enable the undertakings to share the investment risks, improve the efficiency and promote social public interests. Hence, undertakings in automotive industry that reach the aforesaid horizontal agreements that can improve efficiency and promote competition may prove that the provisions of Article 13 of the AML do not apply to their agreements pursuant to Article 15 of the AML".

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Cartel conduct outside China is covered by the AML. According to Article 2 of the AML, the AML applies to monopolistic conduct outside China, provided such conduct eliminates or restricts market competition in China.

SAMR can carry out an antitrust investigation against a cartel outside of China that may have an effect in China. In general, SAMR shall assess whether the cartel may have any anti-competitive effect in China before the initiation of an antitrust investigation in order to establish the jurisdiction. In practice, however, SAMR may determine whether the cartel may have any anti-competitive effect in China after the initiation of the investigation.

PMRDs take charge of an antitrust investigation regarding a cartel within their administrative region. If the anti-competitive effect in China only affects one province, autonomous region or centrally-administered municipality, the PMRD in that region may have jurisdiction over cartel conduct outside China.

In order to establish that conduct outside China has an anti-competitive effect in China: (1) the product under investigation must be imported into China; and (2) there must be a reasonable causal *nexus* between the alleged conduct and the anti-competitive effect in China.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Table of General Investigatory Powers

Investigatory power	Civil/ administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	Yes	N/A
Carry out an unannounced search of business premises	Yes	N/A
Carry out an unannounced search of residential premises	Yes*	N/A
Right to "image" computer hard drives using forensic IT tools	Yes	N/A
Right to retain original documents	Yes	N/A
Right to require an explanation of documents or information supplied	Yes	N/A
Right to secure premises over-night (e.g. by seal)	Yes	N/A

* An unannounced search of residential premises shall be carried out with the assistance of the public security department.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

1. Pre-notice of the inspection is not required

The AML does not place any restrictions on the time and the duration of the inspections for SAMR or PMRD to inspect the business premises, nor does it require SAMR or PMRD to notify the undertakings under investigation in advance before conducting the inspections. In practice, if notified in advance, some undertakings under investigation may destroy, alter or conceal evidence, or even collude with each other against anti-trust investigations, so that key evidence may not be obtained, and the purpose of the antitrust investigations cannot be achieved. It should be noted that although SAMR or PMRD can enter the business premises for the inspection without pre-notice, it still needs to inform the target of the authority of the antitrust enforcement agency and the rights of the under-taking under investigation when entering for the inspection.

2. Privacy rights

(1) Residential premises

The *Constitution*, the *Criminal Law*, and the *Criminal Procedure Law* stipulate that the homes of citizens of the People's Republic of China are inviolable, and the unlawful search of, or intrusion into, a citizen's home is prohibited. Entering a citizen's home to conduct a search must meet the purpose of collecting criminal evidence and must normally be conducted by the public security departments and the People's Procuratorates. Other agencies have no right to enter a citizen's home to conduct a search without authorisation by the law.

If a citizen's home is used as business premises, the citizen's home falls into the concept of business premises, and SAMR or PMRD can enter such "business premises" to conduct an inspection. When entering into the premises for the inspection, SAMR or PMRD should limit the scope of the inspection to the business premises of the undertaking under investigation, and should not expand to the civic life area.

(2) Mobile phone

With the rise of the internet and the continuation of the pandemic, remote working has become increasingly normal and essential. A mobile phone is no longer a personal belonging but an office supply. It enables employees to work anytime and anywhere without being restricted by time and location, making work easier and improving work efficiency.

WeChat as an instant messaging application commonly used in China has played a function similar to employee email. Many employees' WeChat accounts do not distinguish between personal use and work use, and they contain a great deal of work-related communication content. In all dawn raids, WeChat chat records are the most important breakthrough to nail down a cartel. Although the relevant personnel under interview can voice their opinions to SAMR or PMRD officials claiming that the mobile phone is a private mobile phone, if officials still request to check WeChat and search work-related content, he/she should cooperate and permit them to view it.

(3) Desktop and laptop

SAMR or PMRD's inspection power is not limited to obtaining relevant documents, materials and information via observation. SAMR or PMRD could search desktops and laptops with the cooperation of the undertakings under investigation. It has the right to image desktop or laptop hard drives using forensic IT tools. Since the desktops and laptops may contain both working information and personal information, the case handlers shall limit their search within the scope of the antitrust investigation.

(4) The whole-process record of dawn raids

According to Article 47 of the *Administrative Penalty Law* of 2021, administrative organs shall record the whole process of the initiation, investigation and evidence collection, examination, decision, service and execution of administrative penalty in such forms as text, audio and video, etc. in accordance with law, and keep such record for archival purposes. This article permits SAMR or PMRD to record the process of a dawn raid in real time through recording equipment such as cameras, tape recorders, video cameras, law enforcement recorders and video surveillance. However, recording equipment must meet the standards, be reasonably set up and have obvious signs.

3. Search by force

(1) Searching locked rooms or cabinets

The AML does not authorise SAMR or PMRD to enter business premises by force. SAMR or PMRD cannot break locked doors or locked filing cabinets. If SAMR or PMRD uses force to enter the business premises for the inspection, it may interfere with the property rights and privacy rights of the undertaking under investigation.

If the undertakings under investigation delay SAMR or PMRD's entry into the business premises for various reasons, including in order to conceal, destroy and transfer evidence, and to obtain time for collusion, SAMR or PMRD may request the public security departments to cooperate with the investigation and to use force to enter the business premises for the inspection, in order to quickly collect the illegal evidence of the undertakings under investigation and achieve the goal of the antitrust investigation.

(2) Search a person

The AML does not authorise SAMR or PMRD to search a person. However, in order to collect criminal evidence and track down an offender, investigators of public security departments may search the person's belongings. When a search is to be conducted, a search warrant must be produced to the person who is to be searched. Searches of women shall be conducted by female officers. SAMR or PMRD does not have such power to search.

4. Property rights

According to the AML and the *Administrative Coercion Law*:

1. The scope of seizure and detainment is limited to the relevant evidence, and so irrelevant documents and materials cannot be seized or detained.
2. It is not permitted to seize or detain daily necessities of the citizens and dependants thereof.
3. The premises, facilities or other properties of the party concerned which have been seized by a State organ in accordance with the law may not be seized again.
4. SAMR or PMRD implementing the seizure or detainment shall prepare and deliver the decision of seizure or detainment and checklist on the spot. The decision shall list the reasons, basis and duration of the seizure or detainment, the name and quantity of premises, facilities or other properties which have been seized or detained, and the remedy. The list of seized or detained properties shall be duplicated, and the party concerned and SAMR or PMRD shall each keep one copy.
5. SAMR or PMRD is obliged to properly keep the seized or detained places, facilities or properties.

5. Confidentiality

The undertaking under investigation has no right to refuse SAMR or PMRD's accessing and copying of information on the grounds that it contains confidential information or it has not been disclosed. If the copied documents and materials contain confidential information, officials can be required to mark this part of the documents and materials and make internal records by themselves.

When the original documents containing confidential information are seized or detained, the documents can be numbered page by page, and the documents can be checked when they are returned to confirm that no pages have been lost.

6. Bank accounts

SAMR or PMRD can only check the bank account of the undertaking under investigation. It cannot check the bank accounts of affiliated companies, interested parties or any other third parties.

The information that a financial institution provides in the inquiry of SAMR or PMRD should be limited to the deposit information, including the account of the undertaking under investigation, the deposit situation and the accounting vouchers, account books and statements related to the deposit. SAMR or PMRD may take a note, copy, or take photos as needed, but it may not take the originals.

2.3 Are there general surveillance powers (e.g. bugging)?

1. No surveillance powers

No laws or regulations provide SAMR or PMRD with general surveillance powers. On the contrary, the relevant laws and regulations restrict the surveillance powers.

According to Articles 1032 and 1033 of the *Civil Code of China*, a natural person shall enjoy the right to privacy. No organisation or individual may infringe upon the right to privacy of any other person by spying, invading and/or harassing, disclosing or publishing relevant information or by any other means. Unless otherwise prescribed by the law or specifically agreed by the rights holders, no organisation or individual may carry out any of the following acts: entering, taking pictures of or surveying others' houses or hotel rooms or other private spaces; or taking pictures of, surveying, wiretapping, or making public the private activities of others.

In addition, the *Provisions of the Supreme People's Court on Several Issues of Evidence in Administrative Litigation* provides that the evidence obtained from secret photography, secret recording and wiretapping, being an infringement of the legitimate rights and interests of others, cannot be used as the basis for the determination.

2. Secret recording taken by a whistle-blower

Before the initiation of an antitrust investigation, a whistle-blower may collect evidence secretly by a secret recording under abnormal circumstances. Provided it does not infringe on the legitimate rights and interests of others, it will be considered by SAMR or PMRD, and may be used as the foundation to initiate an antitrust investigation.

3. Audio-visual materials from a public camera

The antitrust law enforcement agency once collected the surveillance video of a hotel. The video shows a group of managers from competing entities enter the hotel's meeting room at the same time and walk out of the meeting room two hours later. Combined with the reimbursement invoices for the managers of these entities, it was proved that these competitors had held a meeting at the same time and in the same place. The surveillance video of the hotel was the key evidence in that case. The public camera should be reasonably set up, and the location of the camera should be in a public area.

2.4 Are there any other significant powers of investigation?

Common behaviours obstructing the antitrust investigations include:

1. Disrespecting the law enforcement personnel conducting the dawn raid: insulting; blocking; confining; and/or threatening law enforcement personnel of SAMR or PMRD during the dawn raid.
2. Acts of obstructing evidence collection: unplugging a USB flash drive, computer network cable and/or power cord for evidence collection; tearing or burning paper materials; deleting electronic materials; falsely claiming that the data is lost; and removing the hard disk drive storing on-site video data.
3. Acts of not actively cooperating: refusing to sign for service documents; failing to provide information as required; delaying the investigation; and leaving the investigation site without reason.

Consequences of obstructing antitrust investigations:

1. Penalties for the obstruction of anti-monopoly investigations: according to Article 52 of the AML, individuals may be fined less than RMB 100,000, and undertakings may be fined less than RMB 1 million.
2. Increase of the penalties for monopolistic behaviour: the friction or conflict with law enforcement officials during the dawn raid is not conducive to subsequent active

communication with SAMR or PMRD on the investigated case, and may even be regarded as evidence to aggravate penalties.

3. Penalties under the Administrative Penalties for Public Security: obstructing a staff member of a government department from performing his duties according to law, will lead to the individual being imposed with administrative penalties such as warnings, fines, and even public security detention for less than 10 days.
4. Criminal liabilities: serious obstruction of investigations may be suspected of crimes of disrupting official duties, resulting in criminal liabilities.
5. It may severely damage corporate goodwill and investor confidence and put tremendous pressure on corporate public relations and crisis management.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

1. PMRD officials from all over the country may join the dawn raid

Because cartels may involve several undertakings under investigation, dawn raids will be carried out simultaneously in different places by multiple teams. In addition, for some large-scale companies, it is necessary to set up multiple groups to carry out a dawn raid within the company. Therefore, the team size of each dawn raid ranges from five to 10 people to more than 200 officials.

The officials involved in the dawn raid are typically all law enforcement officials of SAMR or PMRDs, thus it is very common to find officials of PMRD carrying out dawn raids in other provinces. In at least one dawn raid in 2020, hundreds of officials of SAMR or PMRD wore the same uniforms, making it difficult to distinguish SAMR or PMRD officials from others. It is unclear whether this can be formed as a convention in future dawn raids. In addition, in order to facilitate electronic evidence collection, the team will be equipped with IT personnel to image computer hard drives using forensic IT tools. In order to avoid the occurrence of violence obstructing the investigation and to protect the safety of law enforcement officials, in some investigations, the public security department will be asked to assist in participating in the dawn raid.

2. Right to counsel

Law enforcement officers have no statutory obligation to wait for internal legal affairs or external lawyers to arrive before starting a dawn raid. Undertakings can make a request to law enforcement officers through friendly negotiation, hoping that they can wait temporarily, if legal counsel or lawyers can indeed arrive at the company within a reasonable time. However, if law enforcement officials insist on starting the dawn raid immediately, the right to counsel is not a reason to block the investigation.

According to Article 29 of the *Provisions on Administrative Penalty Procedures for Market Regulation* of 2021, the interview of individuals of the undertaking under investigation shall be conducted separately. This may mean that the individuals being interviewed cannot require a lawyer to be present when being questioned.

2.6 Is in-house legal advice protected by the rules of privilege?

The concept of "attorney-client privilege" does not exist under the law of China. In other words, confidential communications between an attorney and a client are not privileged.

In addition, the law of China does not protect any legal document or correspondence that is marked "confidential and privileged" from the inspection of SAMR or PMRD, meaning attorneys and their clients are not exempt from disclosing information that would otherwise be protected by attorney-client privilege outside China.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

1. Internal pre-approval

According to the AML, where one of the investigatory measures (inspection, interrogation, reviewing and copying documents, seizing or detaining evidence, checking a bank account) is to be taken, a report must be filed with the person in charge of the anti-monopoly law enforcement authorities, and approval must be granted.

According to the *Provisions on Administrative Penalty Procedures for Market Regulation*, SAMR or PMRD may take or lift administrative coercive measures such as seizure and detention with the approval of the person in charge of SAMR or PMRD. If the situation is urgent and the administrative coercive measures need to be taken on the spot, the case handler shall report the same to the person in charge of SAMR or PMRD within 24 hours and supplement the approval procedures. If the person in charge of SAMR or PMRD believes that administrative coercive measures should not have been taken, such measures shall be lifted immediately.

2. Challenge system

When imposing administrative penalties, SAMR or PMRD shall implement the challenge system. Where any person participating in the handling of a case has a direct interest in the case or has any other relationship which may affect the impartiality of the law enforcement, such person shall recuse himself/herself from the case. Before a recusal decision is made, the investigation into the case shall not be suspended.

3. Show valid law enforcement credentials

No fewer than two law enforcement personnel shall be dispatched in an antitrust investigation, and they shall show valid law enforcement credentials prior to the inspection, interrogation, etc.

4. Keep commercial secrets and personal information confidential

SAMR or PMRD and the relevant personnel participating in the handling of an antitrust case shall keep confidential the State secrets, trade secrets and personal privacy that they have learned in the process of imposing administrative penalties in accordance with the law.

5. The seizure or detention shall not exceed 30 days

The period of seizure or detention may not exceed 30 days; if the circumstances are complicated, the period may be extended with the approval of the principal of the market regulatory authority, provided that the extension period does not exceed 30 days, except as otherwise provided for by laws and administrative regulations.

6. Legal review

The case handers shall submit the final report of investigation together with the case files to the review body of SAMR or PMRD for review. Review is divided into legal review and case review. No case handler may serve as a reviewer.

For cartel cases, before the principal of SAMR or PMRD makes a decision on administrative penalties, the legal review shall be conducted by the officer engaging in a legal review of decisions on administrative penalty. No decision shall be made if the case fails to undergo or pass the legal review. The legal affairs office of SAMR or PMRD is responsible for conducting legal review. The official who engages in the legal review of decisions on administrative penalty for the first time shall pass the national unified legal professional qualification examination and obtain the legal professional qualification.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

1. Administrative fines imposed on entities and individuals for the obstruction of investigations

As a general rule of the *Administrative Penalty Law*, individuals or entities shall cooperate in an investigation and shall not obstruct the investigation or inspection. If the undertaking under investigation obstructs the antitrust investigation by refusing to provide information or materials, submitting fraudulent information or materials, or concealing, destroying, or diverting relevant evidence, SAMR or PMRD may order rectification and impose a fine of:

- no more than RMB 20,000 on individuals, or RMB 20,000 to RMB 100,000 if the case is serious; and
- no more than RMB 200,000 on entities, or RMB 200,000 to RMB 1 million if the case is serious.

In June 2019, SAMR issued decisions to penalise two calcium gluconate API distributors, Shandong Kanghui Medicine ("**Kanghui**") and Weifang Puyunhui Pharmaceutical ("**Puyunhui**"), as well as 14 individuals for obstructing antitrust investigations by refusing to provide materials or information, and concealing, destroying and relocating evidence during the antitrust investigation.

During the inspection of Kanghui, the SAMR officials uncovered a great deal of evidential materials at Kanghui's document storage room, including the relevant purchase and sales contracts, financial bills and shipment record slips. Kanghui's general manager organised and directed more than 30 individuals including company employees and some non-staff persons to seize the materials. Ignoring the objection of the officials, these people forcibly concealed and removed the materials. Some officials were injured and the investigation was hindered. Moreover, according to the decision, Kanghui also summoned a group of about 20 unidentified persons to block the officials at a meeting room. These people also protested outside the building, making threats to the officials.

During the inspection of Puyunhui, an employee from the company's business department asked his colleague via WeChat to remove and hide a USB flash drive. The officials printed out WeChat chat records between the relevant persons of the company and intended to use them as evidence for the company's suspected monopolistic conduct. In response, the general manager publicly tore up the copies of printed records and other evidential documents. The conduct of destroying evidence continued even after a warning by the officials.

SAMR held that the parties violated Article 42 of the AML, and imposed fines of RMB 2.53 million in accordance with Article 52 of the AML. Kanghui and Puyunhui were each fined RMB 1 million, and the general managers of the two companies were each fined RMB 100,000.

These maximum fines demonstrate that SAMR has become stricter regarding the obstruction of investigations.

2. Criminal liability for the obstruction of investigations

The obstruction of antitrust investigations could be caught under the *Criminal Law*. According to Article 277 of the *Criminal Law*, whoever, by means of violence or threat, obstructs a functionary of a State organ from carrying out its functions according to the law shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, or public surveillance, or be fined.

3. Administrative detention for the obstruction of investigations

The obstruction of antitrust investigations may also be penalised by administrative detention. Article 50 of the *Law on Penalties for the Violation of Public Security Administration* provides that a person who obstructs a staff member of a government department from performing his duties in accordance with the law shall be given a warning or be fined not more than RMB 200; if the circumstances are serious, he shall be detained for not less than five days but not more than 10 days, and may, in addition, be fined not more than RMB 500.

4. Fine rate increased by 1–2% for the obstruction of investigations

The fine against cartels under the AML is 1–10% of the sales amount of the preceding year. In practice, if there are no separate fines against entities or individuals for the obstruction of the antitrust investigation, the refusal to provide information or materials, the submission of fraudulent information or materials, or the concealment, destruction, or diverting of relevant evidence may lead to the fine rate being increased by 1–2%.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

According to Article 46 of the AML, where an undertaking has violated the provisions of the AML by entering into and implementing a monopoly agreement, SAMR or PMRD shall order the undertaking to:

1. stop the illegal act;
2. confiscate the illegal earnings; and
3. pay a fine of 1–10% of the sales volume of the preceding year.

Where a monopoly agreement has been entered into but has not been implemented, a fine of not more than RMB 500,000 may be imposed.

Where an industry association has violated the provisions of the AML in organising the undertakings in the industry to enter into a monopoly agreement, SAMR or PMRD may impose a fine of not more than RMB 500,000; where the case is serious, the registration and administrative authorities for social organisations may de-register the industry association pursuant to the law.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

SAMR or PMRD has no authority to sanction an individual in an antitrust investigation unless: (1) he himself is an undertaking; or (2) he obstructs the investigation as indicated in question 2.8 above.

There is no criminal liability against monopoly conduct in China. An individual cannot be sentenced to imprisonment for his cartel acts.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

With regards to the penalty against cartels, SAMR and PMRD have broad discretion in determining the fines by taking into account the nature, degree, and duration of the violation.

Financial hardship or the inability to pay is not an explicit factor under the AML for SAMR or PMRD to consider when determining the fine. In practice, SAMR or PMRD may reduce the overall fine level for all cartel participants in an antitrust investigation, if fines may remove several undertakings from the market and cause an increase of the unemployment rate and instability in the local community.

SAMR and PMRD have the authority to check the bank account and review the books, and can make a judgment on whether the undertaking under investigation may go to bankruptcy or its economic viability will be jeopardised if a huge fine were imposed. The mere fact that the imposition of a fine might increase the risk of insolvency of an undertaking is insufficient to prevent or reduce the fine.

In China, many cartel arrangements are not aimed at obtaining monopoly profit, but at surviving in the competitive market by preventing selling below cost. Some undertakings will go to bankruptcy without a cartel agreement, as bankruptcy is a natural result of price competition. In such situation, SAMR and PMRD may impose fines against such undertakings without considering their financial hardship or inability to pay, because the financial hardship is inevitable with or without the penalty.

3.4 What are the applicable limitation periods?

According to the *Administrative Penalty Law*, where an illegal act is not "discovered" within two years of its commission, an administrative penalty shall no longer be imposed, except as otherwise prescribed by law. The statute of limitation shall be counted from the date when the illegal act is committed. If the act is of a continual or continuous status, it shall be counted from the date when the act is terminated.

1. The date of the discovery of an illegal act

In practice, if the public security departments, the People's Procuratorates, or the People's Courts initiate an investigation, initiate an evidence collection proceeding, or file a case, these can be considered the "discovery" of an illegal act. In addition, if a whistle-blower files a report and the content is found to be true, the time of the report can be considered the "discovery" of an illegal act.

2. Continual or continuous status of an illegal act

For a cartel, even if the negotiation and conclusion of the cartel agreement have been stopped, if the agreement is still in the process of implementation, the cartel will be considered to have a continual or continuous status; on this basis, it is difficult for the undertaking implementing the cartel agreement to allege that the statute of limitation expired and to avoid administrative penalties.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There are no administrative or criminal penalties imposed on employees under the AML, unless they obstruct the investigation. If it is the latter, the company could pay the legal costs and/or financial penalties imposed on that employee, whether former or current, as no rules or regulations prevent the company from doing so.

In practice, the company will not pay the fines to the authority directly on behalf of its employees. The employees will pay the fines from his/her personal account and the company will indemnify such losses by paying the employees for the same amount.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

According to the *Labour Law* and *Labour Contract Law*, there are three situations in which the employees shall bear the liability for compensation to the employer: (1) the employee rescinds a labour contract in violation of the law; (2) the employee has violated the provisions of a labour contract on the confidentiality obligation; or (3) the employee has violated the non-competition restrictive covenant, thus causing the employer to incur economic losses. There is no other legal basis for the employer to seek compensation from an employee for the loss as a result of an AML violation which is attributable to such employee.

However, if the employee signed a commitment to the company, which (1) lists the prohibited cartel arrangements, (2) identifies the possible fines imposed against the company, and (3) states that he/she would be held liable for any loss caused by his/her cartel activities, the company may have a chance to hold the undersigned employee liable for the loss which he/she caused to the company in the follow-up civil lawsuit.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

The undertaking conducting the cartel shall be subject to the penalty. If the parent company is not involved in the cartel, the parent company will not be fined. A parent company cannot be held liable simply because it holds the majority of the shares of, or is capable of exerting a decisive influence on, the subsidiary.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Article 46 of the AML provides the legal basis for a leniency regime, which gives SAMR or PMRD discretion to mitigate the penalty or grant immunity for undertakings participating in a cartel if they: (1) voluntarily report the relevant facts; and (2) provide material evidence.

The Leniency Guidelines published in June 2020 provide more detailed rules to regulate the leniency programme. The leniency application shall be accompanied by two groups of documents: (1) the report; and (2) material evidence.

The report

The report shall include the following:

1. basic information of the participants of the cartel agreement (including but not limited to name, address, contact information and participating representatives, etc.);
2. the background of the cartel agreement (including but not limited to the time, place, content and specific participants of the agreement);

3. the main content of the cartel agreement (including but not limited to the products or services involved, price, quantity, etc.) and the undertakings' conclusion and implementation of the cartel agreement;
4. the geographic area and market scale affected by the cartel agreement;
5. the duration of the implementation of the cartel agreement;
6. explanation of the material evidence;
7. whether the undertaking has applied for leniency from other overseas law enforcement agencies; and
8. other relevant documents and materials.

Material evidence

Material evidence refers to evidence which plays a critical role in the launch of an antitrust investigation or the determination of a monopoly agreement by SAMR or PMRD, including:

For the first applicant ("**first-in**"):

1. where SAMR or PMRD has no clues or evidence of the case, evidence sufficient for it to launch an antitrust investigation; or
2. after SAMR or PMRD has launched the antitrust investigation, evidence which is not yet in the possession of SAMR or PMRD and can be used to determine a monopoly agreement under the AML.

For the second and following applicants:

1. evidence that has greater proving power or supplementary proving value in terms of the conclusion and implementation of the cartel agreement;
2. evidence that has supplementary proving value to prove: (1) the content of the cartel agreement; (2) the time of the conclusion and implementation of the cartel agreement; (3) the scope of the products or services involved; and (4) the participating members, etc.; or
3. other evidence that can prove the cartel agreement or fix the probative power of the evidence that proves the cartel agreement.

Factors to be considered

SAMR or PMRD shall decide whether to give a mitigated penalty or immunity to the undertaking based on the following:

1. the chronological order of the voluntary report by the undertaking;
2. the extent and significance of the material evidence provided;
3. the suspected cartel arrangements must be stopped immediately after the application for leniency, unless SAMR or PMRD requires the undertaking to continue to carry out the above-mentioned cartel acts in order to ensure the smooth progress of the investigation. If the undertaking has applied for leniency from an overseas law enforcement agency and is required to continue to perform the above-mentioned cartel acts, it shall report to SAMR or PMRD;
4. the undertaking must cooperate promptly, continuously, comprehensively and sincerely with the investigation of SAMR or PMRD;
5. the undertaking must properly preserve and provide evidence and information, and must not conceal, destroy or transfer evidence or provide false materials and information;
6. the application for leniency from SAMR or PMRD must not be disclosed without the consent of SAMR or PMRD; and
7. no other behaviours of the undertaking must affect the antitrust investigation.

Where an undertaking organises or coerces other undertakings to participate in the conclusion or implementation of a monopoly agreement, or prevents other undertakings from stopping the illegal act, SAMR or PMRD will not grant immunity, but may grant it corresponding mitigation.

The chronological order of the voluntary report by the undertaking

SAMR or PMRD ranks the sequence of the undertakings according to the chronological order in which they apply for leniency.

Undertakings participating in a cartel agreement can apply for leniency before SAMR or PMRD initiates the antitrust investigation. They can also apply for leniency after the initiation of the antitrust investigation but before the advanced notification of the administrative penalty.

If the undertaking fails to perform obligations 3 to 7 of the "factors to be considered" listed in the subsection above, the chronological order of such undertaking may be cancelled by SAMR or PMRD. In general, the subsequent undertaking in the chronological order can be supplemented in turn.

Immunity and mitigated rate

1. For the first-in applicant, SAMR or PMRD may grant immunity to such undertaking or mitigate the fine amount by not less than 80%.
2. For the second applicant, the fine amount may be mitigated by 30% to 50%.
3. For the third applicant, the fine amount may be mitigated by 20% to 30%.
4. For subsequent applicants, the fine amount can be mitigated by not more than 20%.

When determining the confiscation of illegal earnings, SAMR or PMRD may apply the same immunity and mitigated rate to deal with the illegal earnings.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The "marker" system is detailed in the Leniency Guidelines.

1. A written receipt issued by SAMR or PMRD to the first-in

For the first-in that applies for leniency by submitting the report on the cartel agreement and material evidence, SAMR or PMRD shall issue a written receipt to the applicant specifying the time of receipt and a list of materials. This written receipt is an official document to prove the chronological order of the leniency application.

The written receipt will not be issued to the first-in if the report submitted does not meet the requirements of the Leniency Guidelines.

2. Marker of the first-in

If the first-in submits a report that meets the requirements of the Leniency Guidelines, but temporarily cannot provide complete material evidence when it applies for leniency, SAMR or PMRD may register the date of the report and will issue a written receipt if the undertaking submits all necessary supplemental materials within the period specified by the authority. This registration is the "marker" and the written receipt issued by SAMR or PMRD will show the date on which it received the report.

If the undertaking fails to supplement the material evidence within the specified period (generally no longer than 30 days; however, this can be extended to 60 days under special circumstances), SAMR or PMRD will cancel its registration qualifications, and the first-in will lose its "marker".

After the first-in is disqualified from registration, it can still supplement the material evidence and apply for immunity if there are no follow-up leniency applicants. If other undertakings have

already applied for leniency, the first-in whose registration qualification has been disqualified may apply for mitigation.

3. A written receipt issued by SAMR or PMRD to undertakings after the first-in

An undertaking which applies for leniency by submitting the report on the cartel agreement and material evidence after the first-in may apply to SAMR or PMRD for mitigation. SAMR or PMRD issues a written receipt to the undertaking specifying the time of receipt and a list of materials.

There is no "marker" system for undertakings after the first-in.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

1. Oral communication with SAMR or PMRD before the leniency application

Before applying for leniency, the undertaking may communicate with SAMR or PMRD anonymously or using its real name, either orally or in writing.

2. Oral submission

In practice, SAMR or PMRD permits an undertaking to orally submit the leniency application if there are disclosure risks in the context of civil litigation. The oral submission will be conducted at the office of SAMR or PMRD. SAMR or PMRD officials will make written records of the oral submission, which shall be verified and signed by the representatives of the undertaking.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

1. The identity of the leniency applicants will be treated as confidential until the issuance of the penalty decision

According to the Leniency Guidelines, if SAMR or PMRD grants immunity or mitigation to an undertaking under investigation, it should mention the leniency applicant in the public announcement of the final decision and state the result and reason for granting such immunity or mitigation in the decision.

2. Documents or materials provided by leniency applicants will not be disclosed to any third party

As indicated in question 2.7 above, the law enforcement personnel shall keep commercial secrets and personal information confidential.

According to the Leniency Guidelines, the report, documents and other materials submitted by the undertaking in applying for leniency shall not be disclosed to the public without the consent of the undertaking, and no entity or individual has the right to access such information.

In practice, in order to attract more leniency applications, SAMR or PMRD will not disclose the documents or materials provided by the leniency applicants to any third party.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The leniency applicant shall cooperate fully on a continuous basis with SAMR or PMRD during the antitrust investigation until the final determination has been issued.

According to the Leniency Guidelines, if the undertaking fails to cooperate promptly, continuously, comprehensively and sincerely with the investigation of SAMR or PMRD, the applicant's chronological order may be cancelled by SAMR or PMRD.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is no "leniency plus" policy under the AML. In practice, if an undertaking in an antitrust investigation reports information about another antitrust violation occurring in a separate industry, it may not get additional benefits from SAMR or PMRD because the authority may not have enough enforcement resources to investigate the reported conduct in the other industry and cannot prove the truthfulness of such reports. However, if another antitrust investigation is initiated based on such report, the reporter will benefit from the leniency application in the separate antitrust investigation and may be eligible for benefits in the current antitrust investigation.

There is no "penalty plus" policy under the AML. However, if SAMR or PMRD discovers that the undertaking has failed to disclose information regarding the separate antitrust activity also investigated by the authority, it may seek greater penalties against such undertaking.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Since individuals do not bear liability under the AML, there is no leniency programme for individuals. If the employer already filed a leniency application to SAMR or PMRD, there is no need for individuals to report cartel conduct independently of their employer. If the employer does not make any leniency application, individuals cannot file a leniency application on behalf of their employer, unless authorisation is granted by the employer.

An individual/reporter can report cartel agreement in writing to SAMR or PMRD. A written report shall generally include:

1. the basic situation of the reporter;
2. the basic situation of the undertaking being reported against;
3. the relevant facts and evidence of the suspected cartel agreements; and
4. whether a report has been made to other administrative agencies or a lawsuit has been filed with the People's Court with regard to the same fact.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Plea bargaining

Since there is no criminal liability for monopolistic conduct in China, there are no plea bargaining procedures in China for cartels.

Settlement negotiation

AMC issued the *Guidelines on the Undertakings' Commitments in Antitrust Cases* in 2019 (published in June 2020), which provides the detailed rules for settlement negotiation.

During the process of investigation, SAMR or PMRD may accept commitments from undertakings in which the undertakings undertake or commit to eliminate the anti-competitive effect of the infringing conduct within a period approved by the authority.

1. The process of settlement negotiation:
   The commitment is, in general, a unilateral conduct made by the undertaking under investigation. However, since the content of the commitments should be evaluated and discussed with SAMR or PMRD before the decision of the suspension of the investigation, a settlement negotiation could be conducted. The process of the settlement negotiation is as follows:
   a. timely filing of the application to suspend the investigation, together with the initial commitments to establish the foundation of the settlement negotiation between the undertaking and SAMR or PMRD;
   b. the undertaking may negotiate with SAMR or PMRD regarding the content of the commitments and address all concerns of the authority; and
   c. if SAMR or PMRD, after considering the subjective attitude of the undertaking towards the cartel, the nature of the cartel, its duration, its consequences, its social impact, the measures committed by the undertaking and their expected effects, holds that (1) the facts are clear, and (2) the committed measures are sufficient to eliminate the effects caused by the cartel arrangements, SAMR or PMRD may decide to suspend the investigation based on the commitments.
2. The antitrust investigations that cannot be settled:
   Not all antitrust investigations can be settled with commitments. Price-fixing, restricting production or sales volume and dividing the market cannot be settled by commitments. In addition, if SAMR or PMRD has identified and verified the cartel agreement after the investigation, it will no longer accept applications for the suspension of the investigation proposed by the undertaking.
3. Public comments to the commitment measures:
   If the cartel arrangements have affected the legitimate rights and interests of another unspecified majority of undertakings, consumers, or the public interest, SAMR or PMRD may solicit public opinions on the commitment measures proposed by the undertaking under investigation. The period for soliciting opinions is generally no less than 30 days.
4. Resume the investigation:
   A settlement based on commitments is not the end of the investigation. The antitrust investigation can be terminated if the undertaking performs its commitments within a time limit designated by SAMR or PMRD. However, the antitrust investigation can be resumed, if: (1) the undertaking has failed to perform its commitments; (2) a major change has occurred which is relevant to the grounds for the settlement; or (3) the settlement was based on incomplete or inaccurate information provided by the undertaking.

7 Appeal Process

7.1 What is the appeal process?

If an undertaking under investigation is dissatisfied with the decision made by SAMR or PMRD about the cartel agreements, it may apply for an administrative review or file an administrative lawsuit against such decision.

Challenging decisions made by PMRD

1. File an administrative lawsuit:
   The undertaking can bring an administrative lawsuit directly to the Basic People's Court (or Intermediate People's Court) where PMRD is located within six months from the date when it knows or should have known the decision issued by PMRD.
2. Appeal:
   Where a litigant disagrees with a judgment of first instance of a People's Court, the litigant has the right to file an appeal with a higher-level People's Court within 15 days from the date of service of the judgment.
   If the People's Court of First Instance is the Basic People's Court, the court of appeal is the Intermediate People's Court where PMRD is located. If the People's Court of First Instance is the Intermediate People's Court, the court of appeal is the Higher People's Court where PMRD is located.
   Hainan Yutai Scientific Fish Feed Co. Ltd. ("**Yutai**") *v. Hainan Provincial Price Bureau* is a good example to demonstrate the whole process of appeal against a decision made by PMRD. In *Yutai v. Hainan Provincial Price Bureau*, Yutai was fined by the Hainan Provincial Price Bureau for violating Article 14 of the AML due to RPM between 2014 and 2015 ("**Relevant Agreements**"):
   - Yutai filed an administrative lawsuit against the decision of the Hainan Provincial Price Bureau with the Intermediate People's Court of Haikou Municipality. The Intermediate People's Court of Haikou Municipality overruled the decision of the Hainan Provincial Price Bureau.
   - The Hainan Price Bureau then appealed to the Higher People's Court of Hainan Province, which revoked the judgment of the Intermediate People's Court of Haikou Municipality.
   - Finally, Yutai applied to the Supreme People's Court of China ("**SPC**") for a retrial of the case. The SPC affirmed the judgment of the Higher People's Court of Hainan Province and held that vertical monopoly agreements shall be prohibited according to Article 14 of the AML unless the concerned undertakings can prove that the relevant agreements are exempted according to Article 15 of the AML.

Challenging decisions made by SAMR

1. File an administrative lawsuit:
   The undertaking can bring an administrative lawsuit directly to the First Intermediate People's Court of Beijing without going through the administrative review process.
   According to the *Provisions of the Beijing Higher People's Court on Relevant Issues Concerning the Jurisdiction Adjustment of the Intermediate People's Court of Beijing (Provisional)*, a first-instance administrative lawsuit involving the national ministry in the Xicheng District is tried by the First Intermediate People's Court of Beijing. Since SAMR is located in the Xicheng District, the First Intermediate People's Court of Beijing is the competent court to challenge decisions made by SAMR.
2. Appeal:
   From 2019, the Intellectual Property Tribunal of the SPC can bypass the Higher People's Courts and directly hear appeals against the rulings and judgments of first-instance civil and administrative monopoly cases made by the Intellectual Property Courts and the Intermediate People's Courts (the *Provisions on Several Issues Relating to the Intellectual Property Tribunal*). In practice, this rule is termed the "leapfrog" appeal.

Within 15 days of the first-instance judgment, any party who disagrees with the judgment regarding SAMR's decision may appeal to the SPC.

7.2 Does an appeal suspend a company's requirement to pay the fine?

If the party refuses to accept a decision on an administrative penalty and applies for administrative review or brings an administrative lawsuit, in general, the enforcement of the administrative penalty will not be suspended. However, the payment of the fine may be suspended under the following circumstances:

1. where suspension is deemed necessary by SAMR or PMRD; or
2. the execution of fines would cause irremediable losses, and the suspension of the execution would not harm the national interest and public interest.

7.3 Does the appeal process allow for the cross-examination of witnesses?

In an appeal, a bench of adjudicators will review the facts and the law of the case. A People's Court of Second Instance may permit witnesses to appear in court, testify and answer questions raised by judges and parties to an action.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Antitrust civil lawsuit against cartel conduct

The general procedures for civil damages actions for loss suffered as a result of cartel conduct are as follows:

1. Initiation of a monopoly civil dispute case:
   The proceedings of a monopoly civil dispute case are initiated after the complaint is accepted and filed by the People's Court. If the litigation criteria are not satisfied, the People's Court may issue a ruling on the non-acceptance of the lawsuit. If the plaintiff disagrees with the ruling, it may file an appeal.
2. Notice of complaint and defence:
   The People's Court sends a copy of the complaint to the defendant. The defendant can submit the defence within 15 days from the date of receipt of the complaint. The failure of a defendant to submit a defence does not affect the trial of the lawsuit by the People's Court. Where a litigant objects to the jurisdiction, the objection will be raised during the time frame for the submission of the defence.
3. Discovery:
   The period for the submission of evidence may be negotiated by the litigants and is subject to approval by the People's Court.
4. Hearing:
   The People's Court will notify the litigants and the other participants in the proceedings three days before the hearing.
5. Issuing judgment:
   Where a judgment is issued in court, the judgment will be served within 10 days; where a judgment is issued on a fixed date, the judgment will be served forthwith upon issuance of the judgment.
6. Appeal:
   Where a litigant disagrees with a judgment of first instance of a People's Court, the litigant has the right to file an appeal with a higher-level People's Court within 15 days from the date of service of the judgment.
   Upon receipt of the petition for appeal, the People's Court that originally heard the case will serve a copy of the petition for appeal to the counterparty litigant. The counterparty litigant can submit a defence within 15 days from the date of receipt of the petition. Non-submission of a defence by the counterparty litigant will not affect the trial of the petition by the People's Court.

Follow on actions *v.* stand-alone actions

In theory, the decision of SAMR or PMRD regarding cartel conduct is helpful in follow-on litigation. In practice, however, the People's Court will conduct a *de novo* review, even if the decision of SAMR or PMRD has been given.

8.2 Do your procedural rules allow for class-action or representative claims?

In the case of a joint action where there are multiple persons (more than 10) comprising one party to the lawsuit, the litigants may elect a representative to participate in the proceedings. The litigation actions of the representative will be binding upon the litigants that he or she represents; for changes of representative, waivers of the claims of the action or confirmation of the claims of the counterparty litigants or settlement, consent by the litigants that he or she represents is required.

If the litigants cannot elect a representative in a necessary joint action, they can participate by themselves, and in an ordinary joint action, they may file a separate lawsuit.

If multiple litigants cannot be confirmed at the time of the filing of the lawsuit, the relevant People's Court may issue a public announcement, stating the facts of the case and the claims, and notify the rights holders to register with the People's Court within a stipulated period.

8.3 What are the applicable limitation periods?

In general, the period of limitation of actions for claiming the damages arising from cartel conduct is three years, commencing from the date on which the plaintiff knows or should have known that its rights and interests were infringed.

If the plaintiff reports the alleged cartel conduct to SAMR or PMRD, the limitation period will be suspended from the date of the report. If SAMR or PMRD decides not to institute a case, to cancel the case or to terminate the investigation, the limitation period will recommence from the date on which the claimant knows or should have known of the non-filing or cancellation of the case or the termination of the investigation. Upon investigation, if SAMR or PMRD concludes that the conduct constitutes cartel conduct, the limitation period will recommence from the date on which the plaintiff knows or should have known that the decision of SAMR or PMRD became effective.

If cartel practice has been continuing for more than two years by the time the plaintiff files an action in court, and the defendant raises the limitation period in the defence, the damages will be calculated two years from the date on which the plaintiff files the lawsuit in the court.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Since, in an antitrust litigation, the plaintiff may only claim for the actual losses or damages, the defendant may argue that by passing on the overcharge to an indirect customer, the plaintiff suffers no losses or fewer losses.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Generally, the legal costs generated in a private antitrust litigation include a litigation fee and reasonable expenses to investigate the alleged conduct (e.g. attorneys' fees).

The litigation fee, which should be paid to the court, comprises the following three categories:

- case acceptance fee;
- application fee; and
- travel expenses, accommodation expenses, living expenses and subsidy for missed work incurred by the witnesses, authenticators, interpreters and adjusters for appearing before the People's Court on the date designated by the court.

The amount of the litigation fee depends on the monetary value of the claim, the number of issues applied and the complexity of the case. The plaintiff pays a case acceptance fee in advance when instituting a civil proceeding. The losing party is ordered to undertake all the legal costs. However, where each party succeeds on some matters and fails on others, the court may order that the litigation fee be shared or that each party bear its own costs.

At the plaintiff's request, the People's Court may include the reasonable expenses incurred by the plaintiff for market research and curbing the monopolistic practice in the damages.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Follow-on civil damages lawsuit

In *Junwei Tian v. Beijing Carrefour Shuangjing Store* ("**Carrefour**") *and Abbott Shanghai* ("**Abbott**"), the Beijing Higher People's Court found that the competition authority's decision alone was insufficient evidence that Abbott and Carrefour had allegedly concluded an anti-competitive agreement. It also concluded that the plaintiff had failed to adduce sufficient evidence to prove the existence of an illicit agreement by other means.

The decisions of the competition authority have so little effect on the People's Courts due to the following reasons:

- the decisions are not detailed enough to show the facts. In the *Junwei Tian* case, the competition authority's decision did not identify the distributors and retailers to whom the RPM clauses allegedly applied;
- the People's Courts cannot request the competition authority to release the evidence collected due to the confidentiality requirement under the AML; and
- the facts discovered in an antitrust litigation may not be the same as those identified by the competition authority. In the *Junwei Tian* case, the plaintiff purchased a tin of Abbott's infant formula in February 2013 at Carrefour, and the competition authority fined Abbott in August 2013. Both Abbott and Carrefour then produced a contract that was signed in November 2013 with effect from 1 January 2013. The contract only included non-binding price recommendations and no clauses that amounted to RPM. The Beijing Higher People's Court specifically noted that this approach did not breach the *Contract Law*.

Stand-alone civil damages lawsuit

Lou Binglin v. Beijing Aquatic Products Wholesale Trade Association is a stand-alone civil damages lawsuit for cartel conduct.

Lou Binglin has an aquatic product shop selling scallops. It is a member of the Beijing Aquatic Products Wholesale Trade Association (the "**Aquatic Association**"). The Aquatic Association issued a handbook to its 31 members, requiring them to sell scallops strictly in accordance with the sales price stipulated by the association and imposed fines on members who sold scallops at a discounted price. Lou Binglin filed a lawsuit with the Second Intermediate People's Court of Beijing challenging the cartel agreement.

The court stated that the 31 members of the Aquatic Association are competitors. The Aquatic Association organised its members to enter into an agreement to fix prices, and imposed fines on members who sold scallops at a discounted sales price, which prevented internal competition between members of the association, affected the normal changing of prices, and increased sales profits, which had the effect of eliminating and restricting competition. Thus, the above-mentioned behaviour of the Aquatic Association consists of an association organising its members to enter into a monopoly agreement to fix the price of a commodity, which violates the AML.

The Second Intermediate People's Court of Beijing issued a judgment and order:

1. the relevant cartel provisions of the handbook of the Aquatic Association are invalid;
2. the Aquatic Association shall stop organising its members to enter into an agreement to fix the sales price of scallops; and
3. the other claims of Lou Binglin are dismissed.

The court did not support the damages claim because the expected benefits are difficult to be determined. The Aquatic Association appealed, and the Beijing Higher People's Court dismissed the appeal and upheld the judgment of first instance.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

SAMR launched a public consultation on a Draft of Amendments to the AML (the "**Draft AML**") in early January 2020. This is the first major change proposed to the AML since it came into force in 2008.

The Draft AML is still subject to consultation and further review by China's administrative and legislative bodies. While there is no fixed timetable for formal adoption, the Draft AML could be passed by the National People's Congress as early as 2021 if the remaining process runs smoothly.

1. The definition of "monopoly agreement" is set as a separate article instead of being part of the article on "horizontal agreements" under the AML

The definition of "monopoly agreement" is currently regulated by Article 13 of the AML, which is the provision on horizontal agreements. There are divergences about whether the definition of "monopoly agreement" also applies to vertical agreements. Specifically, should the authority or private parties, in an antitrust investigation or private litigation against a vertical agreement, prove that the vertical agreement has the effect of "excluding or restricting competition" as required in the definition of "monopoly agreement"?

The Draft AML demonstrates that vertical agreements also need to have the effect of excluding or restricting competition to be subjected to the AML.

2. Adding a provision to forbid the conduct of organising or facilitating other undertakings to reach monopoly agreements

The current AML only applies to competing undertakings, and there are no relevant provisions regarding an undertaking which is not a competitor to the parties of a cartel agreement but still plays an important role in it. The Draft AML extended the scope of the investigations and penalties for monopoly agreements to include an undertaking which organises or facilitates other undertakings to reach cartel agreements.

What is more, it can also apply to "hub & spoke collusion", which is difficult to regulate under the current AML. In typical "hub & spoke collusion", competing undertakings act as "spokes" through a common third party (the "hub") to exchange sensitive information and reach a cartel agreement.

3. Increasing fines against cartel conduct and obstruction or interference with antitrust investigations

The following table illustrates the changes of fines imposed against cartel conduct and obstruction or interference with antitrust investigations in the current AML and the proposed Draft AML:

AML Violations	Current AML Fines	Draft AML Fines
Companies which organise or facilitate others to reach monopoly agreements	None	Up to 10% of the company's revenues in the last year
Trade associations which organise or facilitate others to reach monopoly agreements	Up to RMB 500,000 (approximately USD 70,400)	Up to RMB 5 million (approximately USD 704,200)
Monopoly agreements that are reached but yet to be implemented	Up to RMB 500,000 (approximately USD 70,400)	Up to RMB 50 million (approximately USD 7.04 million)
Monopoly agreements reached between undertakings with no revenues in the last year	None	Up to RMB 50 million (approximately USD 7.04 million)
Companies which obstruct or interfere with antitrust investigations	Up to RMB 1 million (approximately USD 140,900)	Up to 1% of the company's revenues in the last year; for those with no revenues or hard-to-calculate revenues, up to RMB 5 million (approximately USD 704,200)

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

Algorithmic collusion

Although there are no actual cartel cases related to algorithmic collusion in China, this topic is still heavily discussed among scholars in China.

1. What is algorithmic collusion?
   Algorithmic collusion refers to competing undertakings' use of the same repricing software to indirectly collude with each other on pricing. The undertakings using the same repricing software may not know each other, but the repricing software could provide each of them with an aligned price or a price within a range, based on (1) the mass data in the market, and (2) the artificial intelligence ("**AI**") technology of pricing algorithms.
2. The advantage of pricing algorithms:
   Pricing algorithms will help an undertaking to take an optimal pricing strategy and maximise the profit because:
   a. A pricing algorithm is a technologically advanced tool that could improve the efficiency of the pricing process and the maximum profit. In the field of board games, we have witnessed AlphaGo's achievement and Master's 60 wins of the Go game in a row against all the top-ranking Go players in China and Korea. Similarly, we believe that an AI-based pricing algorithm could find the optimal prices for an undertaking more effectively than sales personnel.
   b. Pricing algorithms can obtain, store and process more data than any sales person. The pricing determined by pricing algorithms would be better supported by data, and therefore more able to maximise the profit of the undertaking.
3. The potential antitrust concern of pricing algorithms:
   Pricing algorithms may facilitate price fixing among competitors by providing an aligned pricing range or fixed price, which may violate the AML.
   Jack Ma, founder of Alibaba Group, stated in 2016: "over the past 100 years, we have come to believe that the market economy is the best system, but in my opinion, there will be a significant change in the next three decades, and the planned economy will become increasingly big. Why? Because with access to all kinds of data, we may be able to find the invisible hand of the market.
   The planned economy I am talking about is not the same as the one used by the Soviet Union or at the beginning of the founding of the People's Republic of China. The biggest difference between the market economy and planned economy is that the former has the invisible hand of market forces. In the era of big data, the abilities of human beings in obtaining and processing data are greater than you can imagine.
   With the help of artificial intelligence or multiple intelligence, our perception of the world will be elevated to a new level. As such, big data will make the market smarter and make it possible to plan and predict market forces so as to allow us to finally achieve a planned economy."

Algorithmic collusion is an emerging concept in China, and its technical and economic nature should be explored through real cases. In the internet era, it is likely that the Chinese government could be more cautious in regulating emerging industries and not curbing innovation. In the future, we will observe the development of big data and AI in China and whether algorithmic collusion could be an antitrust issue in China.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The cartel prohibition is enshrined in EU law under Article 101 of the Treaty on the Functioning of the EU (TFEU), which prohibits '*all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*'. This applies to undertakings only, i.e. any natural or legal person, provided they are engaged in economic or commercial activity.

With regard to the nature of the prohibition, EU law only provides for civil sanctions for undertakings, and leaves it to national law to lay down criminal penalties for individual participants.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article 101(1) TFEU prohibits three different forms of conduct, namely:

- agreements, both horizontal and vertical (between competitors and non-competitors), notwithstanding whether they are multilateral or bilateral;
- decisions by associations of undertakings, e.g. rules requiring members to adhere to certain price levels; and
- concerted practices, i.e. any direct or indirect contact between competitors with the object or effect of influencing the conduct on the market of a competitor and the coordination between undertakings which knowingly replaces the risks of competition with practical cooperation.

This classification is not rigid: when faced with a '*whole complex of schemes and arrangements*', the Commission does not need to characterise each undertaking's conduct within it as an agreement or a concerted practice; it need only demonstrate that the undertakings took part in an overall plan with a single anticompetitive objective, constituting a single infringement.

Conduct is prohibited when it has as its object or effect '*the prevention, restriction or distortion of competition*' within the EU. Article 101(1) provides a non-exhaustive list of practices considered anticompetitive, specifically: fixing purchase or selling prices; limiting or controlling production; sharing markets or sources of supply; applying dissimilar conditions to equivalent transactions; and subjecting the conclusion of contracts to unrelated additional obligations.

There are two limitations to the application of the prohibition under Article 101(1):

- first, in order for EU law to apply, agreements must have an effect on trade between Member States, otherwise they would be regulated, if at all, by national competition law; and
- second, EU law recognises a *de minimis* rule as per the Commission's 2014 *Notice on agreements of minor importance*: an agreement only infringes Article 101(1) if its effect on competition is likely to be appreciable, i.e. if it has sufficient impact on market conditions. Restrictions by object are not protected by this rule as the probability of negative effects is so high that there is no need to demonstrate any actual or likely anticompetitive effects.

Pursuant to Article 101(2), prohibited agreements are automatically void and unenforceable.

However, under Article 101(3), an agreement covered by the scope of Article 101(1) can be exempted if it satisfies each of the following conditions: (i) it improves the production or distribution of goods; (ii) it grants a fair share of the benefit to consumers; (iii) the restrictions are necessary to achieve those objectives; and (iv) it does not eliminate competition as to a substantial part of the market concerned. Exemptions can be granted individually or in blocks, by category of agreement (*cf. infra* question 1.5). It is to be noted that while object restrictions can in theory benefit from an individual exemption, practice indicates that it is unlikely that they will meet the conditions set out above.

1.3 Who enforces the cartel prohibition?

The Council of the European Union's *Regulation 1/2003 on the implementation of the rules on competition* (Regulation 1/2003) designates the Commission as the main enforcement body, and more specifically, the Directorate General for Competition (DG COMP). However, Regulation 1/2003 also confers enforcement rights upon national competition authorities (NCAs): when investigating cartel conduct under national law, NCAs must apply Article 101 TFEU in parallel if the conduct may affect trade between Member States; and they cannot prohibit under national law such conduct if it would not be prohibited under Article 101.

In order to coordinate activities between competition authorities, Regulation 1/2003 establishes a European Competition Network (ECN), which facilitates better coordination and the exchange of best practices. The *Notice on cooperation within the Network of Competition Authorities* details its functioning. A directive designed to strengthen the powers of NCAs in order to increase the efficiency of competition law enforcement, known as the ECN+, came into force in February 2019. It aims to address '*gaps and limitations in the tools and guarantees of NCAs [that]*

undermine the system of parallel powers for the enforcement of Articles 101 and 102 TFEU' by requiring Member States to ensure that NCAs have appropriate enforcement tools, including various investigative powers (e.g. the power to inspect businesses premises), harmonising fines within certain parameters and attempting to harmonise the leniency system (*cf. infra* question 9.1).

The Commission's decisions are subject to judicial review by the General Court (GC) and the Court of Justice (CJEU).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

An investigation can be triggered in five different ways: (i) as a result of a leniency application (the most common start); (ii) following a complaint submitted through the anonymous online whistleblower tool; (iii) through the Commission's own market intelligence; (iv) following a complaint from a third party; or (v) after a reference from an NCA.

The Commission starts collecting information once it decides to pursue the matter. In that regard, its powers of investigation are quite broad, and it enjoys a wide margin of discretion in using them, provided their use is necessary and proportionate. In cartel cases, the Commission generally conducts what are known as 'dawn raids' – i.e. unannounced inspections of business premises and, where appropriate, private homes (*cf. infra* section 2).

If, on the basis of the evidence gathered during the searches, the Commission believes there are sufficient grounds to initiate proceedings, it will issue a statement of objections, in which it sets out the facts it relies on, the conclusions it draws and the actions it proposes to take.

The addressees of the statement of objections can then have access to the documents in the Commission's file and present their views in both a written and an oral response.

After having heard the parties, the Commission assesses the evidence to decide whether its original case still stands. If so, it prepares a draft decision setting out its findings and possible further action (e.g. fines). The final decision is adopted by the full College of Commissioners after consultation with an advisory committee made up of NCA representatives, and it is then notified to the concerned parties.

The length of proceedings can vary considerably. The GC's 2020 annual report indicates that the average duration of proceedings has reduced from an average of 48.4 months in 2009 to 15.4 months in 2020.

1.5 Are there any sector-specific offences or exemptions?

EU competition law does not provide for any sector-specific offences or exemptions. However, 'block exemption regulations' exist in relation to certain categories of arrangements (vertical agreements, technology transfers, specialisation agreements and research and development (R&D)), providing agreements that meet the criteria with a safe harbour from an infringement of Article 101 TFEU. The Commission is currently reviewing the Vertical Block Exemption Regulation and the accompanying Guidelines on Vertical Restraints, taking into account feedback from public consultations. In this review, it will determine whether to let the Vertical Block Exemption Regulation lapse, prolong its duration, or revise it. It is also undertaking a review of the two Horizontal Block Exemption Regulations, Commission Regulations (EU) Nos 1217/2010 (Research & Development Block Exemption Regulation) and 1218/2010 (Specialization Block Exemption Regulation), and the respective guidelines. The Horizontal Block Exemption Regulations exempt certain R&D and specialisation agreements from infringing Article 101 as they are considered to satisfy the conditions of Article 101(3). The review will determine whether, once the Horizontal Block Exemption Regulations expire in December 2022, to let them lapse, prolong their duration, or revise them.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

In order for the Commission to find an infringement, the involved undertakings do not need to have a presence inside the EU and practices need not have been conducted in the EU; the essential element is whether the conduct was implemented or had an effect in the EU.

In its September 2017 judgment in the *Intel* case, the CJEU confirmed that the qualified effects test was an appropriate test of jurisdiction. Therefore, if the conduct had an immediate and substantial effect in the EU, the Commission has jurisdiction to carry out competition investigations. In practice, this amounts to assessing whether the cartel may have had an impact on trade within the EU. Therefore, a cartel may be found to have been implemented within the EU even where all the participants are located outside the EU.

The Commission's decision in the *Capacitors* case in March 2018 is an example of the application of this principle. In this case, the cartel took place mainly in Japan; however, the Commission considered that the cartel had been implemented globally, including in the European Economic Area (EEA). Commissioner Vestager stated that the Commission '*will not tolerate anti-competitive conduct that may affect European consumers, even if anticompetitive contact takes place outside Europe*'.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Table of General Investigatory Powers

Investigatory power	Civil/ administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	No	N/A
Carry out an unannounced search of business premises	Yes	N/A
Carry out an unannounced search of residential premises	Yes*	N/A
Right to 'image' computer hard drives using forensic IT tools	Yes	N/A
Right to retain original documents	No	N/A
Right to require an explanation of documents or information supplied	Yes	N/A
Right to secure premises overnight (e.g. by seal)	Yes	N/A

Please note: * indicates that the investigatory measure requires authorisation by a court or another body independent of the competition authority.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The Commission's investigatory powers are listed in Regulation 1/2003: it can issue requests for information; take statements; and inspect premises. Unlike many NCAs, the Commission can exercise these powers on the basis of internal administrative decisions, meaning no prior warrant is required. However, if the Commission wishes to inspect private premises (for example, the homes of directors of an undertaking), then this must first be authorised by the national judicial authority of the Member State concerned.

Inspections can be carried out upon production of a written authorisation or ordered by decision, in which case undertakings are required to submit to the inspection. In cartel cases, the Commission most often conducts 'dawn raids', i.e. unannounced searches, at both business and private premises. As stated above, the latter requires the Commission to obtain judicial authorisation and establish a reasonable suspicion that records related to the inspection are kept at the premises.

The Commission is empowered to examine all business records and make copies thereof, including forensic images of electronic data. However, the Commission may only take note of documents which relate to the subject matter of the inspection. The Commission's *Explanatory Note on the conduct of dawn raids* was revised in 2015 and provides further guidance as to the Commission's powers in relation to software and data and notably addresses the 'Bring Your Own Device' policy, under which the Commission can inspect employees' personal devices and media that are used for professional reasons when they are found on the premises.

While searching offices, the Commission can affix seals on any relevant elements, ask staff for clarifications and record the answers provided; this cannot be done when searching private premises.

2.3 Are there general surveillance powers (e.g. bugging)?

EU law does not provide the Commission with any formal surveillance powers. However, it is worth considering the 2016 GC's judgment in the *North Sea Shrimps* case where the GC permitted secretly recorded telephone conversations to be used as evidence as part of the Commission decision. The GC ruled that the only relevant criterion for assessing the admissibility of evidence is reliability. Therefore, the recordings could not be deemed inadmissible on the basis that they were made in secret. The GC considered that the Commission had obtained the recording properly, and the parties had been given the opportunity to challenge the authenticity of the recordings, and therefore the Commission could use the recordings as evidence.

2.4 Are there any other significant powers of investigation?

Regulation 1/2003 does not confer any additional power on the Commission.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Dawn raids are carried out by the Commission's own team of officials. However, given that they do not have the power to force entry, they must rely on national law enforcement authorities, who have the duty to actively assist them under Regulation 1/2003. Such assistance may be subject to a judicial authorisation under national rules, in which case Member State courts can, pursuant to the *Roquette Frères* case, review the scope of the Commission's inspection decision in order to ensure that the measures intended are not arbitrary or excessive. However, national authorities may not question the necessity of a search; a request for a full review of the decision can be subsequently brought before the GC and CJEU. In the GC's judgment in the *České dráhy* case, the GC clarified that the Commission is entitled to seize documents of both direct and indirect relevance during inspections, but that the scope of inspections should be determined based on documentary evidence, not just the suspicions of the Commission. This case, while concerned with an abuse of a dominant position, is in line with the CJEU's reasoning in the *Deutsche Bahn* case that an inspection order is well reasoned only if the subject matter of the inspection reflects the entirety of the information that the Commission inspectors are in possession of.

The Commission can ask an NCA to carry out the inspections in its place under Article 22(2) of Regulation 1/2003; however, it rarely does so. In that case, EU competition rules rather than national competition rules apply.

The Commission may wait for legal counsel to arrive before commencing the inspection; however, it is under no obligation to do so. The GC has held that the legality of the search is not conditional upon the presence of external legal counsel; in the *Bitumen* cartel case, it upheld the 10% fine increase which the Commission had imposed upon the undertaking for denying officials access to the building pending the arrival of its counsel.

2.6 Is in-house legal advice protected by the rules of privilege?

There is no express recognition of legal privilege in the TFEU; however, there is such protection recognised in case law. The CJEU recognised the right for undertakings to correspond with legal counsel without it being used against them, meaning that written communications between a lawyer and his client can be covered by legal privilege, provided they relate to the investigation and counsel is external to the company and qualified to practise in the EEA.

In-house legal advice is not protected because the independence of in-house counsel might be compromised due to their employment relationship. Privilege should, however, cover internal communications created with a view to instructing external counsel and documents prepared by in-house counsel that solely report the advice of external counsel. To avoid inadvertent disclosure in an inspection, all such documents should be marked as 'privileged' and filed separately.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

In order to avoid irrevocable harm, the CJEU has ruled that rights of defence should be respected from the outset, including during the course of preliminary procedures.

Parties are protected against self-incrimination to the extent that they cannot be compelled to provide the Commission with information that might lead them to admit to participating in an infringement. Purely factual questions are not considered self-incriminatory and must, therefore, be answered.

The Commission must clearly delimitate the scope of the inspection by defining its subject and purpose, meaning it

cannot, in theory, use any information it uncovers that falls outside the scope of its search, unless the documents were found 'by chance'. However, the Commission does not need to identify with absolute precision the product and geographic markets concerned by the search – the search can cover documents that have both direct and indirect relevance provided the scope of the search is based on documentary evidence.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Regulation 1/2003 provides for one-off financial penalties of up to 1% of the total turnover, as well as periodic penalty payments of up to 5% of the average daily turnover of a company for failure to answer a formal request fully or to submit to an inspection. The Commission has historically made use of this power – in April 2010, the Commission imposed an €8 million fine on Suez Environnement and Lyonnaise des Eaux for breaching a seal during Commission inspections and in 2012, the CJEU upheld the €38 million fine imposed by the Commission on E.ON in 2008 for similar conduct. The Commission also fined *Energetický a průmyslový* holding and EP Investment Advisors €2.5 million in 2012 for failing to block an email account as requested by the Commission and diverting incoming emails during a dawn raid. Most recently, in 2018, the Commission sent a statement of objections to Slovak rail company ZSSK, having taken the preliminary view that ZSSK had obstructed a Commission inspection by giving incorrect information and deleting data from a laptop; however, after evaluating evidence and the company's objections, the Commission closed its procedure.

Pursuant to paragraph 28 of the Commission's *Guidelines on the method of setting fines*, obstruction of an investigation also constitutes an aggravating circumstance in the calculation of fines. The Commission has previously increased fines imposed on cartel participants on this basis – for instance, in the 2007 *Professional Videotape* case, the Commission increased Sony's fine by 30% as, during the inspections carried out at Sony's premises, the employees refused to answer the Commission's oral questions.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

To ensure the effective enforcement of competition rules, Regulation 1/2003 gives the Commission, along with the NCAs, the power to impose fines for substantive and procedural infringements. Such fines can be imposed on any undertaking or association of undertakings and a parent company can be fined for the acts of a subsidiary over which it exercises decisive influence.

As for substantive infringements, the Commission can impose fines of up to 10% of the total turnover of the undertakings concerned if they are found to have participated, intentionally or negligently, in a cartel. The Commission enjoys wide discretion when setting the amount of the fines and its Fining Guidelines of 2006 (Fining Guidelines) set out the approach it will normally follow:

- First, to reflect the 'economic significance' of each party's participation in the infringement, a basic amount of the fine is calculated, based on a participant's value of sales (the value of the undertaking's sales before VAT and other taxes to which the infringement directly or indirectly relates in the relevant geographic area within the EEA) for the last full business year of the cartel. An amount of up to 30% of the value of sales, depending on the gravity of the infringement, multiplied by the duration of that party's participation in the infringement, will form the basic amount of the fine.
- Second, the basic amount of the fine is adjusted depending on aggravating and/or mitigating circumstances. The Commission may also increase the basic amount to ensure the fine has a sufficient overall deterrent effect.
- Third, the Commission will ensure the final amount of the fine does not exceed the legal cap of 10% and, finally, will apply leniency and/or settlement reductions when appropriate.

In September 2019, the GC reminded the Commission of its duty to state reasons in its decisions when applying the standard methodology set out in the Fining Guidelines in the *HSBC* judgment.

The Commission can, however, depart from the above methodology when the 'particularities of a given case' justify it, an option that the Commission used in the *Mushrooms* and *Envelopes* cartel cases. In *AC Treuhand*, the CJEU confirmed that the Commission could set the amount of the fine as a lump sum for a consultancy firm with no market activities. Both the CJEU in *Icap* in July 2019 and the GC in *Pometon* in March 2019 and in *Printeos* in September 2019 have emphasised the importance of the Commission justifying fine amounts in a detailed manner when departing from the standard fining methodology.

Interestingly, in *Printeos*, the GC rejected in substance an appeal against the readopted settlement decision. The envelope producer had successfully contested in 2016 the fine imposed as the Commission had not sufficiently explained the variations in fine reductions applied to settling cartel participants. In 2017, the Commission readopted a decision against Printeos, imposing the same fine. Printeos had again introduced an application for annulment of the Commission's decision to the GC. While the GC rejected the appeal in substance, the Commission was nonetheless required to pay costs due to its lack of rigour in the fining methodology and reasoning outlined in its decision. The GC indicated that such lack of rigour was all the more regrettable as this was the second time the Commission adopted the decision.

As for procedural infringements, the Commission can impose fines of up to 1% of the total turnover in the preceding business year of the undertakings concerned where they supply incorrect, incomplete or misleading information.

The Commission can require undertakings to bring a cartel infringement to an end and impose behavioural or structural remedies to that end, as well as periodic penalty payments to ensure compliance with such instructions.

In practice, the Commission often issues high fines in cartel cases. In 2019, fines of €368 million, €1 billion and €31 million were imposed on the *Occupant Safety Systems II*, *Forex* and *Canned Vegetables* cartels, respectively, with the total fine amount for 2019 amounting to €1.48 billion. In 2020, the Commission fined ethylene purchasers €260 million in *Ethylene* for their participation in the first purchasing horizontal cartel in the chemical industry sanctioned under the Fining Guidelines. Total fines in 2020 amounted to just €288 million across three cases, a sharp drop from total fines in 2019, likely due to the Commission's resources being directed to the COVID-19 response. As of 8 July 2021, the Commission's cartel fines have resurged once more, with total fines of €1.4 billion so far across six cases (including €371 million in the *European Government Bonds* cartel and €875 million in the *Car Emissions* cartel).

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The Commission has no power to sanction an individual, except if he is himself an undertaking. However, individuals still run the risk of being sanctioned as the majority of Member States currently have the ability to impose sanctions on individuals, including administrative fines and imprisonment. Some Member States have criminal sanctions for cartel behaviour. For example, Denmark and the UK have specific criminal cartel offences, and in France, Greece and Romania, cartel behaviour can be prosecuted under fraud offences.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The Fining Guidelines provide that, in exceptional cases and upon request, the Commission can reduce the fine due to an undertaking's inability to pay. Inability to pay claims can be raised during settlement discussions, as in the *Mushrooms* cartel case. To benefit from this, undertakings must provide objective evidence that two cumulative conditions are met: (i) that paying the fine would '*irretrievably jeopardise its economic viability*'; and (ii) a specific social and economic context must be established. The Commission published an *Information Note* in 2010 setting out the principles to be applied in deciding whether to grant a reduction.

As for the first condition, the GC noted in *North Sea Shrimps* that the mere fact that the imposition of a fine might give rise to or increase the risk of insolvency of the undertaking concerned is insufficient to substantiate a claim of inability to pay. As for the second condition, the GC has indicated in *Donau Chemie* that it could be fulfilled if the payment were to lead to an increase in unemployment or deterioration in the sectors concerned.

In practice, many requests are unsuccessful. The Commission has, however, accepted reductions to the fines of three undertakings by 50% and 25% in the *Bathroom Fittings* cartel, as well as in the *Pre-stressing Steel* cartel where it granted reductions of 25%, 50% and 75% to three undertakings. In September 2019, the Commission granted a reduction of the fine of one of the companies in the *Canned Vegetables* cartel after finding it unable to pay following an assessment which included examining the company's financial statements, financial projections, financial strength ratios and profitability.

3.4 What are the applicable limitation periods?

Regulation 1/2003 sets two types of limitation periods in Articles 25 and 26.

First, the Commission's power to impose substantive fines is subject to a five-year limitation period, while a three-year limitation period applies for the imposition of procedural fines. These limitation periods start to run from the date on which the infringement is committed or, in the case of a single and continuous infringement, from the date the infringement ended. Any competition authority investigation or proceeding may interrupt the limitation period, in which case time will start running afresh from the date on which the undertakings are notified of the authority's interrupting act. The limitation period may run up until the adoption of a decision imposing a fine subject to a maximum period of 10 years for substantive violations and six years for procedural infringements. The limitation period may also be suspended whilst a decision of the Commission is subject to proceedings before the CJEU, which is particularly valuable for the Commission when it wishes to readopt a decision that has been annulled on procedural grounds.

Second, the Commission's power to enforce both procedural and substantive fines, as well as periodic penalties, is subject to a limitation period of five years, starting from the day on which the decision becomes final. This limitation period may be interrupted by the notification of a Commission decision, refusal to vary the fine, or by any action to enforce payment.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

As mentioned above in question 3.2, the Commission has no power to impose sanctions on individuals.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Please see above questions 3.5 and 3.2.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

A parent company can be held jointly and severally liable for its subsidiary's involvement in a cartel, even if it has not been involved directly in the cartel itself, when it is capable of exerting a decisive influence over the subsidiary. It is presumed that the parent can do so where it holds all (or almost all) of the shares in the subsidiary. While this presumption is in theory rebuttable, in practice it is very difficult to do so. In July 2018, the GC in the *Goldman Sachs* case considered that the Commission had correctly applied the presumption even if Goldman Sachs' shareholding in its former subsidiary was less than 100% (it varied between 84.4% and 91.1%). In this case, the GC considered that Goldman Sachs could exert a decisive influence not only on the basis of the shares it held in its subsidiary but also on the basis of its voting rights, which it could exert as if it were the sole shareholder, and its ability to influence managing decisions, such as appointing board members. In January 2021, the CJEU confirmed the GC's finding in this case.

In principle, the liability of a parent company cannot extend beyond that of its subsidiary if the parent company has not been directly involved in the cartel and its liability only arises from the direct involvement of the subsidiary in the infringement. However, in 2017 the CJEU ruled in *Akzo Nobel* that, even though the Commission was time-barred from imposing fines on one of Akzo's subsidiaries involved in the cartel, the parent company could still be held liable in respect of the entire period, including for the period during which the subsidiary, against whom action was time barred, participated in the cartel.

In 2019, the CJEU held that this principle of economic continuity also applies in the context of private enforcement of competition rules. In *Skanska Industrial Solutions*, the CJEU addressed the question of whether, in determining the person responsible for antitrust damages, the Finnish Court should apply its national law (under which only the legal entity that caused the damage is liable) or EU law. The CJEU ruled that 'undertaking' is an autonomous concept of EU law and cannot have a different scope with regard to the imposition of fines by the Commission as compared with actions for damages.

In his April 2021 opinion on the Spanish preliminary ruling in *Sumal*, which derived from the *Trucks* decision, Advocate General Pitruzzella proposed that EU law does not preclude a subsidiary from being liable in private damages for an infringement by its parent company, noting that joint liability is based on a unity of action in the market. Thus, the parent company need not be specifically involved in an infringement in order to be regarded as a single economic unit or jointly liable with its infringing subsidiary.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The procedure to apply for leniency under EU law is set out in the Commission's 2006 *Notice on immunity from fines and reduction of fines in cartel cases* (Leniency Notice) and the 2012 *Antitrust Manual of Procedures*.

Full immunity is available to the first undertaking to come forward with information of secret cartel activity that will enable the Commission to either carry out a targeted inspection or find an infringement of Article 101 TFEU. A company can, therefore, seek immunity in two cases: (i) before the Commission has sufficient evidence to adopt an inspection decision itself; or (ii) after it has initiated an inspection but the applicant is the first to provide incriminating evidence proving the cartel conduct. In the latter case, applications are subject to a higher evidential threshold and are rarely successful in practice: immunity would only be awarded if the Commission had conducted its inspection based on its own intelligence and this inspection had not generated evidence that would enable it to find an infringement.

In order to apply, undertakings must provide the Commission with all the evidence they possess, along with a corporate statement comprising a detailed description of the arrangement, the exact location of the offices, and information on other competition authorities that it has approached or intends to approach. In 2019, the Commission made available the eLeniency tool, which is designed to facilitate the submission of documents and statements by undertakings and their lawyers online through a secure, restricted system.

In order to be eligible for leniency, prospective applicants must satisfy a number of cumulative conditions, namely: (i) they cannot have coerced another company to join the cartel or stay in it; (ii) they cannot have tampered with evidence; (iii) they must have terminated their involvement in the cartel before reporting to the Commission, unless necessary to protect the surprise element of subsequent inspections; (iv) they cannot inform others that they have applied for leniency; and (v) they must genuinely, expeditiously and fully cooperate on a continuous basis.

Before formally applying, undertakings can approach the Commission anonymously and in hypothetical terms in order to establish whether the evidence they hold would be sufficient to be awarded immunity.

A company which is not entitled to full immunity may still be able to obtain a reduction in fines where it provides evidence with significant added value to the Commission's existing file, i.e. facts previously unknown to the Commission. Applicants for reduction need to fulfil the same conditions as for immunity (except for coercion). Depending on the value of the evidence brought in, the first applicant will benefit from a reduction between 30–50%, the second from 20–30% and others up to 20%.

Given that cartels usually affect more than one Member State and due to the lack of a central mechanism for undertakings to obtain leniency in all jurisdictions, companies usually submit applications to every relevant competition authority. In *DHL Express*, the CJEU ruled that leniency applications to different competition authorities for the same infringement are fully independent. An NCA that receives a leniency application referring to the undertaking's concurrent application to the Commission does not need to consider the contents of that separate application.

The ECN+ makes ECN instruments legally binding on NCAs and introduces some improvements to guard against the legal uncertainties companies face that disincentivise them from applying for leniency. For example, Member States are required to ensure that NCAs accept summary applications from applicants who have applied to the Commission for leniency, provided that the Commission application in question covers more than three Member States. The Commission is to be the main interlocutor of the applicant until it is clear whether the Commission will pursue the case – for example, it will instruct the applicant on the conduct of any further internal investigations. The ECN+ was scheduled to be implemented by Member States by 4 February 2021 – so far, only Germany, France and Spain appear to have implemented the directive, and remaining Member States are expected to do so later in 2021. (*Cf. infra* question 9.1.)

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The Leniency Notice establishes a marker system for immunity applicants and thus enables them to secure their position in line for leniency. It is a discretionary system and the Commission grants markers on a case-by-case basis, depending on the specificities of the case and the applicant's justifications.

The applicant must provide information with regard to cartel participants, affected markets, the duration and nature of the conduct, any parallel leniency applications, and the reasons for which the grant of a marker is necessary. Once the marker is awarded, the undertaking must give the information and evidence required within a set (typically short) period of time.

The ECN+ imposes a requirement on all Member States to establish a marker system. As noted above, this directive was to be implemented by 4 February 2021.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The Leniency Notice allows for the submission of oral statements. They are recorded at the Commission's premises and form part of the Commission's file. The Commission published a *Guide to the making of oral statements* in October 2013.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The identity of applicants is kept confidential from other companies subject to the cartel investigation until the issue of the statement of objections, and will become known to the general public at the time of the publication of the final decision. The contents of the Commission's file are also kept confidential throughout the investigation; access is granted to the addressees of the statement of objections in order to preserve their rights of defence. This covers all documents obtained, produced or assembled during the proceedings, except for internal Commission documents such as correspondence with other competition authorities. Moreover, access to documents containing business secrets

or other confidential information may be partially or totally restricted, and corporate statements submitted by leniency applicants can only be accessed on the Commission's premises.

Despite these safeguards, disclosure of documents is nonetheless often a concern of parties to Commission procedures. In the *Lantmännen* hybrid settlement bioethanol cartel probe, the GC rejected an interim order requested by Lantmännen to prevent the Commission from sharing documents exchanged between it and the Commission during the settlement process – its concerns included the fact that confidential information in the documents could be spread to third parties, which may have increased the risk of follow-on damages claims. This judgment was confirmed by the CJEU.

As for disclosure in follow-on actions for damages before Member States' courts, the issue is governed by the applicable national rules (which must be in line with the rules contained in the Damages Directive). The Damages Directive has effectively superseded the previous position established by the CJEU that EU law does not prevent claimants from being granted access to leniency materials provided they have been adversely affected by the infringement. National courts could thus previously request provision of leniency documents under national rules, while taking into account the need to strike a fair balance between the right of effective redress and the need to ensure the effectiveness of the leniency regime.

The Damages Directive and the Commission's *Notice on cooperation with national courts* set out rules limiting access to the Commission's file: national courts cannot order parties to disclose leniency statements or settlement submissions at any time; and certain documents such as the statement of objections can only be accessed after the closing of the file. Contemporaneous documents, however, can be disclosed at any time in the process, including before the Commission closes its investigation.

The ECN+ guarantees the confidentiality and non-disclosure of leniency applications by obliging NCAs to ensure that they cannot disclose the leniency statements submitted as part of a leniency application.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

Under the Leniency Notice, applicants must cooperate genuinely and fully with the Commission from the time they submit their application to the end of the administrative proceedings, i.e. the adoption of a final decision.

Applicants must provide the Commission with accurate and complete information. More specifically, they must include any relevant information and evidence relating to the case. They must remain at the Commission's disposal to answer any request as to the establishment of the facts, make staff available for interviews, not tamper with evidence, and not disclose any information relating to their application before the statement of objections, unless otherwise agreed. In the *Deltafina* case, the Commission withdrew conditional immunity because the applicant had breached the obligation of cooperation by disclosing its application for leniency to competitors before the Commission had launched its inspection. However, the company still benefitted from a 50% fine reduction outside of the leniency framework to reward its cooperation.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

The leniency programme under EU law does not provide for any additional rewards or penalties.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Individuals can either report a cartel directly to the Commission if they are willing to reveal their identity or use the new anonymous whistleblower tool launched by the Commission in March 2017. The encrypted messaging system run by an external intermediary enables two-way communications between individuals and the Commission.

In October 2019, the Commission adopted *Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law* (Whistleblowing Directive). The Whistleblowing Directive protects not only current employees from dismissal, degradation and discrimination, but also former employees, job applicants, supporters of the employee and journalists, among others. Companies with more than 50 employees or more than €10 million annual turnover are obliged to set up suitable internal reporting processes. The deadline for implementation of the Whistleblowing Directive into national law by EU Member States is December 2021.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

A settlement procedure for cartel cases was introduced in July 2008. The rules governing the settlement process are laid down in Regulation 622/2008 and the Commission's *Notice on the conduct of settlement procedures*. The core feature of the settlement procedure is the formal acknowledgment of an undertaking's participation in a cartel. Such admission is rewarded with a 10% fine reduction, as well as a limitation on any specific increase for deterrence. Settlement agreements can be reached with all participants involved in a cartel, or only with some of them (so-called 'hybrid' settlements).

The settlement process can be divided into three broad stages:

- First, the parties and the Commission must agree to start settlement discussions. An undertaking cannot be forced to engage in a settlement and the Commission has in turn a broad discretion to determine which cartel cases are suitable for settlement, taking into account factors such as the prospect of saving time and resources and the probability of agreeing on the scope of the potential objections within a reasonable timeframe.
- Second, settlement discussions will take place on a bilateral and confidential basis to assess whether it is worth settling. The parties will have the possibility to access the file and to be heard, albeit to a more limited extent than in the standard procedure. Participants can end the discussions at any time, in which case they will revert back to the normal procedure. Parties deciding to opt-out from the settlement process will not be able to rely on indications regarding the amount of the fine given during settlement discussions, as the recent *Timab* ruling shows.
- Third, parties must submit a formal request in the form of a settlement submission, acknowledging in '*clear and unequivocal terms*' their liability, and indicating the maximum

amount of the fine which they foresee being imposed. The Commission will then issue a formal statement of objections and, if the parties agree with its content, will proceed with the adoption of a final decision.

The Commission is increasingly using the settlement procedure, and settlement decisions tend to be adopted more quickly. The most recent decisions are the following: in March 2019, settlements in *Occupants Safety Systems II*; in May 2019, settlements in *Forex*; in September 2019, settlements in *Canned Vegetables*; and in July 2020, settlements in *Ethylene*. Interestingly, most of the settlement decisions have stemmed from leniency applications.

Settling parties can still contest the validity of the fine ultimately imposed before the EU courts, as *Société Générale* did in *EUROLIBOR*, before withdrawing its appeal, and Printeos in the *Envelopes* cartel case.

In November 2017, the Icap group, which did not participate in the settlement proceedings in *Yen Interest Rate Derivatives*, successfully challenged its fine before the GC. The GC ruled that the Commission had infringed the presumption of innocence by mentioning Icap and its facilitating role in the cartel in the settlement decision; however, the GC annulled the decision not on those grounds but on the lack of reasoning on the fining calculation, a judgment which was later confirmed by the CJEU.

By contrast, in *Pometon*, the GC rejected similar claims of breach of the presumption of innocence of Pometon, a non-settling party in a hybrid settlement case, considering that although the settlement decision mentioning Pometon had been adopted before the decision in the adversarial procedure, it did not legally define the facts attributed to Pometon and had therefore not prejudged Pometon's liability. Pometon appealed to the CJEU and in its judgment, the CJEU confirmed the GC's decision that the Commission had not breached the presumption of innocence.

After *Pometon*, in May 2019, the Commission issued two settlement decisions in the Forex cartel (*Three Way Banana Split* and *Essex Express*) while according to official statements, more decisions under the adversarial procedure are expected. This implies a likely return of staggered decisions in hybrid settlement cases.

In September 2019, in *HSBC*, the GC analysed another hybrid settlement, annulling the fine imposed due to an insufficient statement of reasons but confirming HSBC's participation in the infringement. HSBC, JP Morgan and Crédit Agricole decided not to participate in the settlement procedure. Contrary to *Icap*, the GC did not provide any substantial guidance in response to the similar plea raised challenging the fine; instead, it provided a brief discussion of HSBC's procedural plea, confirming the general right of a presumption of innocence and swiftly concluding that, since the Commission had already validly established HSBC's participation in the infringement, '*there is no reason to assume that, if the settlement decision had not been adopted before the contested decision, the content of the latter would have been different*'.

7 Appeal Process

7.1 What is the appeal process?

The Commission's decisions can be appealed before the GC, within two months of the decision, by the addressees of the decision and third parties with a direct and individual interest. Actions for annulment can be brought on four grounds: (i) lack of competence; (ii) infringement of an essential procedural requirement; (iii) infringement of the TFEU; and (iv) misuse of powers. The GC has unlimited jurisdiction to review and assess the Commission's decisions and it may annul, increase or decrease any fine imposed.

Following a judgment by the GC, a further appeal can be brought to the CJEU within two months of the notification of the GC judgment. The CJEU is only competent to review points of law, breaches of procedure and infringements of EU law by the GC.

7.2 Does an appeal suspend a company's requirement to pay the fine?

Fines imposed by a Commission decision must normally be paid within three months of notification. However, the payment of the fine can be suspended if the undertaking gives the Commission an appropriate bank guarantee and agrees to pay interest in case the appeal is unsuccessful. If an undertaking is unable to provide such guarantees, it can also apply for interim measures before the EU courts to suspend the enforcement of the contested decision. However, the majority of applications for interim measures are unsuccessful.

7.3 Does the appeal process allow for the cross-examination of witnesses?

The Rules of Procedure of the EU courts provide that the Judges and the Advocate General can, at the request of a party or on their own motion, question witnesses. The representatives of the parties can do the same, subject to the control of the President of the court. Cross-examination of witnesses is thus permitted; however, there is no absolute right to cross-examination by the parties.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

In *Courage* and *Crehan*, the CJEU established that any individual or business has a right to full compensation for the harm caused to them by anticompetitive practices. This right is an EU right; however, its exercise is governed by national rules and damages claims, either following an infringement decision (so-called 'follow-on' actions) or brought on a stand-alone basis. It must be initiated before national courts. In *Manfredi*, the CJEU recalled that victims must, in that context, prove that the harm suffered is the result of a violation of competition rules.

The right to full compensation is enshrined in the 2014 Damages Directive; two provisions of which are aimed in particular at making it easier for victims to substantiate damages claims. First, the Directive introduces a rebuttable presumption that cartel victims have suffered harm. Second, the Directive makes final infringement decisions of competition authorities (or of review courts) binding on their own national courts and *prima facie* evidence of infringement in courts of other Member States, therefore streamlining follow-on claims.

In addition, the Commission has issued a *Communication on the quantification of harm caused by competition law infringements* aimed at assisting national courts, as well as a detailed practical guide covering the types of anticompetitive harm and techniques available to quantify such harm.

8.2 Do your procedural rules allow for class-action or representative claims?

Class actions or representative claims are a matter of national law and the Damages Directive does not contain provisions

on collective redress mechanisms. The Commission, however, issued in June 2013 a *Recommendation on common principles for injunctive and compensatory collective redress mechanism in the Member States concerning violation of rights granted under Union Law*, where it recommends the introduction of opt-in systems of collective redress as a general rule and the institution of procedural safeguards (such as a prohibition of contingency fees or punitive damages) to avoid abuses. In January 2018, the Commission published a report on the progress made by Member States implementing measures allowing for collective redress. Following the Report, the Commission published a proposal for the Damages Directive on representative actions for the collective interests of customers, which introduces a harmonised model for class actions. In June 2020, the *Directive on representative actions for the protection of the collective interests of consumers* was adopted by the Council and the European Parliament, and in December 2020, it entered into force. The Directive introduces a system of representative actions for the protection of consumers' collective interests against infringements of EU law. Member States have until 25 December 2022 to transpose the Directive and until 25 June 2023 before the new rules must be applied.

8.3 What are the applicable limitation periods?

Limitation periods for bringing damages claims vary across Member States; however, the Damages Directive harmonises certain basic rules. It specifies that limitation periods must be for at least five years and should not start to run before the infringement has ceased, and the plaintiff knows or can reasonably be expected to know of the behaviour, the fact that it constitutes an infringement and the identity of the infringer. Moreover, limitation periods must be suspended or interrupted: (i) if a competition authority has initiated an investigation or other proceedings in relation to that infringement, until at least one year after the infringement decision has become final or the proceedings are terminated; and (ii) for the duration of any consensual dispute resolution.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

In line with the right to full compensation, the Damages Directive makes clear that any direct or indirect purchaser in the supply chain can obtain compensation for the harm suffered. In turn, any defendant in a damages action can argue that the plaintiff passed on the whole or part of the overcharge resulting from the infringement down to the supply chain, so that the loss passed on no longer constitutes harm for which the plaintiff needs compensation (the 'passing-on' defence). In order to succeed, the defendant must prove the existence and the extent of pass-on of the overcharge.

As Member States now need to quantify actual loss suffered at each level of the supply chain, the Commission has committed to providing guidelines for national courts. An October 2016 *Study on the passing-on of overcharges* was in this context published at the Commission's request. Between July and October 2018, the Commission published and invited comments on a set of draft guidelines. In July 2019, the Commission published the *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser* (the Passing-on Guidelines) which provide practical guidance to assist national courts in estimating the share of the overcharge passed on to the indirect buyer (*cf. infra* question 9.1).

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Cost rules for civil damages in follow-on claims remain at the discretion of Member States. While the Commission acknowledged that costs associated with damages actions can be a decisive disincentive to bringing damages claims, the Damages Directive does not address that particular issue. However, the Commission has invited Member States to reflect on their cost allocation rules and highlighted the importance of the 'loser pays' principle, which prevails in Member States, and generally serves to filter unmeritorious cases.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

As mentioned in question 8.1, damages claims can only be initiated before national courts. With the coming into force of the Damages Directive, it can be expected that follow-on damages will increase across the EU. To date, Germany, the Netherlands and the UK have been the most prominent jurisdictions for initiating damages claims. In recent years, there have been a significant number of follow-on damages claims introduced in the national courts of these three countries, often brought by companies and not consumers. However, the implementation of the Damages Directive in the EU has increased the number of damages claims in other Member States, such as Spain.

Netherlands: In March 2017, TenneT was awarded €23 million in damages by a Dutch court due to overcharges it suffered from ABB's participation in the *Gas Insulated Switchgear* cartel. In February 2020, the Amsterdam Appeal Court overruled an earlier lower court judgment, lifting the limitation period in respect of a damages action against one of the *Sodium Chlorate* cartel members and stressed the importance of applying the principle of effectiveness for damages actions for breaches of EU competition law. In May 2021, the Amsterdam District Court made an interim ruling in the *Trucks* cartel, emphasising that each claim of damage had to be individually assessed (and that it had not been established that no damage had been caused to such claimants by the infringement). The court also accepted that a cartel could have a lingering effect; however, it was not possible to establish this in the present case.

UK: In the UK, the first damages award in a follow-on case was a claim filed by BritNed following the *Power Cables* decision. In October 2018, the English Court did not consider that there was an overcharge, but awarded €13 million in damages relating to increased costs paid by BritNed which would not have been paid in the absence of the cartel. In November 2018, the English High Court reduced this by 10% to €11.7 million. Following the Commission's decisions on multilateral interchange fees, damages lawsuits against Visa and Mastercard were brought in the UK in the *Merricks* case. In May 2020, two separate follow-on damages actions against Visa and MasterCard, each containing 58 claimants, were registered with the Competition Appeal Tribunal. In June 2020, the UK Supreme Court found in favour of a group of British retailers in a consolidated set of appeals against Visa and MasterCard, with the determination of damages to follow absent a settlement. The Supreme Court reinforced a relatively low bar for successful collective actions by noting that, for example, a collective proceeding should not be prevented from going to trial due to difficulties in quantifying damages. Furthermore, in May 2020, Arcelik, an electrical-appliance manufacturer, announced it received settlements of £20.15 million and £22.8 million from members of the *Cathode Ray Tube* cartel.

Germany: In March 2020, financial right claims lodged a €270 million damages claim against members of the truck cartel in Munich on behalf of 2,900 transport companies.

Spain: In orders published in March and May 2020, a Spanish second-instance court partially accepted appeals by two cartel members, considering it disproportionate to grant the claimants access to certain information such as delivery costs and product planning documents. In two separate judgments in April 2020, Spanish second instance courts reduced claimants' compensation that previously ranged from 5–10%, to 5% of the truck purchase price.

Hungary: The CJEU issued a recent preliminary ruling in response to a request sent by the Hungarian Court in *Tibor Trans v DAF* (a claim following the *Truck* decision), confirming that a cartelist may be held liable for damages to victims with no contractual relationships and outside the place of the infringement. The CJEU ruled that the EU's cartel decision covered the entire European market.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The ECN+, which entered into force in February 2019, aims to address '*gaps and limitations in the tools and guarantees of NCAs [that] undermine the system of parallel powers for the enforcement of Articles 101 and 102 TFEU*' by requiring Member States to ensure that NCAs have appropriate enforcement tools, including various investigative powers (e.g. the power to inspect businesses premises), harmonising fines within certain parameters and attempting to improve the leniency system. For example, Member States are required to ensure that NCAs accept summary applications from applicants who have applied to the Commission for leniency, provided that the Commission application in question covers more than three Member States. However, the ECN+ falls short of providing the one-stop-shop system for leniency that many had hoped for. Member States are required to bring into force the necessary laws for the domestic implementation of the ECN+ by 4 February 2021.

In July 2020, the Commission adopted a communication on the protection of confidential information by national courts in proceedings for private enforcement. The Communication follows a public consultation the Commission carried out in 2019, which confirmed the need for additional guidance on disclosure of evidence in damages claims proceedings. The Communication provides a series of measures and guidance on effective protective measures that national courts may use to protect confidential information in these proceedings, while considering the specific circumstances of the case.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

In a landmark judgment in January 2021, the CJEU in *Printeos* established the Commission's obligations in repaying annulled fines under Article 266 of the TFEU. In particular, it confirmed an applicant's entitlement to repayment of a principal annulled fine amount, together with the interest generated at a rate of 3.5% plus the relevant European Central Bank (ECB) refinancing rate at the date of the decision, for the period between the payment of the fine by the applicant and the Commission's repayment of the fine post-annulment. The CJEU also held that additional compound interest on such interest amount was due. Parties to the annulled *Airfreight* and *Steel Bar* cartel decisions have issued appeals to the GC on this basis, the outcomes of which remain to be seen. There are five airlines in the *Airfreight* cases and four Italian companies pursuing action following *Steel Bar*.

There is also an increasing focus on regulating digital markets. In June 2020, the Commission announced its consultation on a new competition tool, which is aimed at addressing structural problems in markets, notably with respect to challenges in the digital sector. The tool aims to address the Commission's perceived gaps in its enforcement toolkit. In July 2020, the Commission launched a sector inquiry into the Internet of Things, focusing on consumer-related products and services connected to a network that can be controlled at a distance, such as wearable devices and smart home appliances. Information gathered during the inquiry will contribute to the Commission's enforcement of competition law in the sector. The Commission is currently requesting information from a variety of undertakings active in the sector and expects to publish its preliminary report based on the responses in the spring of 2021.

Acknowledgment

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis for cartel enforcement in Germany is the Act against Restraints of Competition (ARC). Section 1 ARC corresponds to Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) – save the requirement of effects of restrictions of competition on trade between Member States which does not apply under Section 1 ARC – and broadly prohibits agreements or concerted practices between undertakings that have as their object or effect the prevention, restriction or distortion of competition. The substantive law – which applies both to companies and individuals – can be enforced by the Federal Cartel Office (*Bundeskartellamt*, FCO) on the basis of two different types of proceedings. Infringements which are addressed merely by a cease-and-desist order are dealt with in administrative proceedings (*Verwaltungsverfahren*) which are governed by the ARC. In cases where the authority intends to impose fines (*Bußgeldverfahren*), the proceedings are governed by the Code on Administrative Offences (*Ordnungswidrigkeitengesetz*) and the Code on Criminal Procedure (*Strafprozessordnung*).

1.2 What are the specific substantive provisions for the cartel prohibition?

Practices that are prohibited under Section 1 ARC include (i) horizontal agreements (such as fixing prices or terms and conditions, allocating markets (territory, customers or quotas), bid rigging or exchanging sensitive market data (e.g. prices)), and (ii) vertical agreements (such as resale price maintenance).

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced primarily by the FCO in Bonn. The authority has nine independent divisions that are responsible for different industry sectors and product markets. Additionally, the FCO has three divisions which focus exclusively on the enforcement of the cartel prohibition as well as a special unit for combatting cartels (SKK) which provides technical assistance to the special cartel divisions.

Infringements with regional effects are dealt with by the State Cartel Offices (*Landeskartellbehörden*). However, the majority of cartel cases are dealt with by the FCO, which is in charge of both the investigation of potential violations and the enforcement of the cartel prohibition.

In cases of bid rigging, the state prosecutor can open proceedings against individuals on the basis of the German Criminal Code (*Strafgesetzbuch*).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Where the FCO has indications of anti-competitive conduct through third-party complaints, a leniency application by one of the companies involved, or an anonymous whistle-blower, it normally gathers further information and evidence regarding the infringement. To collect this further information and evidence, the FCO has a broad range of investigative powers, which are described in more detail below.

Once the FCO has completed its fact-finding, it will issue a statement of objections setting out the underlying facts of the case, the alleged infringements and the FCO's preliminary legal assessment. Around the same time, those subject to the FCO's investigation will be given access to the FCO's file and will have the opportunity to comment on the allegations.

The final procedural step is the adoption of a formal decision by the FCO. In administrative proceedings (*Verwaltungsverfahren*), a non-confidential version of the decision will be published on the FCO's website in certain cases, with an English language translation (https://www.bundeskartellamt.de). Fining decisions adopted under the Code on Administrative Offences are not normally published. However, the FCO will generally publish press releases and case reports which will describe the cases in some detail.

1.5 Are there any sector-specific offences or exemptions?

Section 1 ARC does not apply to certain restrictions of competition in the agricultural sector or in the water supply sector, or to resale price maintenance in the magazine and newspaper sector.

Moreover, there is an exemption from Section 1 ARC for publishing cooperations between newspaper or magazine publishers to the extent that such agreements enable the parties to strengthen their economic base for intermedia competition. Since the exemption only relates to Section 1 ARC but not to Article 101(1) TFEU, it does not apply to cooperations which may affect trade between Member States. As such, the exemption relates primarily to small and medium-sized publishing houses. By way of example, the FCO did not apply the exemption with respect to the cooperation between two large national German newspapers in the joint marketing of supra-regional

advertising space through a newly founded joint venture in light of relevant sales generated by the parties with customers in other EU countries.

The relevant exemption relates to agreements between newspaper or magazine publishing houses on publishing cooperation. It does not apply to editorial cooperations. Moreover, as the FCO noted in a report on a fine decision against a publishing house (*DuMont/Bonner Generalanzeiger*), it takes the view that any hard-core restrictions such as pure price or territorial cartels remain prohibited. The FCO stresses that the purpose of the exemption is not to eliminate competition, but to strengthen the plurality of the press by strengthening competition between newspaper and magazine publishing houses and other media, in particular pure online media.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Cartel conduct outside of Germany is covered by the prohibition insofar as the conduct has an appreciable effect on Germany. The FCO tends to interpret this rule broadly and it asserts jurisdiction even in cases with little or only indirect effect on Germany. Agreements which are concluded in Germany but have an effect only outside of Germany are not covered. Depending on the individual facts, however, export cartels may have at least a potential effect on Germany and can, in such cases, be covered by the prohibition.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The FCO may generally collect any evidence. It may carry out unannounced searches of business premises and residential premises. In this context, it may seize physical and electronic documents. It also has the right to 'image' computer hard drives using forensic IT tools. As a general rule, such investigative measures require a search warrant by a judge. Further, the FCO may interview individuals. Companies are obliged to provide company-specific and market-specific information; in particular, information on company turnover. This requirement is intended to put the FCO in a position to calculate antitrust fines.

The former principle that companies and individuals acting for companies were generally not required to provide information on the location and content of certain documents, let alone to provide incriminating documents or respond to questions of the FCO, was abolished in 2021 by the 10th Amendment to the ARC. The 10th Amendment to the ARC, based on requirements of Articles 6(1) sentence 2 e), 8 and 9 of Directive 2019/1, significantly extended the investigatory powers of the FCO by introducing far-reaching duties of cooperation for companies and individuals both in administrative proceedings (*Verwaltungsverfahren*) and in fine proceedings (*Bußgeldverfahren*). (Directive 2019/1 does not distinguish between administrative proceedings and fine proceedings.) In line with the existing system at the European level, undertakings are now required to participate in the examination of the facts; however, they must not be forced to confess.

Under the extended investigatory powers, the FCO may request the provision of information and release of documents. Representatives of undertakings may be summoned by the FCO to appear for interviews. In addition, FCO officials may, in case of inspections of business premises or residential premises, request from all representatives or employees of the undertaking information which may enable access to evidence as well as explanations on facts or documents relating to the subject matter and purpose of the inspection. Individuals may not refuse to provide incriminating information or to release incriminating documents due to the risk of personal prosecution if the information provided only creates the risk of prosecution for an administrative offence (but not the risk of prosecution for a crime as, for example, in cases of bid rigging) and the FCO committed to not prosecute.

The FCO has stated that it will need to be balanced in the future as to whether and to what extent the extended investigatory powers *vis-à-vis* undertakings must be used and the prosecution of natural persons must as a consequence be waived. It may be derived from the comments by the FCO on the draft 10th Amendment to the ARC that it might intend to use the extended powers of investigation primarily in proceedings concerning abuse of market dominance where comprehensive investigations of market mechanisms and market conditions are required.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The FCO may review and seize external counsel advice documents kept at the premises of the undertaking under investigation unless the relevant documents qualify as defence documents, which requires that (i) the documents were created after the formal initiation of proceedings relating to the conduct under investigation, (ii) the defence relationship between the undertaking under investigation (or its parent company) and external counsel already existed when the documents were created, and (iii) the documents specifically relate to the ongoing investigation. As such, the concept of legal privilege under the German rules is not as broad as under EU rules as legal privilege under the EU rules may also cover documents which were created ahead of an antitrust proceeding.

2.3 Are there general surveillance powers (e.g. bugging)?

Competition authorities do not have general surveillance powers. Bugging is restricted to the most serious criminal offences only and the cartel prohibition does not fall into this category.

2.4 Are there any other significant powers of investigation?

FCO officials may seize electronic devices, such as laptops, tablet computers or smartphones, where the officials do not have access to the device (e.g. lack of password) or where the hard drive cannot be imaged.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The searches are carried out by FCO officials who are, as a general rule, accompanied by police staff and IT experts to support the FCO officials in their searches. The FCO will normally be prepared to wait for approximately 30–60 minutes for external legal counsel to arrive before starting the inspection.

2.6 Is in-house legal advice protected by the rules of privilege?

In-house legal advice is not protected by the German rules of privilege.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

During the investigation, the company and the individuals concerned are protected by fundamental rights of defence. According to the 10th Amendment to the ARC, to the extent that individuals acting for companies are, in principle, obliged within the context of requests for information, interviews or inspections to provide information or to release documents to the FCO, including in fine proceedings (*Bußgeldverfahren*), they may refuse to do so if the disclosed information creates the risk of prosecution of the relevant individual or certain relatives of the individual for a crime (such as, for example, in case of bid rigging) or if the disclosed information creates the risk of prosecution for an administrative offence and the FCO does not commit to not prosecute.

The fundamental rights of defence also include the right to legal advice and to appoint a legal representative. Moreover, the investigatory powers are strictly limited to the object of the investigation. Officials are, therefore, not permitted to exceed this limitation (e.g. by searching files which do not fall within the object of the investigation).

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Following the 10th Amendment to the ARC coming into force in 2021, the FCO can impose, both in administrative proceedings (*Verwaltungsverfahren*) and in fine proceedings (*Bußgeldverfahren*), fines for: failure to (i) respond to a request for information; (ii) respond to such request correctly or completely or in time; or (iii) surrender documents or to surrender documents completely or in time, failure to tolerate a search of offices or premises or objects used for business purposes, breaking any seal of business premises, books or documents, and failure to (i) comply with a request during the search of undertakings to provide information that might facilitate access to evidence and explanations on facts or documents that might be connected to the subject matter and purpose of the search, or (ii) comply with such request correctly or completely or in time.

Fines in these cases may, according to the 10th Amendment to the ARC, amount to up to 1% of the total turnover of the undertaking concerned in the financial year preceding the decision of the FCO.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Fines can be imposed on companies up to a maximum of 10% of worldwide turnover in the last completed business year. Unlike on the EU level, the 10% threshold is interpreted by the Federal Court of Justice (*Bundesgerichtshof*) and consequently also by the FCO as the upper limit of any fine, not as a cap on an otherwise unlimited fine. The FCO can also take into account the proceeds gained from the infringement when determining the level of the fine.

Under its Fining Guidelines of 2013 (available on the FCO's website: https://www.bundeskartellamt.de), the FCO uses a two-step procedure to calculate fines. First, it defines the statutory framework of fines, and second, the FCO sets the fine within this framework.

In a first step, the FCO defines the statutory framework of the fine. As previously mentioned, the upper limit of the framework of fines for serious intentional cartel administrative offences amounts to 10% of the total turnover achieved in the business year preceding the authority's decision. For negligent offences, the maximum fine amounts to 5% of the total turnover achieved.

In a second step, the FCO sets the fine within the statutory framework of fines. The scope for setting a fine in a specific case is determined with consideration to the so-called gain and harm potential (i.e. competitive gains achieved or achievable by the infringement and the harm caused to third parties or to the national economy) on the one hand and the total turnover of the entity which infringed competition rules on the other. The FCO generally assumes a gain and harm potential of 10% of the domestic turnover to which the infringement relates during the entire period of the infringement. A multiplication factor is then applied to the established gain and harm potential to account for the size of the respective group of companies. In cases in which the value calculated is below the legal upper limit, this value will represent the upper limit for the further assessment of the fine. Where the value determined is obviously too low in a specific case on account of a significantly higher gain and harm potential, this value can exceptionally be exceeded in order to set an adequate fine. Finally, aggravating and mitigating factors are taken into account in order to set the final amount of the fine, including offence-related criteria (e.g. the type and duration of the infringement and its qualitative effects) and offender-related criteria (e.g. the role of the company within the cartel and its position on the market affected). Hard-core cartels are typically rated in the upper range of the fining framework.

Interest is payable on the fine, commencing four weeks from the date of the formal notification of the FCO's decision, even where the decision is being appealed.

There are no mandatory additional sanctions on companies (e.g. no mandatory blacklisting from bidding for government contracts or similar measures). However, companies may be excluded by public contracting authorities from bidding for government contracts for up to three years following the relevant event in case of indications of previous violation of the cartel prohibition. In this respect, an electronic database (*Wettbewerbsregister*) is being set up at the FCO which will enable public contracting authorities to check whether a company has committed violations of the law which might lead to its exclusion from public award procedures.

Importantly, the Higher Regional Court (*Oberlandesgericht*) Düsseldorf, which is the court of appeal for fine decisions of the FCO, is not bound by and does not apply the methodology for the calculation of fines according to the FCO Fining Guidelines. As a result, the Higher Regional Court will determine the amount of the fine in cartel cases on appeal within its sole discretion irrespective of the affected turnover, taking into account the 10% threshold as the upper limit of the fine framework. The practical consequence is that undertakings which appeal a fine decision of the FCO run a considerable risk that the fine imposed by the FCO will eventually be (significantly) increased on appeal, even if the appeal is partially successful with respect to some infringements determined by the FCO in

its fine decision. Since the court, unlike the FCO, determines the amount of the fine within the framework of up to 10% of worldwide group turnover irrespective of the cartel affected turnover, the risk of an increase of the fine is particularly high for multi-product companies and large groups of undertakings.

Such (considerable) increase of fines occurred several times in recent years, which has provoked much criticism in the legal community as companies may be deterred from appealing fine decisions and rather choose a settlement with the FCO.

The 10th Amendment to the ARC introduced a non-exhaustive list of factors that may be taken into account for the determination of the amount of the fine in addition to the factors' gravity and the duration of the infringement. The FCO will update its guidelines on the calculation of fines on that basis. The existing guidelines continue to apply for the time being, taking into account the new statutory provisions regarding determination of the fine.

The relevant factors stipulated by the new provisions – which relate on the one hand to circumstances concerning the infringement itself and on the other hand to the behaviour of the undertakings concerned before and after the infringement – are: the nature and the magnitude of the infringement, in particular the amount of the turnover directly or indirectly linked to the infringement; the relevance of the products and services affected by the infringement; the manner in which the infringement was committed; previous infringements committed by the undertaking as well as any adequate and effective precautions taken prior to the infringement to prevent and uncover infringements; and the undertaking's efforts to uncover the infringement and remedy the harm as well as the precautions taken after the infringement to prevent and uncover infringements.

With respect to the factor of the amount of the turnover directly or indirectly linked to the infringement, the legislative materials note that account may be taken both of the magnitude of the affected turnover generated individually by an undertaking concerned as well as of the magnitude of the affected turnover relating to the entire infringement and their relationship to each other. As such, it is not required that the affected turnover forms the basis for the determination of the fine, as within the methodology applied by the FCO. It is, therefore, uncertain whether the methodology for the determination of the amount of the fine applied by the FCO on the one hand and by the Higher Regional Court of Düsseldorf on the other hand will become more aligned as a result.

With respect to the factor of adequate and effective precautions taken prior to the infringement to prevent and uncover infringements, it is according to the legislative materials generally to be assumed that an undertaking has taken all objectively necessary measures to effectively prevent cartel infringements by employees if the measures taken have led to the detection and notification of the infringement. Where the management is itself involved in the infringement, no mitigation is possible.

With respect to the factor of the undertaking's efforts to uncover the infringement and remedy the harm as well as the precautions taken after the infringement to prevent and uncover infringements, the legislative materials note that the relevant factor allows for the consideration of compliance measures taken after the infringement, in particular to remedy compliance deficits indicated by the infringement. At the same time, it shall be possible to take into account the remedy of damages and measures of the undertaking to investigate the infringement. According to the legislative materials, the active cooperation of an undertaking may be an indication of the seriousness of such efforts.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The level of fines for individuals amounts up to €1 million for participation in serious infringements (i.e. hard-core cartel activity such as price fixing, bid rigging, allocation of quotas, customers or territories) and up to €100,000 for less serious infringements.

It should be noted that German law generally does not provide for criminal sanctions for violations of the ARC, except for Section 298 of the German Criminal Code (*Strafgesetzbuch*), which provides for a prison sentence of up to five years for bid rigging in tender proceedings. According to a Federal Court of Justice (*Bundesgerichtshof*) decision, bid rigging could, depending on the circumstances of the individual case, also be regarded as a particular form of fraud (warranting a prison sentence of up to five years). If the FCO discovers cases involving bid rigging, it must refer the proceedings against individuals to the state prosecutor. The corresponding proceedings against companies stay with the FCO.

There are no additional sanctions for individuals (e.g. director disqualification).

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Fines are only reduced by the FCO on this basis in exceptional cases, where a company proves that it cannot pay the FCO's fine in the long run without endangering its very existence. In cases where a company proves that it cannot pay the FCO's fine in the short to medium term, the FCO can agree to issue a debtor warrant (repayable as soon as the company's finances improve) or it can agree to otherwise defer the fine.

3.4 What are the applicable limitation periods?

In general, serious infringements become time-barred five years after termination of the infringement, whereas less serious infringements become time-barred three years after termination of the infringement. However, investigations by the FCO, the European Commission or competition authorities of other Member States will suspend the limitation period.

According to the Federal Court of Justice (*Bundesgerichtshof*), the statute of limitations in case of a coordinated price increase either based on an agreement or in the form of a concerted practice starts to run only when there are no goods affected by the coordinated price increase on the market anymore because the effect of the price increase ends due to a renewed change in prices. In case of bid rigging, the statute of limitations according to the Federal Court of Justice starts to run only with the final execution of the contract, which does not occur prior to the preparation of the final bill. This point in time is relevant not only for the party benefitting from bid rigging, but for all parties involved even if they abstained from submitting an offer in line with the collusive agreement.

Infringements become in any case time-barred after the end of the double statutory limitation period. However, the resulting absolute 10-year limitation period for serious cartel infringements is, according to a change in the law by the 10th Amendment to the ARC, prolonged by the time period during which a fine decision of the FCO is the subject of a pending court proceeding. As a result, a cartel infringement which was not time-barred when the fine decision relating to such

infringement became the subject of a court proceeding, notably upon appeal by an undertaking concerned, can no longer become time-barred due to the expiration of the absolute 10-year limitation period during the pending court proceeding.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Companies have frequently covered the legal costs and fines imposed on company employees or directors (including former employees and directors). However, this has been viewed more critically in recent years and, in addition to potential tax implications, it could well be possible that courts will prohibit such conduct in the future.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Under German employment law, legal costs and/or cartel fines can be recovered from an employee if the employee acted intentionally. If the employee was merely grossly negligent in his conduct, recovery is more difficult.

It is, however, currently unclear whether competition law prevents an undertaking from holding employees liable for a cartel fine imposed on the undertaking. It might be argued that German law provides for the personal liability of the acting individuals on the one hand and the corporate liability of undertakings on the other hand and that a fine imposed on an undertaking for its cartel participation must not be 'shifted' to the acting individual (or ultimately to the individual's Directors and Officers (D&O) liability insurer). A case concerning this question is currently still pending at the District Court of Dortmund.

In a judgment which concerned damages claims of a company against members of the board of directors, the District Court of Saarbrücken held in 2020 in an *obiter dictum* that a company cannot hold members of the board of directors liable for a cartel fine imposed by the European Commission under European competition law (which unlike German law does not foresee a personal liability of acting individuals). According to the District Court, this would violate the useful effect (*effet utile*) of Article 101 TFEU. The court held that fines imposed by the European Commission must have a sufficiently deterrent effect and that in this context cartel fines are the essential element of the deterrent effect against companies. In the view of the court, it would mitigate this effect if companies could pass on parts of the fine to members of the board of directors.

A final assessment of the question is likely only to be expected by the Federal Court of Justice (*Bundesgerichtshof*).

In any event, an employer should consider that the cooperation of an employee in a cartel investigation will usually require an indemnification of the employee, to the extent legally possible, from any damages claims of the employer *vis-à-vis* the employee. Refusal to grant such indemnification will usually lead to the loss of cooperation of that individual with the company. This may adversely affect the company's ability to obtain reductions of the fine under the statutory leniency programme, which requires full cooperation with the FCO's investigation by the company and its employees.

With respect to recovery of attorneys' fees, the District Court of Saarbrücken noted in 2020 in the abovementioned decision in an *obiter dictum*, without any further discussion, that it was at least doubtful whether these can be recovered. On the other hand, the District Court of Munich had held in a judgment in 2013, which concerned liability of a board member *vis-à-vis* the company for failure to introduce an appropriate compliance system to prevent violations of the law (in that case, payment of bribes outside Germany), that the company could recover the costs of internal investigations and of advice and representation in administrative proceedings.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

A parent company is subject to sanctions if it directly or indirectly exerted decisive influence on a subsidiary which participated in a cartel, irrespective of whether management of the parent company participated in the cartel or failed to properly supervise the subsidiary. While German administrative offence law does not allow for a rebuttable presumption to this effect in cases of (almost) wholly owned subsidiaries – as applied by the European Commission – but requires proof to the free conviction of the judge, there may be, in practice, not much difference to the results at the European level. Legislative materials state that in cases where a clear majority of shares is held, a high probability militates for the assumption that the business policy of the relevant entity is actually determined by the majority shareholder.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

In order to provide companies engaged in cartel activity with an incentive to end their involvement and to inform the FCO of the infringement, the FCO introduced a leniency programme in 2000, which was revised in 2006. Following the codification, based on the requirements of Articles 17–19 of Directive 2019/1, by the 10th Amendment to the ARC of statutory conditions for granting undertakings immunity from fines or reduction of fines, the FCO abolished its leniency programme in January 2021. The FCO will publish general administrative principles on the exercise of discretion regarding the design of the procedure and the application of the statutory leniency programme.

According to the statutory leniency programme, the FCO may grant immunity from a fine or reduce a fine imposed on natural persons and undertakings involved in cartels (cartel participants) that contribute to uncovering a cartel through their cooperation with the FCO (leniency).

Due to the liability of individuals under German competition law, the statutory leniency programme is available both to companies and individuals. A leniency application submitted for an undertaking also applies to their current and former directors, managers and members of staff.

Unless expressly declared otherwise, a leniency application submitted for an undertaking applies to all legal persons that constitute the undertaking at the time the application is filed.

The leniency application shall include details as to all of the following information and shall be submitted together with the corresponding evidence:

1. the name and address of the applicant;
2. the names of the other cartel participants;
3. the products and territories affected;
4. the duration and nature of the offence, in particular also with regard to the applicant's own involvement; and
5. information on any past or possible future leniency applications in relation to the cartel that have been made or will

be made to other competition authorities, other European competition authorities or other foreign competition authorities.

Under the statutory leniency programme, leniency may be granted only if the applicant:

1. discloses its knowledge of, and its role in, the cartel to the FCO in its leniency application or if a cartel participant, in the event of an application in its favour, fully cooperates in clarifying the facts;
2. ends its involvement in the cartel immediately after filing its leniency application, except for individual activities that, in the FCO's view, may be necessary to preserve the integrity of its investigation;
3. meets the obligation to cooperate genuinely, continuously and expeditiously with the FCO from the time of its leniency application until the conclusion of the FCO's enforcement proceedings against all cartel participants; and
4. while contemplating filing a leniency application, did not destroy, falsify or conceal information or evidence relating to the cartel, and did not disclose the fact of its contemplated leniency application, or any of its contemplated content.

A cartel participant will be granted immunity if it fulfils these general conditions for leniency and if it is the first to submit evidence that, at the time the FCO receives the leniency application, enables the FCO to obtain a search warrant for the first time. Further, the FCO shall generally not impose a fine on a cartel participant if such participant fulfils the abovementioned general conditions for leniency and if it is the first to submit evidence that, if the FCO is already able to obtain a search warrant, makes it possible to prove the offence for the first time, and if no other cartel participant has already fulfilled the conditions for immunity mentioned above. However, immunity from fines shall not be possible if a cartel participant has taken steps to coerce other cartel participants to join a cartel or to remain a member of such cartel.

The FCO may reduce the fine imposed on a cartel participant if such cartel participant fulfils the abovementioned general conditions for leniency and if it submits evidence of the cartel which, relative to the information and evidence already available to the FCO, represents significant added value for the purpose of proving the offence.

It should be noted that the leniency programme has no effect on civil cartel damages claims or on criminal investigations conducted by the public prosecutor. Whistle-blowers can therefore still be subject to follow-on damages claims, and individuals could face criminal prosecution where the case involves bid rigging.

As noted by the FCO, such lack of specific protection may decrease incentives for leniency applications in cases where there may be a risk of prosecution of individuals for a crime.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The revised 2006 FCO leniency programme introduced a marker system permitting applicants to place a marker with the FCO by declaring their willingness to cooperate. In line with the requirements of Article 21 of Directive 2019/1, the marker system was codified by the 10th Amendment to the ARC. As mentioned, following the entry into force of the 10th Amendment, the FCO abolished its leniency programme in January 2021.

According to the statutory marker system, a cartel participant may contact the FCO to initially declare its willingness to cooperate (marker) in order to be assigned a place in the queue for leniency in the order in which the applications are received.

A marker shall, at least, include a brief description of the following:

1. the name and address of the applicant;
2. the names of the other cartel participants;
3. the products and territories affected;
4. the duration and nature of the offence, in particular also with regard to the applicant's own involvement; and
5. information on any past or possible future leniency applications in relation to the cartel that have been made or will be made to other competition authorities, other European competition authorities or other foreign competition authorities.

The FCO shall specify a reasonable period within which the applicant is to submit a leniency application including details as to all the abovementioned required information together with the corresponding evidence. The place in the queue for leniency of the finalised leniency application shall be determined based on the time of the marker provided that the applicant fulfils its obligations at all times. In this case, all the information and evidence properly produced prior to the expiry of the period specified by the FCO for finalising the leniency application are deemed to have been submitted at the time of the marker.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

A marker may be placed orally. A leniency application may be submitted orally in agreement with the FCO.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The FCO may (and will in practice) infinitely refuse to disclose leniency statements contained in its file, a leniency statement being legally defined as a voluntary statement made by, or on behalf of, an undertaking or a natural person to a competition authority describing that undertaking's or natural person's knowledge of or role in a cartel which was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme.

The so-protected leniency statement does not cover evidence which exists irrespective of an investigation of the FCO. Upon application by private litigants, the competent court may ask the FCO to disclose such evidence. For its decision in this respect, the court must take into account the effectiveness of public competition law enforcement, in particular the impact of the disclosure on pending proceedings and on the functioning of leniency programmes.

Until the complete termination of the procedure of the FCO *vis-à-vis* all parties, disclosure of evidence is ruled out to the extent that it contains information which was produced by a legal entity or a natural person specifically for the proceedings of the FCO.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

As mentioned, leniency may be granted only if the applicant, *inter alia*, meets the obligation to cooperate genuinely, continuously and expeditiously with the FCO from the time of its

leniency application until the conclusion of the FCO's enforcement proceedings against all cartel participants.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is no 'leniency plus' or 'penalty plus' policy in Germany.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

In 2012, the FCO established an anonymous online whistle-blowing system accessible through the FCO's website (https://www.bundeskartellamt.de) which enables the FCO to receive anonymous tip-offs of cartel law infringements. The system guarantees the anonymity of informants and enables continuous communication via a protected electronic mailbox. On the basis of the information received via the notification system, investigations have been carried out in numerous cases since 2012, searches have been carried out in several cases and fines have already been imposed.

Leniency applications can be made by individuals independently of their employers. However, there is no need for a separate application by an individual if the company has applied for leniency since, as mentioned, a leniency application submitted for an undertaking also applies to their current and former directors, managers and members of staff. An independent leniency application by an employee can compromise the position of its employer, as even in the best possible scenario for the employer, the company can only come second in its application, in which case immunity is no longer available.

There are no financial rewards to incentivise whistle-blowing by individuals.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Unlike the European Commission, the FCO does not have formal settlement or plea-bargaining procedures outside of the leniency process. However, the FCO has adopted informal settlement rules and the termination of cartel proceedings, by way of settlement, has become the rule. The FCO has set out the basic principles of its informal 'settlement procedure' in its 'Information Leaflet on the settlement procedure used by the FCO in fine proceedings' (*Bußgeldverfahren*) (current version of February 2016), which is available on the FCO's website (https://www.bundeskartellamt.de). The main characteristics are that the companies concerned confess their participation in the anti-competitive conduct and accept the fine imposed by way of a 'settlement declaration'. Such declaration is considered by the FCO a mitigating circumstance, leading to a reduction of the fine in the form of a 'settlement discount' of up to 10%. While the settlement does not include a waiver to file an appeal, negotiated decisions imposing fines have usually not been appealed so far. Half of the settlements are so-called 'hybrid' settlements, where a settlement is agreed with some of the companies concerned whereas the other companies refuse to settle and go through the normal proceedings. Settlements are regularly used by the companies concerned in cases where leniency is no longer available to the parties.

7 Appeal Process

7.1 What is the appeal process?

As previously mentioned, the FCO's decisions are subject to appeal to the Higher Regional Court (*Oberlandesgericht*) in Düsseldorf. A further appeal against decisions of the Higher Regional Court to the Federal Court of Justice (*Bundesgerichtshof*) is only permitted on questions of law.

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes; if the FCO's decision is appealed, the fine will only become payable following the judgment of the court. However, where the court confirms the fine set by the FCO, interest is payable on the fine, commencing four weeks from the date of the formal notification of the FCO's decision, even where the decision is being appealed.

7.3 Does the appeal process allow for the cross-examination of witnesses?

German procedural rules do not permit the cross-examination of witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Under German procedural law, designated courts have jurisdiction to rule on damages actions for the compensation of loss suffered as a result of cartel conduct.

Legal basis for damages actions

Damages claims are based on Section 33a ARC. In addition, claims for damages may, under certain circumstances, be based on Sections 8 and 9, respectively, of the German Act against Unfair Competition. A further legal basis can be found in general tort law, Section 823 *et seq.* of the German Civil Code.

Parties entitled to claim

An action for civil damages can be brought by both direct and indirect purchasers to the extent they are concerned by the cartel infringement.

Where the direct purchaser brings an action for civil damages against the cartel members, they can in turn raise the defence and counterargument that the direct purchaser passed the effect of the increased cartel price on to its customers ('passing-on' defence). However, proof of passing on of increased cartel prices can be difficult, in particular if there are many indirect purchasers or if the cartelised products were not only resold but processed or otherwise converted.

In cases where the indirect purchaser has suffered direct loss through the cartel's activity, it has previously been established that an action for damages can be brought (i.e. in cases where the indirect purchaser of goods, which were the subject of a cartel on the level of production, purchases these goods from

a wholesaler which is a wholly owned subsidiary of an undertaking involved in the cartel, the indirect purchaser can bring a claim for damages).

Burden of proof and statutory presumptions

In principle, the claimant must demonstrate and provide evidence for the facts forming the basis of the competition law infringement, as well as of the loss incurred. However, there are a number of statutory (rebuttable) presumptions in the ARC, leading to a reversal of the burden of proof.

Since 2017, there has been a statutory (rebuttable) presumption in the ARC that a cartel causes damages. The legal presumption relates to the existence of damages and the causal link between the cartel infringement and the damages.

The 10th Amendment to the ARC in 2021 introduced a statutory (rebuttable) presumption that contracts relating to goods or services with undertakings involved in a cartel which fall factually, temporally and geographically in the scope of the cartel were affected by the cartel. A respective statutory (rebuttable) presumption was introduced with respect to indirect purchasers.

With respect to damages claims of indirect purchasers against cartel members, there has been, since 2017, a statutory (rebuttable) presumption to the benefit of indirect purchasers that a price increase was passed on by the direct purchaser.

Binding effect

Final decisions adopted by the FCO (i.e. after the conclusion of any appeals), the European Commission or by competition authorities of other Member States have a binding effect on the German civil courts both regarding facts and liability. This is intended to facilitate private follow-on actions, as national courts will not hear further evidence on the competition law infringement after a final formal decision has been made by a competition authority. However, and importantly, there is no binding effect with respect to whether and the extent to which the infringement caused damages to third parties.

Determination of damages

Under Section 249 of the German Civil Code, damages are calculated on the basis of the difference between the financial position of the claimant after the loss has occurred and the financial position that the claimant would have been in had the loss not occurred. The loss incurred is the difference between the actual cartel price and the hypothetical competitive price. The damages to be compensated also include lost profits.

According to a judgment of the Federal Court of Justice (*Bundesgerichtshof*) in 2020, umbrella pricing effects and price amount damages caused thereby are, as possible effects of a cartel agreement, able to cause damages to customers of cartel outsiders. In another judgment in 2020, the Federal Court of Justice ruled that the parties to a basic agreement are jointly and severally liable not only for any damages caused by the implementation of this agreement and their participation in respect of individual contract awards but for any damages caused by the prohibited coordination of conduct, including damages resulting from the fact that the weakening of competitive forces caused by the coordination had an adverse impact on the offer prices of the cartel participants or those of cartel outsiders for the customers.

Estimation of the loss incurred

There is no specific statutory provision relating to the determination of the loss incurred and, in particular, no statutory presumption in this context.

Section 287 of the German Code of Civil Procedure entitles the judge to determine whether damages are to be awarded and estimate the amount of damages on the basis of certain facts, thereby reducing the standard of proof required. It is sufficient for the claimant to provide a reliable factual basis for such an estimate. In cartel cases, the court can base its estimate of the loss incurred on the basis of the profit made through the illegal cartel activities by the defendants.

The Federal Court of Justice (*Bundesgerichtshof*) has held that, with respect to a quota and customer allocation cartel, there is no *prima facie* evidence (*Anscheinsbeweis*) regarding damages in the form of inflated prices caused by the cartel. At the same time, the Federal Court of Justice noted there is a factual presumption that prices generated in the context of a cartel, including a quota and customer allocation cartel, on average exceed those which would have existed without the cartel agreement, and that this presumption becomes more relevant the longer and the more sustainably a cartel is exercised.

The District Court of Dortmund in two judgments in 2020 estimated the damages without taking into account expert opinions of the parties and without appointing a separate economic expert. The District Court held that the overall view of all relevant aspects of the facts showed that the minimum damage to be estimated according to Section 287 of the German Code of Civil Procedure was a cartel-related surcharge of 15% of the net price. In this respect, the court referenced the fact that the parties had agreed through general terms and conditions on a contractual penalty of 15% in case of a cartel. (The Federal Court of Justice ruled in 2021 that a contractor involved in a cartel is not unduly disadvantaged contrary to the principles of good faith by a lump-sum damages clause in general terms and conditions. The damages claim of a cartel victim which purchased a product for an inflated price caused by the cartel may, according to the Federal Court of Justice, in principle be effectively liquidated through a respective clause in the purchasing contract in a lump-sum amount of 15% of the billing amount, provided the clause reserves the cartel participant the right to prove that the customer incurred a lower damage.) The District Court held that a party which is thinking economically will bear the risk of payment of such penalty only if the expected profit from the cartel corresponds in any case to this risk. With respect to purchasing of products in a time period for which no contractual penalty had been agreed, the District Court assumed a cartel-related surcharge of 10% of the net price.

In a judgment in February 2021, the same District Court again estimated the amount of the damage without obtaining an economic expert opinion and in this case – which did not involve a contractual penalty provision – assumed a cartel-related surcharge of 10% of the net price.

All three judgments of the District Court of Dortmund were appealed to the Higher Regional Court (*Oberlandesgericht*) of Düsseldorf.

As a judgment by the Higher Regional Court of Frankfurt in 2020 dismissing damages claims against manufacturers of drug store items shows, it may be particularly challenging for a claimant to prove facts indicating that an infringement caused inflated prices in case of information exchange between competitors that did not take place in the context of a hard-core cartel – in particular a price cartel, a quota cartel or a customer allocation cartel – if there are no indications that such 'pure information exchange' gave rise to coordination between the participating undertakings with respect to prices, conditions or other parameters of competition.

Similarly, the District Court Nürnberg-Fürth in a judgment in 2021 dismissed damages claims against confectionery manufacturers based on a mere exchange of information, arguing that an overall examination of all relevant evidence did not allow any conclusions to be drawn as to any damages incurred by the claimant as a result of the exchange of information.

In another judgment in 2021, the same District Court held that the relevant exchange of information in the case at hand was not sufficient to establish the required probability for the occurrence of damages and that it was decisive whether the coordination objectives of the cartel participants have actually been implemented.

With respect the trucks cartel, the Federal Court of Justice ruled in 2020 that the conduct by the undertakings concerned did not constitute a pure information exchange on list prices but that the parties had discussed their future list prices and their increase and had coordinated their future pricing through both agreements and concerted practices. In this context, the Federal Court of Justice ruled that in case of coordination of price lists and list price increases by a cartel with high market coverage over a longer period of time, a principle derived from experience (*Erfahrungssatz*) applies regarding the occurrence of damages even without coordination of transaction prices.

In a decision on damages claims arising from umbrella pricing effects, the Federal Court of Justice in 2020 held that there is no *prima facie* evidence (*Anscheinsbeweis*) with respect to the existence and amount of umbrella pricing. At the same time, the Federal Court of Justice noted that under certain circumstances, it can be expected with probability that cartel outsiders are able to enforce higher prices on the market than they would be able to without the cartel infringement, and that the larger the market coverage of a cartel is and the longer the cartel infringement lasts, the higher this probability is.

Right to have evidence surrendered and information provided by cartel members

A private claimant may (independent from cartel damages litigation) claim from cartel members the delivery of evidence which is necessary for the assertion of cartel damages claims, provided the claimant specifies the evidence as precisely as possible on the basis of reasonably available facts. The claim does not relate to leniency statements. If cartel members refuse to disclose evidence, a claimant may ask a court to order disclosure. For its decision, the court must take into account, *inter alia*, the effectiveness of public competition law enforcement.

The 10th Amendment to the ARC clarified that the existence of claims of private claimants against cartel members for delivery of evidence necessary for the assertion of cartel damages claims is independent from the point in time when the relevant damages claims arose.

Any party whose violation of Section 1 ARC or Article 101 TFEU has been established by a final decision of the FCO, the competition authority in another Member State or the European Commission can be ordered by a court by way of a preliminary injunction to surrender this decision if the conditions of a claim for delivery of evidence as mentioned above are fulfilled. A respective court order does not require a special need for urgency. The court shall take the measures required in the particular case to safeguard the protection of trade and business secrets and other confidential information.

On this basis, the District Court of Hanover in 2020 ordered a cartel member by way of a preliminary injunction to release an unredacted fine decision (of the European Commission) to the claimant, requiring the claimant, however, to not pass on the document to third parties, including other undertakings of the same group not involved in the legal dispute.

Disclosure of information from the FCO's file

In a legal proceeding concerning a private cartel damages claim or a claim for disclosure of evidence, the court may request, upon application by a party, that the FCO provide documents and items that are included in its files on a proceeding or kept in official custody during a proceeding if the applicant credibly demonstrates that it has a claim for damages against another party and the information expected to be included in the file cannot be obtained from another party or third party with reasonable effort. For its decision, the court must take into account, *inter alia*, the effectiveness of public competition law enforcement, in particular the influence of such disclosure on ongoing proceedings and on the functioning of leniency programmes and settlement proceedings. The FCO may refuse to provide documents and items which are included in its files on a proceeding or kept in official custody during a proceeding if these contain leniency statements.

8.2 Do your procedural rules allow for class-action or representative claims?

In Germany, collective proceedings or class actions are not available. However, customers can submit damages claims via third parties by assigning their claims to them. This is of particular interest to smaller companies that do not otherwise have the financial resources to enforce their legal rights through litigation, as well as larger companies facing a significant absolute cost risk in case of high amounts of damages claims.

If cartel damages claims are assigned to a third party which brings the claims through a vehicle that has been merely founded to claim customers' damages on its own behalf, it must be made sure that such vehicle is properly funded. Otherwise, courts will consider the claim to be *contra bonos mores* (immoral) and void as a major part of the procedural risks is shifted to the defendant, thereby circumventing the defendant's legal rights.

Following legislative measures to promote private competition law enforcement, there is today considerable activity in the German market of litigation law firms cooperating with process financiers. Several cases are currently pending before German courts which involve numerous damages claims bundled by way of assignment to the claimant.

8.3 What are the applicable limitation periods?

The limitation period for damages claims based on a violation of Section 1 ARC is five years.

The limitation period starts to run at the end of the year in which: the claim arose; the claimant became aware, or should have become aware in the absence of gross negligence, of the relevant circumstances and of the identity of the defendant; and the infringement was terminated.

Investigations by the FCO, the European Commission or competition authorities of other Member States will suspend the limitation period. According to a judgment by the Federal Court of Justice (*Bundesgerichtshof*) in 2020, the suspension of the limitation period of a claim for damages as a result of investigations by the European Commission does not only begin with the formal opening of proceedings by the European Commission but already with a measure clearly aimed at investigating the company in question for a prohibited restriction of competition (such as, for example, an inspection).

The limitation period will also be suspended if a cartel damages claimant files suit against the defendant for information or delivery of evidence based on the respective substantive claim.

The suspension of the limitation period ends one year after termination of the proceedings through a final and conclusive decision or otherwise. This is intended to ensure that claimants have enough time to collect relevant information for the assertion of civil damages claims.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Yes, there is a statutory 'passing-on' defence in civil damages claims according to which the loss of the purchaser is compensated to the extent the purchaser passes on a price increase caused by a cartel infringement to his purchasers (indirect purchasers). If a product or service was purchased for an inflated price, the existence of a loss is, however, not excluded because the product or service was resold.

The Federal Court of Justice (*Bundesgerichtshof*) ruled in a judgment in 2020 that a cartel participant wishing to invoke the passing-on defence must provide tangible evidence in favour of the passing on of the damages caused by the cartel. If indirect purchasers would only have relatively minor and difficult to quantify claims for damages and there is consequently no concern with respect to multiple recourse to the parties involved in the cartel, the passing-on defence may be ruled out.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

When submitting an action, the claimant must render an advance payment to cover court fees. With the formal decision, the court allocates the legal costs of the proceedings, i.e. the court fees and expenses, as well as the statutory attorney fees, on a *pro rata* basis in relation to the outcome of the case. As a general rule, the legal costs must be borne by the unsuccessful party.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

There have been a number of successful damages claims in Germany, including with respect to the vitamin cartel, the cement cartel, the ready-mix concrete cartel, the carbonless paper cartel, and the rail cartel. Further, there are numerous pending damages proceedings against cartel members before German courts; for example, regarding the trucks cartel with respect to which more than 400 legal actions have already been filed in Germany.

Furthermore, settlements have been agreed while court proceedings were pending, i.e. in the rail cartel. Additionally, it is understood that there have been a number of out-of-court settlements in cartel damages cases. In most cases, these settlements were entered into shortly before judgment was due to be passed by a court, in order to prevent a precedent being created. In their nature, these settlements are highly confidential and the details, or even the existence, of a settlement are not disclosed.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The 10th Amendment to the ARC, including a number of changes relating to public and private cartel enforcement, entered into effect in January 2021. The Amendment implemented Directive 2019/1, the implementation of which was due by 4 February 2021.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

There has been a significant decline in the number of leniency applications to the FCO in recent years (2016: 59, 2017: 37, 2018: 24, 2019: 16, 2020: 13). In the view of the FCO, this may be explained by the facilitation of enforcement of private cartel damages claims and the uncertainty faced by potential leniency applicants regarding subsequent claims for damages. The FCO has stated that it considers the decline in leniency applications concerning given the paramount importance of leniency programmes for the detection of cartels.

In light of the declining number of leniency applications, the FCO explores innovative methods of investigation. With respect to the 'screening' of markets, the FCO in case of indications of cartel agreements, including for example bid rigging, queries customers for data in individual cases and checks them for any anomalies. Further, the FCO intends to extend the capabilities of its digital anonymous whistle-blowing system through which it received almost 700 hints in the years 2019/2020.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

In India, cartelisation is a civil offence prohibited under the Competition Act, 2002 ("**Act**").

1.2 What are the specific substantive provisions for the cartel prohibition?

Section 2(c) of the Act defines a cartel as including an association of producers, sellers, distributors, traders or service providers who, by an agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or trade in, goods or provision of services.

Cartels are prohibited under Section 3(1), read with Section 3(3), of the Act. Section 3 of the Act prohibits and renders void agreements entered into between enterprises, persons or associations of enterprises, or persons with respect to the production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an appreciable adverse effect on competition ("**AAEC**") in India.

Section 3(3) of the Act is the specific substantive provision which prohibits anti-competitive agreements in India, including horizontal agreements (and cartels), between enterprises which:

(a) directly or indirectly determine purchase or sales prices;
(b) limit or control production, supply, markets, technical development, investment or the provision of services;
(c) allocate geographic markets or customers; or
(d) directly or indirectly result in bid rigging or collusive bidding.

Such agreements are presumed to have an AAEC and are consequently void.

An agreement can be in any form – written, oral or even a gesture. It does not have to be legally binding.

1.3 Who enforces the cartel prohibition?

The Competition Commission of India ("**CCI**") is the nodal agency which enforces cartel prohibition in India.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The basic procedural steps are as follows:

Step 1: Inquiry into alleged cartelisation

The CCI has the power to inquire into any alleged cartel arrangement in the following instances:

(a) receipt of information filed by any person or their association;
(b) receiving a reference by the Central Government or the State Government or a statutory authority;
(c) *suo moto* (on its own motion); or
(d) upon receipt of a leniency application.

Step 2: *Prima Facie* order passed by the CCI

Upon receiving the information, the CCI is required to form a *prima facie* view on the matter and pass either of the following orders:

(a) Scenario 1: In case the CCI is of the opinion that there exists no *prima facie* case, it shall close the matter and pass an order to that effect under Section 26(2) of the Act.
(b) Scenario 2: In case the CCI is of the opinion that there is a *prima facie* violation of the Act, it shall direct the Director General ("**DG**") to investigate the matter. To this effect, it shall pass an order under Section 26(1) of the Act.

Step 3: Investigation by the DG

The DG is the investigative arm of the CCI. Upon receipt of an order under Section 26(1), the DG is required to review all the information on record with the CCI and collect further information and evidence. The DG is required to submit a report to the CCI, containing its findings on the allegations made, supported by all the evidence, documents and statements collected during the course of the investigation, along with the DG's analysis ("**DG's Report**").

Step 4: Inquiry by the CCI upon receipt of the DG's Report

Upon receipt of the DG's Report, the CCI has the following options:

(a) If the DG finds that there is no contravention, the CCI may:
   - invite objections from any of the parties concerned to the DG Report;
   - agree with the findings of the DG and close the matter; or
   - disagree with the findings of the DG and direct a further investigation or support a further inquiry or itself proceed with a further inquiry in accordance with the provisions of the Act.
(b) If the DG finds that there is a contravention, the CCI may:
   - agree with the findings of the DG and pass any and all orders under Section 27 of the Act; or
   - if the CCI is of the opinion that further inquiry is called for, it shall inquire into such contravention before arriving at a conclusion.

1.5 Are there any sector-specific offences or exemptions?

The Ministry of Corporate Affairs of the Government of India has extended the exemption granted to Vessel Sharing Agreements ("**VSAs**") of the liner shipping industry with effect from 4 July 2018 for a period of three years. The exemption applies to carriers of all nationalities operating ships of any nationality from any Indian port provided such agreements do not include concerted practices involving fixing of prices, limitation of capacity or sales and the allocation of markets or customers. During the subsistence of this exemption, parties entering into VSAs are required to file the relevant VSA and other documents with the DG of Shipping.

Moreover, under the Proviso to Section 3(3), an exemption is also accorded to any joint venture agreement if the same increases efficiency in production, supply, distribution, storage, acquisition to control of goods or provisions of services.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Section 32 read with Section 19(1) of the Act empowers the CCI with extra-territorial jurisdiction, thereby giving it the power to inquire into any cartel operating outside India, which causes or is likely to cause an AAEC within India.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The following table provides a brief summary of the general investigatory powers of the authorities under the Act:

Investigatory power	Civil/administrative	Criminal
Order the production of specific documents or information	Yes, Sections 36(2) and (4) provide this power to the CCI and the DG (read with Section 41(2))	Not applicable
Order summoning and enforcing attendance of any person and examining them on oath	Yes, Section 36(2)(a) provides this power to the CCI and Section 41(2) read with Section 36(2)(a) provide this power to the DG	Not applicable
Calling upon experts to assist the CCI in conducting inquiry	Yes, Section 36(3) provides this power to the CCI	Not applicable
Carry out an unannounced search of business premises	Yes (after obtaining a search warrant from the Chief Metropolitan Magistrate, Delhi)	Not applicable
Carry out an unannounced search of residential premises	Yes, Section 41(3) of the Act read with Section 220 of the Companies Act, 2013 applies to residential premises	Not applicable
Right to "image" computer hard drives using forensic IT tools	Yes, DG officials have the power to seize and copy hard drives, servers and electronic devices including laptops, tablets and mobile phones	Not applicable
Admit evidence in the form of tape recordings, video recordings, and other written statements	Yes, the CCI or DG officials have this power as per Regulation 41(a) of the CCI (General) Regulations, 2009 ("General Regulations")	Not applicable
Admit documents and other records relevant for the proceedings	Yes, the CCI or the DG has these powers under Regulation 41 of the General Regulations	Not applicable
Admit opinion of handwriting experts or experts in identifying finger impressions	Yes, the CCI or DG officials have this power according to Regulations 41(d) and (e) of the General Regulations	Not applicable
Power to call for information	Yes, the CCI has this power at any time before passing orders in a proceeding, per Regulation 44 of the General Regulations	Not applicable
Right to retain original documents	Yes. However, such documents cannot be retained after the conclusion of the investigation	Not applicable
Right to require an explanation of documents or information supplied	Yes	Not applicable
Right to secure premises overnight (e.g. by seal)	There is no specific provision under the Act	Not applicable

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The Act contains provisions for the imposition of pecuniary penalties for non-compliance with the directions of the CCI and the DG. The CCI, during an inquiry, can also temporarily restrain any party from carrying on the alleged act of cartelisation until conclusion of such inquiry. Further, the DG has the power to conduct unannounced search and seizure exercises ("**dawn raid**").

2.3 Are there general surveillance powers (e.g. bugging)?

The Act does not provide any general surveillance powers to the CCI or the DG. However, the DG usually, in the course of its

investigation, coordinates with telecom companies to procure telephone call logs. In some extreme cases, the DG has sought cell tower data from telecom companies to geo-locate individuals whom it suspects of having participated in a cartel. In other instances, the DG has continually directed that individuals of companies, alleged to have engaged in cartelisation, provide clarifications in person.

2.4 Are there any other significant powers of investigation?

The Act empowers the CCI to regulate its own procedure. In addition, both the DG and the CCI are vested with the same powers as a civil court under the Code of Civil Procedure, 1908, including summoning and enforcing the attendance of any person, examining him on oath and requiring the discovery and production of documents.

The investigation powers of the CCI and the DG include the power to conduct dawn raids, which has been exercised in six instances thus far. While conducting dawn raids, the DG has the same powers of search and seizure as that of an inspector under the Criminal Procedure Code, 1973.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The searches under the Act are conducted by officials from the office of the DG or any other officer authorised to carry out the search by the DG. Nothing under the Act, or the rules framed therein, requires the officers conducting a search to wait for the legal representatives to be present before commencing the search exercise.

2.6 Is in-house legal advice protected by the rules of privilege?

The Bar Council of India Rules (the code of ethics governing advocates in India) do not recognise a full-time salaried employee of a person, firm, corporation, government or concern as an "attorney". As such, the professional communications between in-house counsel and officers, directors and employees of a company cannot avail attorney-client privilege in India.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The Act does not provide any specific material limitations to the investigatory powers to safeguard the right of defence of companies and/or individuals under investigation. However, according to Section 57, no information relating to any enterprise being information obtained for purposes of the Act, will be disclosed without prior permission in writing of the enterprise. Likewise, Regulation 35 of the General Regulations details provisions of maintenance of confidentiality of any party, on receipt of request.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The Act imposes sanctions for the obstruction of an investigation under Section 43 of the Act. The Act also imposes sanctions for contravention of orders of the CCI under Sections 42 and 42A. A failure without reasonable cause to comply with the directions of the CCI or the DG in the course of an investigation exposes the offender to a fine of up to INR 100,000 for each day during which such failure continues, subject to a maximum of INR 10 million.

While the CCI has never penalised any person under this provision in a cartel case, a penalty of INR 10 million was imposed on Google (*In Re: M/s Consim Info Private Limited and M/s Google Inc. USA and Ors. (Case Nos 07 and 30 of 2012)*) in an investigation for alleged abuse of dominance, for non-compliance with the directions of the DG.

It may also be noted that in the recent case of *AKMN Cylinders (P) Ltd. & Anr v. CCI (Competition Appeal A.T. No. 50/2018)*, where the CCI had imposed a penalty on an individual on account of non-cooperation with the DG, the National Company Law Appellate Tribunal ("**NCLAT**") set aside the penalty after an apology by the Appellant.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

In case of cartels, under Section 27 of the Act, the CCI is empowered to impose on the enterprise a penalty of up to three times its profit for each year of the continuance of such an agreement or 10% of the turnover for each year of the continuance of such an agreement, whichever is higher. India, at present, does not have penalty guidelines to determine the quantum of penalty to be levied in each case.

In *Excel Crop Care Limited v. CCI & Anr. (Civil Appeal No. 2480 of 2014)* ("**Excel Crop Case**"), the Supreme Court of India ("**Supreme Court**") clarified that the "relevant turnover" and not the "total turnover" of an enterprise should be taken into consideration when imposing penalties on contravening enterprises. The Supreme Court further clarified that "relevant turnover" refers to an entity's turnover pertaining to products and services that have been affected by such contravention.

In addition to monetary penalties, the CCI has wide powers to impose non-monetary penalties such as cease and desist orders, or pass such other orders or directions as it may deem fit.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Section 48(1) of the Act presupposes guilt only on the relevant individuals who were in charge and responsible for the conduct of the company at the time of the contravention of the Act. Section 48(1) also permits this presumption to be rebutted if relevant individual(s) can demonstrate that the infringing act was committed without their knowledge or they had exercised due diligence to prevent such contravention. In contrast, under Section 48(2), the consent, connivance or neglect of the relevant individuals is established by their *de facto* involvement and is therefore not rebuttable. Additionally, Section 48(2) extends to any individual or person that has been involved with the company's contravention and is not limited to persons in charge of the company at the time of such contravention. In the cases of *Sports Broadcasters (Case No. 02 of 2013)* ("**Sports Broadcasters Case**") and *Dry Cell Batteries (Case No. 02 of 2016)* ("**Dry Cell Batteries Case**"), the former/ex-employees of the Opposite Parties were also penalised under Section 48 for contraventions of the Act.

The maximum penalty that can be imposed on individuals associated with a company's cartel conduct under Section 27 is 10% of his/her income for each year during the continuance of

such conduct by the company. However, in practice, on most occasions, the CCI has computed penalties by applying a rate of 10% to the individuals' average income for the three preceding financial years.

In *PK Krishnan (Case No. 28 of 2014)*, the CCI not only imposed a penalty of 10% of the individuals' average income for the three preceding financial years, but also specifically directed the All Kerala Chemists and Druggists Association to disassociate its management, governance and administration from two of its office bearers for a period of two years. Therefore, besides imposing monetary penalties on errant individuals of an organisation, the CCI has wide powers under Section 27 of the Act to pass any other order "it may deem fit". In case of companies, a similar risk (as highlighted above) would exist if the CCI were to order the suspension or removal of directors or key managerial personnel.

More recently, in *International Subscription Agency v. Federation of Publishers' and Booksellers' Associations in India* ("**FPBAI**") *(Case No. 33 of 2019)*, the CCI, apart from finding FPBAI to be in contravention of Section 3 of the Act, also found the incumbent Presidents of FPBAI liable in terms of Section 48 of the Act. The CCI hence penalised FPBAI to the tune of INR 200,000 and, in light of the fact that they are both senior citizens and honorary members earning no income from FPBAI, imposed a penalty to the tune of INR 100,000 each upon the incumbent Presidents of FPBAI, in terms of Section 27(b) of the Act.

On 10 July 2020, in *Chief Materials Manager, South Eastern Railway and Hindustan Composites Limited and Ors. (Case No. 03 of 2016)* and others, the CCI, pursuant to several complaints of alleged cartelisation, directed an investigation by the DG. During the DG investigation, several members of the parties being investigated came forward with vital disclosures that indicated cartelisation. The CCI held 10 of the parties guilty of contravention of Section 3. However, despite finding officials liable under Sections 48(1) and 48(2) of the Act, the CCI imposed no penalty on them and only directed them to cease and desist from indulging in cartelisation practices.

In the context of directors at least, an order of the CCI categorically directing the company to disassociate itself from a director is likely to trigger disqualification and vacation of office under Sections 164 and 167 of the Companies Act, 2013. Furthermore, the recently released compliance manual of the CCI also indicates the possibility of a CCI order disqualifying directors of companies. Further, in *Mahyco Monsanto Biotech (India) Pvt. Ltd.* ("**Monsanto**") *& Anr. v. Competition Commission of India & Anr. (SLP(C) No. 4254 of 2019)*, it was submitted by Monsanto therein that Section 48 would kick in only after the CCI passes an order under Section 27 of the Act. Monsanto filed the said appeal against a decision of the Delhi High Court. This decision had upheld the CCI order stating that the directors of the firm would be held liable for the affairs of the company in case the CCI concluded that they were the key persons responsible for the affairs of the company. This challenge to the liability of directors of a firm is presently pending before the Supreme Court.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The Act does not include any provisions for the reduction of a penalty on the basis of financial hardship.

However, in *Express Industry Council of India and Jet Airways & Ors. (Case No. 30 of 2013)*, a case relating to a cartel for fixing of a fuel surcharge for cargo transport by airlines, the CCI considered the fact that the airlines were incurring losses and had substantial debts when deciding the quantum of penalty.

3.4 What are the applicable limitation periods?

The Act does not set out a limitation period for investigating matters relating to anti-competitive agreements. Further, the decision of the Supreme Court in the Excel Crop Case clarified that the CCI can examine anti-competitive agreements that have been entered into prior to the enforcement of Section 3 of the Act (i.e., 20 May 2009) and are either acted upon subsequently, or the effects of which continue after the enforcement of Section 3 of the Act. However, an appeal under Section 53B (1) of the Act will have to be filed within a period of 60 days from the date on which a copy of the order is received by the party.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

The Act does not contain any provision in this regard.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

The Act does not contain any provision in this regard.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

The Act does not contain any provision in this regard.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Yes, a leniency programme is provided for under Section 46 of the Act and supplemented by the CCI (Lesser Penalty) Regulations, 2009 ("**Leniency Regulations**") as amended in 2017. The Leniency Regulations govern the procedure and extent to which leniency (i.e., reduced penalties) can be granted to applicants who make vital disclosures on cartel activity. The term "vital disclosure" of information means full and true disclosure of information or evidence which would be sufficient to enable the CCI to form a *prima facie* opinion in relation to the existence of a cartel.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes, the leniency programme in India provides for a marker system wherein "priority status" is granted to leniency applicants in order to determine the quantum of reduction in the penalties which could be imposed.

The CCI is empowered to grant an "up to 100%" reduction in fines, i.e., complete immunity, to the applicant who is the first to make "vital disclosure" to the CCI. Such information should either enable the CCI to form a *prima facie* opinion of the existence of the cartel or establish the contravention of Section 3 of the Act in a matter under investigation by the DG.

Subsequent leniency applicants who disclose evidence that provides "significant added value to the evidence" already in

possession of the CCI or the DG may also be granted leniency. The CCI can grant an applicant which is marked as second priority a reduction in penalty of "up to 50%", whereas the third and subsequent applicants can be granted a reduction in penalty of "up to 30%".

In practice, the CCI does not grant the first applicant an "up to 100%" reduction in fines in cases where an investigation has commenced, and the parties subsequently file a leniency application. In *Cartelisation with respect to tenders floated by Pune Municipal Corporation for Solid Waste Processing (Case No. 50 of 2015, Suo Motu Case No. 3 of 2016 and Suo Motu Case No. 4 of 2016)* ("**PMC Cases**"), all the parties filed their leniency applications after the commencement of the investigation. In this case, the CCI granted "up to 50%" reduction in fines to the first leniency applicant followed by the other applicants. In *Cartelisation in the supply of Electric Power Steering Systems (Suo Moto Case No. 07 (01) of 2014)* ("**EPS Case**"), wherein NSK Limited Japan ("**NSK**") had disclosed the existence of the cartel, the CCI granted complete immunity by way of a 100% penalty reduction, whereas JTEKT Corporation ("**JTEKT**"), which had filed its leniency application during the pendency of the DG investigation, was granted a reduction of 50% in the penalty imposed on it. While the CCI has exercised its power to grant a 100% reduction to the first applicant in the Dry Cell Batteries Case and Sports Broadcasters Case, where the information brought a new cartel to light, it has also exercised its discretion and not awarded any reduction to the second and third applicants in one of the PMC Cases.

The Leniency Regulations require that an enterprise seeking leniency should, in addition to making vital disclosure, also cease participation in the cartel (unless ordered otherwise by the CCI) and fully cooperate with the CCI. Such cooperation is required throughout the investigation and other proceedings before the CCI. Further, relevant evidence pertaining to the cartel should not be concealed, destroyed, manipulated or removed by the leniency applicant.

The CCI passed its first order in a leniency case in 2017, seven leniency orders in 2018, two leniency orders in 2019 and one leniency order in 2020, wherein zero penalties were imposed. On 5 June 2020, in *Cartelisation in Industrial and Automotive Bearings and Ors. (Suo Motu Case No. 05 of 2017)* ("**Automotive Bearings Case**"), the CCI, pursuant to receipt of a leniency application, established cartelisation by four industrial bearings manufacturers, and held them liable in terms of Section 48 for acts of contravention of the Act by their respective companies. It is to be pertinently noted that the leniency application was filed during the DG investigation period. However, the CCI invoked zero penalties and only ordered the parties in contravention to cease and desist from indulging in cartel behaviour.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

While the Leniency Regulations permit the applicant to initially contact the CCI orally, the CCI will subsequently direct the applicant to submit a written application comprising the information specified in the Schedule to the Leniency Regulations, which includes the goods/services involved, the geographic market covered, the duration of the cartel, an estimate of the volume of the business affected by the cartel, and evidence supporting the existence of the cartel. Oral applications can be made in order to secure a marker.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The Leniency Regulations mandate that the CCI treat the identity and all information received from the applicant as confidential. The CCI may subsequently, during the investigation process, request the applicant to waive confidentiality over relevant evidence to enable it to approach other entities which form part of the cartel.

The DG may disclose information in a leniency application if the applicant consents to the disclosure in writing, the disclosure is required by law, or the applicant has made a public disclosure of the information. Further, if the DG deems it necessary, it may disclose information in the leniency application, without the applicant's consent, only after recording reasons in writing for such disclosure, and obtaining prior approval from the CCI.

The Leniency Regulations also provide for access to the case files not only to leniency applicants, but also to non-leniency applicants (including third parties/private litigants), who have been impleaded in leniency proceedings. Third parties, who are not parties to the proceedings, may be granted the right to access the non-confidential version of the file on application to the CCI. The Leniency Regulations grant those who have the right of access to file, the right to obtain copies of the non-confidential version of the evidence and information submitted by leniency applicants, after the DG's investigation report has been forwarded to parties involved in any investigations by the CCI.

In 2019, in the EPS Case, the CCI released a redacted public version of the order, with a view to protect the confidential and commercially sensitive information put forth by the DG in its investigation report as well as the parties in their leniency applications. Further, in this case, upon mutual agreement between the parties, the CCI also ordered the creation of a "confidentiality ring", pursuant to which a non-confidential *qua* parties version of the DG report was forwarded to the concerned parties as well as persons implicated under Section 48.

It is important to note that the DG must maintain confidentiality of such leniency applications and related documents until the time of the closure of the investigation and the publication of the formal order of the CCI. In case the CCI or the DG has agreed to provide confidential treatment to certain information for a certain period of time under Regulation 35 of the General Regulations, such information shall remain confidential for such specific duration of time (generally three to five years).

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The "continuous cooperation" requirement ceases to apply upon completion of the investigation and proceedings before the CCI.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

The Indian competition law regime does not include a "leniency plus" or "penalty plus" policy. The Competition Amendment Bill, 2020 proposed to introduce a "leniency plus" regime by offering further reduction in penalties to a leniency applicant for its activities in one market that leads to another cartel in another market. This Bill, however, has not yet come into force.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes, the 2017 amendment to the Leniency Regulations has brought clarity in this regard as it states that individuals involved in a cartel can act as whistle-blowers and also seek a reduction in penalty. To this end, the leniency applicant is required to specify the names of such individuals involved in the cartel at the time of submission to the CCI.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Act does not prescribe any procedure for settlement or plea bargaining.

7 Appeal Process

7.1 What is the appeal process?

Sections 53A and 53B of the Act stipulate that any person aggrieved by an order/decision of the CCI may appeal to the NCLAT within 60 days from the date of receipt of such order/decision. Under Section 53O, all proceedings before the NCLAT are deemed judicial proceedings, wherein the NCLAT has the same powers as a civil court. A final appeal from the NCLAT's order lies before the Supreme Court under Section 53T of the Act within a period of 60 days from the date of communication.

It should be noted that a *prima facie* order directing the DG to conduct an investigation is not appealable. Such an order under Section 26(1) of the Act is administrative in nature only, and does not entail civil consequences, per the ruling in *Competition Commission of India v. Steel Authority of India Ltd. (2010) (10 CC 744)*. However, aggrieved parties have approached high courts to interfere/halt the CCI's investigation.

7.2 Does an appeal suspend a company's requirement to pay the fine?

No, there are no specific provisions in the Act for suspension of the company's requirement to pay the fine. The erstwhile Competition Appellate Tribunal ("**COMPAT**") and, subsequently, the NCLAT as well as the Supreme Court, at their discretion, have typically required appealing parties to deposit between 10% and 25% of the total fine imposed by the CCI before hearing the appeal.

In the case of *Ambuja Cements Limited & Ors. v. CCI & Ors.*, the Supreme Court ordered the cement manufacturers to deposit 10% of the total penalty imposed on them by the CCI and upheld by the NCLAT, during the pendency of the appeal.

In another case, *Himmatlal Agrawal v. Competition Commission of India (Civil Appeal No. 5029 of 2018)*, wherein the COMPAT had ordered the Appellant to deposit 10% of the penalty amount and dismissed the appeal upon his failure to do so, the Supreme Court held that the right to appeal was a statutory right, and an appeal could not be dismissed due to the Appellant's failure to deposit the amount. However, it found that the stay order on recovery of the penalty by the CCI could be vacated if the deposit is not made.

It may also be noted that in the case of *SCM Soilfert Ltd. & Anr. v. CCI (I.A. 55/2018 in A.T. No. 59/2015)*, the NCLAT clarified that interest is required to be paid on the penalty amount from the date it was due until the date when it is given to the CCI, regardless of the deposit with the COMPAT/NCLAT registry.

7.3 Does the appeal process allow for the cross-examination of witnesses?

There are no specific provisions in this regard. However, given that the NCLAT has the same powers as a civil court, cross-examination is permissible.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

The NCLAT under Section 53A(b), read with Section 42A or 53Q(2) of the Act, has been empowered to adjudicate upon a claim for civil damages in cases of cartel conduct arising from:

(a) findings of the CCI;
(b) orders of the NCLAT in an appeal from the findings of the CCI; or
(c) the contravention of orders of the CCI and the NCLAT.

The Act does not contain any provisions for "stand-alone" action. Therefore, it only contemplates "follow-on" actions.

8.2 Do your procedural rules allow for class-action or representative claims?

Section 53N(4) of the Act provides for a claim for loss or damages to be filed by way of class actions and representative claims.

8.3 What are the applicable limitation periods?

The Act does not provide a limitation period for filing an application for civil damages arising from cartel conduct. In cases where no period of limitation is prescribed, Indian courts generally adhere to a principle known as the "doctrine of laches", which provides that proceedings ought to have been initiated within a "reasonable period of time", and that a failure to do so results in serious prejudice and harm to the defendant and adversely impacts the ability of the defendant to defend itself.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The Act does not contain any provisions relating to the "passing on" defence.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Under Rule 4 of the COMPAT (Form and Fee for Filing an Appeal and Fee for Filing Compensation Applications) Rules, 2009, if the amount of compensation claimed is less than INR 100,000, the

fees payable would be INR 1,000. If the amount of compensation claimed is more than INR 100,000, the amount of fees payable would be INR 1,000 plus INR 1,000 for every additional INR 100,000 claimed, subject to a maximum of INR 300,000.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

No such cases have been decided yet and there have not been any substantial out-of-court settlements. However, follow-on claims have been filed by the Metropolitan Stock Exchange of India against the National Stock Exchange, as well as by East India Petroleum Limited against South Asia LPG. These claims are presently pending before the NCLAT and any decision in these cases may provide guidance for follow-on claims.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Leniency

The trend from recent leniency cases indicates that the CCI will consider granting a 100% reduction in fines or complete immunity only where the applicant has come forward and has disclosed a cartel that was previously not known to the CCI. However, where the investigation has already been under way and a significant time had lapsed from the start of the investigation before the parties came forward and cooperated with the investigation, the CCI has tended to treat the leniency application as a case for reduction of fines as opposed to granting complete immunity.

Most recently, in 2019, this decisional practice of the CCI was evidenced in the EPS Case wherein NSK, which had disclosed the existence of the cartel, was granted complete immunity by way of a 100% penalty reduction, while JTEKT, which had filed its leniency application during the pendency of the DG investigation, was granted a reduction of 50% in the penalty imposed on it.

However, emerging trends disrupt this pattern of the CCI, as mentioned earlier in relation to the Automotive Bearings Case, where zero penalty was imposed.

Confidentiality rings

The CCI *vide* Press Release No. 08/2021-22, dated 17 May 2021, is presently in the process of working with stakeholders to review the extant confidentiality regime under Regulation 35 of the General Regulations and seeking public comments on the same. Such confidentiality rings will be aimed to enable all parties to have access to relevant documents, while ensuring that business-sensitive or commercially sensitive information is protected. The CCI intends to include such provisions in the CCI (General) Amendment Regulations, 2021. The effects of implementation of such provisions remain to be observed.

Price parallelism

In its seminal judgment in *Rajasthan Cylinders and Containers Ltd. v. Union of India (2018 SCC OnLine SC 1718)*, the Supreme Court has conclusively held that parallel pricing alone is not sufficient for a finding of bid rigging and that market conditions can be responsible for such parallel behaviour. This decision clarifies the standard of proof required to establish bid rigging in an "oligopsony", i.e., a market with only a few buyers. Since such a situation is prevalent in most markets involving large-scale competitive bidding in India (for instance, those involving the railways and various natural resources), this decision is of particular significance for companies operating in such markets with public sector undertakings as buyers.

Commercial justification

The CCI has also begun to consider commercial justifications more seriously when deciding on both abuse of dominance and cartel cases. In *Indian Oil Corporation and Ors. (Case No. 05 of 2018)*, the commercial justification provided by parties was accepted by the CCI in relation to a cartel case for the first time.

Emerging trend of investigation into tech companies

In *Flipkart Internet Private Limited v. Competition Commission of India (SLP(C) No. 11558/2021)* and *Amazon Seller Services Private Ltd. v. Competition Commission of India (SLP(C) No. 11615/2021)*, the Supreme Court recently refused to halt the preliminary inquiry by the CCI into the alleged anti-competitive practices carried out by Flipkart and Amazon. This demonstrates a judicial demeanour inclined to not interfere in the functions of sectoral regulators, such as the CCI in investigating anti-competitive practices of large technology-based companies.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

It is interesting to note that the Act provides for the levy of a penalty based on the "turnover" of the culpable entities. However, the meaning of the term "turnover" has not been clarified in the Act. Therefore, the CCI has often levied penalties as a percentage of the "total turnover" in the past. In the Excel Crop Case, the Supreme Court sought to correct this practice, by observing that such a practice would bring about inequitable results, and clarified that a penalty ought to be levied on the "relevant turnover" of the culpable entities, i.e., the turnover pertaining to products and services that have been affected by the contravention. However, in the Sports Broadcasters Case, the CCI held that the concept of relevant turnover/profit requires proof that the parties are a multi-product company. Such a multi-product company must prove that its products/services are not related to and not dependent on the products that are involved in the cartel. Essentially, the parties must clearly indicate what proportion of their total turnover does not include the turnover from products/services that are not part of the cartel. If this cannot be proved, the CCI will calculate penalties based on the total turnover/profit, as opposed to a "restricted" turnover/profit that may be submitted by the parties.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The general nature of the cartel prohibition is administrative. Cartels do not fall within the scope of criminal law in Italy unless the conduct also violates a criminal provision.

1.2 What are the specific substantive provisions for the cartel prohibition?

The relevant provisions for the cartel prohibition are Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 2 of Italian competition law no. 287/90 (Italian Competition Law).

In accordance with Article 101 of the TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, shall be prohibited as incompatible with the internal market.

The main difference between the European and the Italian provisions is the geographical scope considered. While Article 101 of TFEU requires that the agreement and concerted practices must affect trade between Member States, Article 2 of the Italian Competition Law refers to an impact on the national market or a substantial part of the same market.

Both provisions provide a list of prohibited conducts such as purchasing or selling, price fixing, production limitation, market sharing and discrimination among trading parties.

Procedural provisions that must be applied in case of cartels are set by Presidential Decree no. 217/1998.

1.3 Who enforces the cartel prohibition?

Under the Italian Competition Law, the Italian Competition Authority (ICA) is the authority empowered to investigate cartels and impose pecuniary fines.

The ICA is an administrative independent authority established by the Italian Competition Law, the remit of which spans from competition law to consumer protection.

Italian courts can hear damages claims stemming from competition law breaches. Such claims may be of two types: (i) follow-on damages claims are based on an infringement decision of the ICA or other antitrust agencies (notably, the European Commission); and (ii) stand-alone damages claims require the party seeking damages to first establish the breach of competition law before showing that the infringement caused them harm.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The decision to start a cartel investigation must be published on the ICA bulletin.

Unannounced inspections (dawn raids) at the premises of the alleged infringers often mark the start of the proceedings. In urgent cases, the ICA may adopt interim measures.

During the investigation, parties are likely to receive one or more requests for information and be heard by the case handlers.

At the end of the investigation, the ICA will provide a statement of objections and arrange a final hearing.

During the investigation, parties may submit briefs and documents as well as commitments with the aim of closing the investigation without fines.

1.5 Are there any sector-specific offences or exemptions?

Italian law does not provide for any sector-specific offences or block exemptions from the cartel prohibition.

However, under Article 8(2) of the Italian Competition Law, Italian competition law does not apply to undertakings entrusted with the operation of services of general economic interest operating on the market as monopolists, provided the restrictive conduct is indispensable to pursuing the relevant general interests.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Conducts occurring outside Italy should fall within the scope of the Italian Competition Law only if such conduct has as its object or effect the restriction of competition within the Italian market. It follows that the ICA can investigate cartels and impose fines on foreign companies whose conduct impacts on the national market or on a substantial part of it.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Under Articles 8–11 of Presidential Decree no. 217/1998, the ICA may:

- require the parties to provide information and documents;
- conduct inspections and take copies of relevant documents;
- obtain economic and statistical analyses and request experts' opinions; and
- summon parties and conduct hearings.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

There are no specific or unusual features of the investigatory powers in Italy.

2.3 Are there general surveillance powers (e.g. bugging)?

Presidential Decree No. 217/1998 does not include the exercise of any type of general surveillance powers such as bugging or telephone tapping.

2.4 Are there any other significant powers of investigation?

According to Article 14 of the Italian Competition Law, the ICA can submit expert reports and economic and statistical analyses, and consult experts on any matter relevant to the investigation.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The ICA's officials carry out searches of business and/or residential premises with the assistance of the Italian Financial and Customs Police ("*Guardia di Finanza*"). The officials have no obligation to wait for a company's legal advisors.

2.6 Is in-house legal advice protected by the rules of privilege?

Communications sent by in-house counsel are not protected by attorney-client privilege, while communications between external lawyers and clients are protected.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Under Article 13(7) of Presidential Decree no. 217/1998, parties who want to safeguard the confidentiality of the information they provide to the ICA shall submit a specific, grounded request. The ICA may redact documents or parts of documents containing information of a personal, commercial, industrial or financial nature.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

According to Article 14(5) of the Italian Competition Law, the ICA may impose:

i) a fine up to EUR 25,822 on parties who refuse or fail to provide information or documents without a justified reason; or
ii) a fine up to EUR 51,646 on parties who provide untruthful information or documents.

In 2020, the ICA imposed a fine of EUR 51,646 on each of the two companies involved in investigation no. A523B ("*Ticketone/condotte escludenti nella vendita di biglietti- Friends&Partners*") for providing untruthful information (decision no. 28187 of 17 March 2020).

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Pursuant to Article 15 of the Italian Competition Law, the ICA may impose on companies a fine of up to 10% of their turnover realised in the financial year prior to the notification of the final decision. The criteria used by the ICA to quantify the fine are set out by ICA decision no. 25152 of 22 October 2014. Relevant factors are, *inter alia*, the gravity and duration of the infringement.

If an infringer fails to comply with the order to cease the wrongful conduct, the ICA may impose an additional fine of up to 10% of their relevant turnover. In cases of repeated non-compliance, the ICA may order the suspension of the infringers' business activity for up to 30 days.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Currently, under Italian competition law, the ICA is not permitted to impose sanctions on individuals.

However, individuals may attract criminal sanctions if their conduct falls within the scope of the application of criminal law provisions (e.g. in certain cases of bid rigging).

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Pursuant to point no. 31 of ICA decision no. 25152/2014, the ICA may reduce the fine in case of "an actual limited ability to pay" of the company. In order to obtain the reduction, the company must submit relevant documents and evidence showing that the application of a fine according to the standard criteria would irremediably affect the company's profitability and bring about its bankruptcy.

3.4 What are the applicable limitation periods?

The general limitation period is five years after the cessation of the infringement.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

This is not applicable, as individuals are not caught by competition law provisions (unless they are entrepreneurs).

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Yes, under Articles 2392 and 2407 of the Italian Civil Code.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

The ICA generally follows the case law of the European courts, according to which parent companies may be held liable for their subsidiaries' conduct where the subsidiaries do not independently determine their own conduct on the market. When a parent company directly or indirectly holds 100% (or a percentage close to 100%) of the share capital of the subsidiary involved in a cartel, there is a rebuttable presumption that the parent company actually exercised a decisive influence over its subsidiary, so that the parent company may be found jointly and severally liable for the cartel.

So far, the ICA considered parent companies liable only in cases where, in practice, it was able to demonstrate their active involvement or reasonable knowledge of the infringing conduct. An exception to this approach is represented by the ICA's decision in case I811 ("*Vendita auto tramite Finanziamenti*"), where, for the first time, the ICA fined parent companies in the absence of evidence of any involvement in the conduct. The decision has recently been quashed by the first instance administrative court.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

On 15 February 2007, the ICA adopted its Notice on the Non-imposition and Reduction of Fines (Leniency Notice) under Article 15 of the Italian Competition Law. The Leniency Notice was amended several times (the last amendment dates back to 2013).

The Leniency Notice applies only to cartels and under certain conditions permits undertakings to obtain full immunity or a fine reduction.

Full immunity may be granted to the first undertaking that decides to provide the ICA with information or evidence about the cartel. The following requirements shall be met:

- information or evidence provided are decisive in establishing the infringement, as well as through a targeted inspection;
- the ICA does not already have sufficient information or evidence to prove the existence of the cartel; and
- the undertaking shall satisfy the other conditions set out by paragraph 7 of the Leniency Notice (*inter alia*, full and continuous cooperation with the ICA).

A fine reduction, normally not exceeding 50%, may be granted to the undertakings that provide the ICA with evidence regarding the existence of the cartel. The evidence must significantly strengthen, by its nature or its level of detail, the proof already acquired by the ICA and appreciably contribute to the ICA's ability to prove the alleged infringement. As for the full immunity, the undertaking shall satisfy the conditions of paragraph 7 of the Leniency Notice.

The criteria used by the ICA to evaluate the fine reduction are i) the timeliness of the cooperation provided by the undertaking (in relation both to the stage of the proceedings and the level of cooperation provided by other undertakings), and ii) the probative value of the material submitted.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Once the ICA has received an application to benefit from immunity or a fine reduction, the ICA will provide a "marker" and set a deadline for the applicant for completing the application and providing appropriate evidence.

To obtain a marker, the applicant must provide:

- the business name and address of the applicant;
- the business name and address of other undertakings involved in the cartel;
- a description of the cartel, including its nature, the goods or services covered by the cartel, the geographic scope and the duration; and
- information regarding any other leniency applications which the applicant has submitted or intends to submit, in relation to the same cartel, to other competition authorities.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

According to paragraph 10 of the Leniency Notice, the ICA may permit oral applications. In such case, statements made by company representatives are recorded on suitable media during a hearing at the ICA.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

Access to leniency statements is precluded until the statement of objections is given.

The ICA will grant access only to those parties that are investigated in the same proceedings, while courts may not order the disclosure of leniency statements in the context of damages claims.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

According to paragraph 7 of the Leniency Notice, the undertaking must provide full and continuous cooperation with the ICA until the end of the investigation.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is no "leniency plus" or "penalty plus" policy.

However, an undertaking under investigation may obtain a reduction of up to 50% of the basic fine if, during the investigation, it reveals information and submits documents that pertain to a different infringement for which it can benefit from immunity.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Any person is entitled to submit a complaint to the ICA alleging a cartel; however, there are no specific provisions applicable to employees.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

There is no settlement procedure under Italian competition law.

Pursuant to Article 14-*ter* of the Italian Competition Law, undertakings under investigation may submit commitments to the ICA within three months from the start of the investigation. The ICA may accept the commitments and close the investigation without ascertaining the infringement and, consequently, without imposing a fine.

7 Appeal Process

7.1 What is the appeal process?

ICA decisions may be appealed before the Regional Administrative Court of Lazio ("*TAR Lazio*") within 60 days from their publication or communication.

The rulings of TAR Lazio may be appealed before the Supreme Administrative Court ("*Consiglio di Stato*") within 30 days from their notification or three months from their publication.

Each instance has an average length of one to two years.

7.2 Does an appeal suspend a company's requirement to pay the fine?

The appeal process does not suspend a company's duty to pay the fine. However, the parties may apply for the suspension of the decision until the final ruling by providing a guarantee. Parties must demonstrate that the payment of the fine would cause an irreparable harm to the company.

7.3 Does the appeal process allow for the cross-examination of witnesses?

No, the appeal process does not permit cross-examination of witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

In 2017, Italy fully implemented Directive no. 104/2014 on actions for damages for infringements of EU and national competition law.

The directive applies to claims for damages subsequent to an infringement of competition law committed by a company or an association of companies.

Civil damages actions may take the form of: i) follow-on actions filed before the competent national court and subsequent to a previous decision of a competition authority establishing the infringement; or ii) stand-alone actions filed before the competent national court independently of a preliminary proceeding introduced before a competition authority.

Pursuant to Legislative Decree no. 3/2017 (Decree), the infringement must be considered definitely established if the ICA's final decision is no longer subject to appeal in court. Therefore, in follow-on actions, the party's burden of proof is essentially limited to quantifying the damages suffered and the causal link.

8.2 Do your procedural rules allow for class-action or representative claims?

Yes. The Decree also applies to class actions.

Please note that in Italy, since 2010, consumers have been able to launch class actions for damages subsequent to certain conducts (e.g. breach of contract) under Article 140-*bis* of the Italian Consumer Code.

On 18 April 2019, the Italian Parliament approved Law no. 31 of 12 April 2019 which significantly widens the scope of application for class actions, making it easier for claimants to fulfil the admissibility requirements.

New class action rules came into force on 19 May 2021. The new rules also permit undertakings to introduce class actions.

8.3 What are the applicable limitation periods?

According to Article 8(1) of the Decree, the applicable limitation period is five years.

The limitation period starts running when i) the infringement has ceased, and ii) the party is aware (or should be aware) of the following circumstances:

a) the conduct and the fact that such conduct constitutes an infringement of competition law;
b) the damage resulting from the infringement of competition law; and
c) the identity of the infringer.

According to Article 8(2) of the Decree, the limitation period is suspended when the ICA starts an investigation regarding an infringement of competition law related to the civil damages action. The suspension ends one year after the ICA's decision has become definitive or after the proceedings are terminated in any other way.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Article 11 of the Decree permits the passing-on defence in civil damages claims.

The party invoking the passing-on defence carries the burden of proof demonstrating that the claimant passed on to its purchasers or customers the whole or part of the overcharge arising from the infringement.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

As a general rule of Italian law, the costs for civil damages claims shall be borne by the unsuccessful party in the proceedings.

However, the court may decide differently, i.e. order that each party bears its own costs, taking into account the circumstances of the case.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Most cartel damages rulings pertain to an old motor insurance cartel decision of the ICA.

This suggests that cartel damages claims are normally settled at some point, i.e. before judicial proceedings reach the final stage. Out-of-court settlements for such claims are strictly confidential when requested by the defendant. Just recently, the Court of Naples ruled against Iveco in a follow-on civil damages claim from the so-called "truck cartel" and ordered the defendant to pay EUR 11,550 to the claimant (judgment no. 6319/2021 of 6 July 2021).

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

A statutory change is expected in the near future in relation to the implementation of Directive (EU) 1/2019 of the European Parliament and of the Council of 11 December 2018. This directive aims at reinforcing the competition authorities of the Member States and rendering enforcement more effective to ensure the proper functioning of the internal market. This is expected, *inter alia*, to broaden the ICA's investigative powers to also include the possibility of carrying out inspections at private residences of key managers of companies under investigation.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

Pursuant to Article 18 of the Decree, claims for antitrust damages may only be heard by the commercial divisions of three Italian courts – Milan, Rome and Naples.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade ("Antimonopoly Act") is the primary legal basis of the cartel prohibition. Cartel offences that are in violation of the Antimonopoly Act can be subject to criminal and/or administrative sanctions.

1.2 What are the specific substantive provisions for the cartel prohibition?

A cartel is prohibited as an "unreasonable restraint of trade", as defined in Article 2, paragraph 6 of the Antimonopoly Act. Any type of hard-core cartel, including bid rigging, market allocation, and customer allocation, falls within the scope of this provision. Meeting of intent (i.e., agreement) and mutual binding of business activities are the two main elements that constitute illegal cartel conduct.

1.3 Who enforces the cartel prohibition?

The Japan Fair Trade Commission ("JFTC") primarily enforces the cartel prohibition. If the JFTC believes that a cartel offence should be criminally prosecuted, it will file a criminal accusation with the Public Prosecutor's Office ("PPO"), and the PPO will criminally prosecute the cartelists, both companies and individuals.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The basic procedural steps for administrative procedures (which are aimed at imposing administrative sanctions) are different from those for criminal procedures (which are aimed at imposing criminal penalties).

In administrative procedures, the JFTC usually initiates an investigation into the alleged cartel conduct by dawn raid; i.e., unannounced search of business premises. Then, the JFTC collects relevant evidence through various methods, including interviewing relevant officers and employees and issuing orders to companies to produce relevant information. If the JFTC determines that there was a cartel based on the relevant evidence collected, it issues a notice to cartelists regarding the commencement of its opinion-hearing process. The JFTC then permits cartelists to review the evidence which it has gathered to establish a violation of the Antimonopoly Act, and provides an opportunity for the cartelists to submit their opinions. Following these procedures, if the JFTC believes there was a violation, it will issue a cease-and-desist order and an order for the payment of an administrative surcharge (i.e., administrative fine) against the cartelists.

If the JFTC believes a criminal sanction is necessary, it will initiate the investigation as a quasi-criminal procedure wherein the JFTC will conduct a dawn raid and seizure of evidence with a warrant issued by a judge of a relevant court. The JFTC usually cooperates with the PPO to investigate the cartel criminally, and if the JFTC believes there is a criminal violation of the Antimonopoly Act, it will file a criminal accusation with the PPO; following a necessary follow-up investigation, the PPO brings a criminal charge to a relevant court.

1.5 Are there any sector-specific offences or exemptions?

There are no sector-specific offences in Japan. Regarding sector-specific exemption, certain joint activities are exempted from the cartel prohibition under sector-specific laws such as the Insurance Business Act and the Road Transport Vehicle Act.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

If cartel conduct outside of Japan substantially lessens competition in a relevant market in Japan, the Antimonopoly Act shall apply. The most recent example of extraterritorial application is the Cathode Ray Tube ("CRT") case in Japan (Supreme Court Decision 2017.12.12). In this case, the JFTC fined CRT makers located outside of Japan, alleging that they fixed the price of CRTs and sold them to CRT television makers located in Southeast Asian countries whose parent companies are Japanese. The JFTC argued that the relevant market involved Japan, regardless of the fact that neither the cartel products, i.e., CRTs, nor the finished product incorporating the cartel products, i.e., CRT televisions, had entered the Japanese market, because the Japanese parent companies of CRT television makers were negotiating the prices and other trading terms with CRT makers. The Supreme Court upheld the JFTC's enforcement.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

In administrative investigations, the JFTC has an indirect compulsory power to investigate cartel conduct. More specifically, the JFTC may: (i) order persons involved in a case or any other relevant person to (a) appear at a designated time and place to testify, or (b) submit reports; (ii) order experts to appear and give expert testimony; (iii) order persons to submit account books, documents, or other material and retain these materials; and (iv) enter any place of business of persons involved in a case and any other necessary place to inspect the conditions of business operation and property, account books, documents, and other material (i.e., dawn raid). A company or a person who does not respond to the orders or provides a false statement in response to the orders may be subject to criminal sanction.

In criminal investigation, the JFTC may inspect, search and seize materials in accordance with a warrant issued by a court judge under the Antimonopoly Act as part of the compulsory investigation of criminal offences.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The JFTC issues guidelines as to how it uses its investigative power to provide transparency. The JFTC does not permit attorneys to be present during interviews with relevant officers and employees.

2.3 Are there general surveillance powers (e.g. bugging)?

No. The JFTC does not have such power.

2.4 Are there any other significant powers of investigation?

Other than the general investigative power explained in question 2.1, there are no other significant powers.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The JFTC officials will carry out searches of business premises in administrative investigations. Staff from the PPO will also carry out searches of business premises and/or residential premises in criminal investigation. The JFTC makes it clear that they will not wait for legal advisors to arrive, although it permits the attorney's presence at the search.

2.6 Is in-house legal advice protected by the rules of privilege?

The recent revision of the Antimonopoly Act introduced very limited attorney-client privilege in cartel investigations. The Japanese privilege covers communication between companies and attorneys regarding legal advice related to conduct subject to leniency application (i.e., hard-core cartels). The privileged documents will be segregated and reviewed by JFTC staff other than investigation teams, and then, if the content is regarded as privileged, the privileged document will be returned to the company.

Unfortunately, in-house legal advice will, in general, be out of the scope of privilege protection unless the in-house counsel is instructed by the employer to act as an advisor independent of the employer.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

A general limitation on investigatory power by the government authority will apply. For example, the target of a dawn raid or production order must be relevant for the alleged violation. Additionally, in administrative investigation, only indirect compulsory power is vested in the JFTC, and thus, use of force to make the target comply with the investigation is not permitted.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Yes, the Antimonopoly Act provides that a person who has obstructed a JFTC investigation may be subject to imprisonment of up to one year or a criminal fine of up to JPY 3 million, and companies will be subject to a criminal fine of up to JPY 200 million (the amount of the fine for companies was substantially increased following the most recent revision of the Antimonopoly Act).

To our knowledge, the JFTC has never filed a criminal accusation with the PPO based on an obstruction of justice. This is most likely because the procedure for prosecuting obstructions of justice is stringent and requires involvement of the PPO, while the penalty amount is not so substantial.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The Antimonopoly Act adopts a dual-sanction regime: administrative sanctions; and criminal sanctions. The JFTC usually chooses administrative sanctions, and only very limited cases with widespread influence on people's livelihoods are subject to criminal sanctions.

The JFTC has the authority to order cartelists to cease and desist the prohibited acts or to take any other measures necessary to restore competition in the relevant market. The JFTC also has the authority to issue surcharge payment orders that require the cartelists to pay a surcharge as an administrative fine for breaching the Antimonopoly Act. The surcharge payment system went through a major change in the recent Antimonopoly Act revision which entered into force in December 2020. Following the revision, the surcharge is calculated as follows: (i) determining the amount of relevant sales including sales of closely related products or services (for calculation of sales, the JFTC can go back up to 10 years); (ii) applying the calculation rate, which is, in principle, 10% subject to factors that may increase or decrease the rate (e.g., the rate for small and mid-size enterprises will be 4%); and (iii) and adding the amount of any financial reward obtained by cartelists through cartel conduct.

As a criminal penalty, companies can be subject to a criminal fine of up to JPY 500 million for their involvement in a cartel under the Antimonopoly Act.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Individuals can be subject to imprisonment of up to five years and/or a criminal fine of JPY 5 million if they were involved in a cartel. A person who was sentenced to imprisonment is disqualified as a director of a company under the Companies Act unless the person has completed the imprisonment period or the sentence is suspended.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Financial hardship or inability to pay does not provide a ground to reduce fines.

3.4 What are the applicable limitation periods?

The limitation period for cease-and-desist orders and surcharge payment orders is seven years, extended from five years in the most recent revision.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There is no law prohibiting a company from paying the legal costs of former or current employees, and in practice we have seen companies subject to antitrust investigation do so. Paying financial penalty on behalf of employees will create moral hazard issues, and this is not usually seen in practice.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

While it is possible, we have not seen any precedent in practice.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

A parent company will not be held liable for the cartel conduct of a subsidiary under the Antimonopoly Act, provided it is not itself involved in the cartel.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Japan introduced a leniency programme in 2006, which is considered a success and has attracted many applications. The leniency programme went through major changes in its most recent revision, and now creates more incentive for a target business to cooperate with the JFTC's investigation proactively.

Under the revised leniency system, when companies file a leniency application before the initiation of the JFTC's investigation, the first applicant is eligible to receive immunity from any subsequent surcharge payment order, the second applicant is eligible to receive a 20% reduction, the third to fifth applicants receive a 10% reduction and the sixth or subsequent applicants will receive a 5% reduction. When companies file a leniency application after the initiation of a JFTC investigation, they are eligible to receive a 10% reduction (up to three applicants after the dawn raid or up to five applicants including the applicants before the initiation of the investigation; subsequent applicants will receive a 5% reduction). With regard to the second and subsequent applicants before the initiation of a JFTC investigation, a reduction of up to 40% may be added to the respective percentages, depending on the degree of cooperation by the applicants with the investigative process ("cooperation credit"). Regarding the applicants after the initiation of a JFTC investigation, the cooperation credit amount will be up to 20%. The cooperation credit amount will be determined by an agreement between the JFTC and the applicant.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes, a marker status will be granted if an applicant files a Form I with the JFTC before the initiation of a JFTC investigation. Form I must include the goods/services involved in the cartel, an outline of the cartel (e.g., type of cartel and participants) and the beginning and end dates of the cartel.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The application form must be submitted in electronic format (via email) to the JFTC in order for the applicant to qualify as a leniency applicant. However, the leniency rule permits the applicant to report a substantial part of the application orally to accommodate the applicant's need to minimise subsequent risk in civil litigation.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

A leniency application will generally be treated confidentially unless and until the JFTC issues formal orders in connection with the relevant cartel. When the JFTC issues formal orders in connection with the relevant cartel, the JFTC will make public on its website which companies applied for leniency and the treatment that each of the leniency applicants received.

As for the extent to which the documents provided by leniency applicants will be disclosed to private litigants, the JFTC has a policy to not provide the documents to private litigants in order to avoid discouraging any potential leniency application. However, a court may issue an order to the JFTC to produce documents, although we have not seen any cases so far.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

If a company utilises cooperation credit, explained in question 4.1 above, it is likely that the company is obliged to cooperate with the JFTC investigation until the JFTC issues final orders.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No, Japan does not have a leniency plus or penalty plus policy.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Anyone may report cartel conduct to the JFTC in their individual capacity, and the JFTC may use it to discover the cartel. The Antimonopoly Act does not provide for leniency or immunity for an individual whistle-blower; however, the Whistle-blower Protection Act prohibits companies from retaliating against employees who report corporate wrongdoings to the authorities.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

In criminal cases, cartelists can use plea-bargaining procedures under Article 350-2, paragraph 2, item 3 of the Code of Criminal Procedures, which provides for the Japanese plea-bargaining system applicable to crimes under the Antimonopoly Act.

Under the plea-bargaining system in Japan, a prosecutor is authorised to enter into a plea-bargaining agreement with a suspect or a defendant to drop or reduce charges in exchange for providing cooperation to the prosecutor, by providing certain evidence or testimony in relation to cartel conduct. In contrast to the plea-bargaining system in the U.S., this system is only available when the suspect or defendant cooperates in prosecuting another person's crime, not the crime of the applicant.

We have not seen any cases where plea-bargaining is used in criminal antitrust cases, most likely due to the following reasons. First, Japan has a dual-sanction regime, where the vast majority of cartel cases are resolved by administrative orders. Second, under the current leniency rule, the JFTC does not file a criminal accusation with the PPO, and the PPO does not bring any criminal charge regarding the first applicant of leniency in the case (including their officers and employees) and, thus, only second and subsequent leniency applicants or companies that did not apply for leniency have an incentive to utilise plea-bargaining. Moreover, from a practical viewpoint, in the vast majority of criminal cartel cases, at the time of the criminal referral by the JFTC, prosecutors usually have evidence as a result of the leniency application and subsequent quasi-criminal investigations, and the prosecutor does not usually have an incentive to consider plea-bargaining in order to acquire additional evidence.

7 Appeal Process

7.1 What is the appeal process?

The JFTC's orders (including cease-and-desist orders and surcharge payment orders) can be appealed to the Tokyo District Court within six months from the date the target company becomes aware of the order. This process is the same as an ordinary appeal process against administrative orders based on the Administrative Case Litigation Act. Antitrust cases are subject to the exclusive jurisdiction of the Tokyo District Court and a panel, usually consisting of three judges, conducts a proceeding and makes a judicial decision.

With regard to criminal cases, the appeal process is the same as in ordinary criminal cases. The defendant must file a notice of appeal with the competent high court within 14 days of the entry of judgment of the district court, and the judgment of the high court may be appealed before the Supreme Court.

7.2 Does an appeal suspend a company's requirement to pay the fine?

An appeal does not suspend a company's requirement to pay the administrative fines.

However, when the disposed party or an interested third party files a petition, the court may stay the whole or part of the execution of the administrative orders if it determines that there is an urgent need to avoid serious damage.

Stay of execution is subject to a strict screening process as the standard for "urgent need" and "serious damage" is rather high. We have not seen any companies' requests for stay of execution to pay the fine permitted.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes, the cross-examination of witnesses is permitted in the appeal process of both administrative and criminal lawsuits.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

A victim of cartel conduct may bring a claim before a competent district court: (i) for damages under Article 25 of the Antimonopoly Act; (ii) for damages under general tort provision; (iii) to return unjust enrichment; or (iv) for damages based on a contract breach (a purchase agreement by a national or local government usually includes a provision to prohibit cartels and bid rigging, and bid rigging in a public bid usually constitutes a contract breach).

The claim for damages under Article 25 of the Antimonopoly Act is a follow-on action, where a plaintiff can claim for damages only after a cease-and-desist order or surcharge payment order by the JFTC becomes final, and a victim is not required to prove intent or negligence of the cartelists. The JFTC order does not necessarily bind the court's decision on the liability of the cartelist.

8.2 Do your procedural rules allow for class-action or representative claims?

The opt-out type of class action for antitrust cases is not permitted in Japan. Theoretically, victims can use a rule for an appointed party system (i.e., representative claim); however, to our knowledge, there have not been any such cases in practice.

In the appointed party system, persons with a common interest may appoint one or more persons from themselves to stand as the plaintiff on their behalf. In contrast to class action, each party files a claim for damages and the court should examine and make a judgment on each claim.

8.3 What are the applicable limitation periods?

The applicable limitation periods for each of the claims listed in (i) through to (iv) question 8.1 are as follows:

(i) three years from the date on which the JFTC's orders become final;

(ii) three years from the date on which a plaintiff becomes aware of the damages and the identity of the perpetrator or 20 years from the date of the cartel conduct;

(iii) 10 years from the date on which the right can be exercised; and

(iv) the same as regards (iii).

Even if the limitation period has expired for a particular claim, other claims may be used within the above period.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The law does not explicitly provide for a "passing on" defence in civil damages claims.

However, given that any direct purchaser in the supply chain can obtain compensation for the actual harm suffered, the proof that the plaintiff passed on the whole or part of the overcharge resulting from cartel conduct down to the supply chain would reduce the amount of compensation owed by the defendant.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Article 61 of the Code of Civil Procedure stipulates that the defeated party bears the court costs.

In Japan, attorney fees are not included in the "court cost" to be borne by the loser, as set out in Article 61. A plaintiff may claim attorney fees as a type of damage in a tort claim.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

There have been many successful civil damages claims for cartel conduct, especially bid-rigging cases. For instance, in a case where residents of a city claimed that their city suffered damages as a result of bid rigging and filed a lawsuit on behalf of the city, the court accepted the claim for damages against the construction company (Tokyo High Court 2009.7.2). Additionally, based on our experience, out-of-court settlement has been widespread in practice, which enables victims of the cartel to obtain compensation in a quick manner.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

As described in questions 2.6 and 4.1, the surcharge payment system was revised and took effect in December 2020. The recent revision introduced limited attorney-client privilege in cartel cases.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

This is not applicable in Japan.

Masayuki Atsumi is a partner heading the competition/antitrust law practice at Miura & Partners. As a bilingual attorney with qualifications in three jurisdictions – Japan, New York and England & Wales – he has been involved in numerous multi-jurisdictional antitrust issues including cartel investigation defence and merger control. He has worked at the Japan Fair Trade Commission and the US Federal Trade Commission, and provides practical advice to his clients by leveraging his experience in competition agencies. Mr. Atsumi has also represented and advised many domestic and global companies in complex regulatory/compliance issues. Mr. Atsumi has been recognised as one of "40 Under 40" in Asia by *Asia Legal Business*. He is also a frequent contributor to foreign and domestic media regarding Japanese antitrust law issues.

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Miura & Partners ("M&P") was founded in January 2019 by a team of experienced lawyers, with the goal of establishing a professional law firm where client satisfaction is the starting point.
M&P's competition practice has been recognised as one of the best in the market, handling all types of competition law cases, including defence in JFTC investigations, follow-on damages lawsuits, merger control, and general antitrust law consulting. The firm has two partners with experience at the JFTC, and with their experience and expertise the firm has successfully defended many clients in antitrust investigations by the JFTC. As clients' business activities become increasingly international, the team has built the capability to handle cross-border cartel investigation/follow-on lawsuits across a number of jurisdictions, by cooperating with a local law firm in each jurisdiction.

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1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis for the cartel prohibition is Article 9 of the Portuguese Competition Act (Law nr. 19/2012, of 8 May – hereinafter "the Act" – which repealed and replaced, with effect as of 7 July 2012, the previous Portuguese Competition Act, Law nr. 18/2003, of 11 June). Article 9 prohibits and sanctions anti-competitive agreements, practices and decisions by associations of undertakings in terms similar to Article 101 (1) of the Treaty on the Functioning of the European Union (hereinafter the "TFEU").

Similarly to all other infringements of competition law, cartels are considered administrative offences and not criminal offences. As a result thereof, they are penalised with fines and other ancillary sanctions (please see section 3 below).

1.2 What are the specific substantive provisions for the cartel prohibition?

The specific substantive provision is Article 9 of the Act, which prohibits agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their object or effect the prevention, distortion or restriction of competition, to a considerable extent, in the whole of or in part of the domestic market. The above shall include, in particular, agreements, practices or decisions by associations of undertakings, which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technological development or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
(e) conclude contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The list above (which is in line with Article 101 (1) of the TFEU) is non-exhaustive; therefore, other conducts that have the object or effect of restricting competition to an appreciable extent may be caught by the above-referred prohibition.

1.3 Who enforces the cartel prohibition?

The cartel prohibition (and competition law enforcement in general) is enforced by the Portuguese Competition Authority ("*Autoridade da Concorrência*") (hereinafter "the Authority"), established in 2003 by Decree-Law nr. 10/2003, of 18 January, and currently ruled by Decree-Law nr. 125/2014, of 18 August. The Authority is a public entity with the nature of an independent administrative body. It benefits from (i) statutory independence for the performance of its attributions, (ii) administrative, financial and management autonomy, and (iii) independence from an organic, functional and technical perspective. The Authority has sanctioning, supervisory and regulatory powers which are established in Decree-Law nr. 125/2014 and further developed in the Act.

Within the Authority, the investigation of cartels is committed to a dedicated unit called the "Anti-cartel Unit", which was created in order to address the need for reinforcing the Authority's effectiveness of intervention in terms of cartel detection and investigation.

The Authority is responsible for enforcing competition law in any sector of the economy. However, for activities subject to sector-specific regulation, the Act establishes (in Articles 5 (4), 34 (4) and 35) a general principle of cooperation between the Authority and sector-specific regulators in the application of competition legislation, which translates into the following:

- whenever the Authority becomes aware of facts occurring within the scope of sector-specific regulations and likely to be classified as prohibited practices, it shall immediately inform the sector-specific regulator, so as to permit the latter to issue an opinion within a time limit stipulated by the Authority;
- whenever the Authority intends to apply interim measures within the course of an investigation in a market subject to sector-specific regulation, it shall request the opinion of the sector-specific regulator (to be issued within five working days);
- before adopting a final decision, and unless the case is closed without conditions, the Authority shall consult the sector-specific regulator (which shall issue its opinion within the time limit stipulated by the Authority);
- whenever a sector-specific regulator deals, within the scope of its own responsibilities, on its own initiative or at the request of an entity within its jurisdiction, with issues concerning a possible breach of the provisions of the Act, it shall immediately inform the Authority of the procedure and of its essential facts;

- before taking a final decision, the sector-specific regulator shall inform the Authority of the draft decision, so that the Authority issues its opinion within a time limit set for that purpose; and
- in any of the above situations and where applicable, the Authority may decide not to initiate an investigation or to stay an ongoing investigation, for as long as necessary.

Cooperation with sector-specific regulators is therefore based on consultation mechanisms, according to which the Authority, in the course of the investigations it conducts, obtains an opinion from other regulators.

In order to facilitate cooperation in the enforcement of competition law, the Authority and the sector-specific regulators can enter into bilateral or multilateral protocols.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Investigations can be initiated *ex officio* or following a complaint. Ever since June 2017, an online complaints portal (and a dedicated telephone line) has been available on the Authority's website, making it easier to report any type of anti-competitive behaviour and allowing for the anonymity of the complainant (see http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201708.aspx?lst=1&Cat=2017).

The sanctioning powers of the Authority are exercised under a principle of opportunity, which means that the Authority is granted the ability to choose which cases to pursue on the basis of criteria of public interest. Pursuant to Article 7 (2) of the Act, in assessing whether to initiate proceedings, the Authority shall take into account aspects such as its previously set priorities in competition policy, the elements of fact and of law brought to the file, the seriousness of the alleged infringement, the likelihood of proof of the infringement and the extent of investigation measures required to adequately fulfil its mission.

If the Authority considers that there are insufficient grounds to act on a complaint, it shall inform the complainant and set a time limit of no less than 10 working days for the complainant to present its observations in writing. If the observations presented within the established deadline do not lead to a different assessment of the complaint, the Authority shall expressly declare, in writing, that the complaint is unfounded or not subject to priority treatment and close it. The complainant may appeal such a decision to the Competition, Regulation and Supervision Court.

If, on the contrary, an investigation is indeed initiated (*ex officio* or otherwise), such investigation shall be divided into two stages. During the first stage ("*inquérito*"), the Authority undertakes all necessary inquiries (within the scope of its investigation powers) to identify the relevant anti-competitive conduct, its agents and to collect evidence to this end. The Act has introduced an indicative period of 18 months following the opening of the case for the conclusion of the first stage. Whenever compliance with such time limit is not possible, the defendant shall be informed of that as well as of the additional time necessary to conclude the investigation.

The first stage ends with a decision of the Authority to either:

(i) close the investigation, if there is not sufficient evidence to conclude that there is a reasonable likelihood of a decision imposing a sanction;
(ii) settle the case by issuing a sanctioning decision within the context of a settlement procedure;
(iii) close the investigation by adopting a decision imposing conditions (to guarantee compliance with commitments submitted by the party concerned in order to eliminate the effects on competition stemming from the practice); or
(iv) continue with the case by initiating the second stage of the investigation ("*instrução*"), with a notification to the defendant of a Statement of Objections ("SO").

If an investigation was initiated following a complaint by an interested third party, it cannot be closed pursuant to (i) above, without the complainant being given the opportunity to submit any observations in writing within no less than 10 working days from being informed of the Authority's decision to close the investigation. Unless the complainant's observations reveal, directly or indirectly, a reasonable likelihood of a sanctioning decision being issued, the Authority shall close the case and this decision is subject to appeal to the Competition, Regulation and Supervision Court.

During the second stage of the investigation, the defendant is assured the exercise of its defence rights: it is given a "reasonable period" (no less than 20 working days) to reply to the SO and it may request the Authority to undertake additional evidentiary measures (e.g., witness depositions) and to have its written submissions complemented by an oral hearing. The Authority can refuse additional evidentiary measures considered irrelevant to the case or having mainly a delaying purpose.

The Authority may promote additional measures to gather evidence, at its own initiative, even after a reply to the SO has been submitted by the defendant. Any additional evidence included in the case as a result thereof shall be notified to the defendant, who shall have a period of not less than 10 working days to state its views in relation thereto.

The Act expressly recognises the possibility of the Authority issuing a new SO whenever the evidence collected as a result of additional evidentiary measures materially changes the facts initially attributed to the defendant.

The second stage should be concluded within an indicative period of 12 months from the notification of the SO. Whenever compliance with such time limit is not possible, the defendant shall be informed of such fact and of the additional time necessary to conclude the proceedings.

This second stage ends with a decision of the Authority to either:

(i) order the closing of the case without any conditions being imposed;
(ii) order the closing of the case with the imposition of conditions (to guarantee compliance with commitments submitted by the party concerned in order to eliminate the effects on competition stemming from the practice);
(iii) impose a sanction in the context of a settlement decision; or
(iv) declare that a prohibited practice has occurred and, where such practice cannot be justified pursuant to the exemption criteria (please see question 1.5), the decision may be accompanied by an admonition or the imposition of the relevant sanctions (fines and other – please see section 3 below) and, if applicable, by the imposition of behavioural or structural measures that are indispensable for halting the prohibited practice or its effects.

Structural measures can only be imposed by the Authority when there is no equally effective behavioural measure or when, though existing, such behavioural measure would be more onerous for the defendant than the structural measure.

Whenever the market in question is subject to sector-specific regulation, there are specificities concerning the procedure and the intervention of the sector-specific regulator (please see question 1.4).

In March 2013, the Authority published its Guidelines on the handling of antitrust proceedings (available on the Authority's website in Portuguese only). The Guidelines' main aim is to clarify how the Authority acts when handling and investigating

antitrust proceedings under the Act. The Guidelines include information on the most important steps of the procedure described above.

1.5 Are there any sector-specific offences or exemptions?

The Act applies equally across all sectors of the economy and to all economic activities in the private, public or cooperative sectors.

Companies that are legally charged with the management of services of general economic interest or which have the nature of legal monopolies are subject to the provisions of the Act, but only to the extent that those provisions do not constitute an impediment in law or in fact to the fulfilment of the mission which they have been entrusted with.

An exemption from the general rule of Article 9 prohibiting anti-competitive agreements is established in Article 10 in terms equivalent to Article 101 (3) of the TFEU. Agreements, practices or decisions by associations of undertakings can be considered justified if they contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, and, cumulatively thereto, they:

(a) allow the users of such goods or services an equitable part of the resulting benefit;
(b) do not impose on the undertakings concerned any restrictions that are not indispensable to attaining such objectives; and
(c) do not afford such undertakings the possibility of eliminating competition in a substantial part of the goods or services market in question.

It is not possible to request from the Authority a prior assessment of agreements, practices or decisions covered by the prohibition of Article 9. The Act fully embraces the self-assessment principle provided at EU level and specifically states that it is the responsibility of the undertakings or associations of undertakings concerned which invoke the justification under Article 10 to provide evidence that the conditions are fulfilled.

Practices prohibited by Article 9 are also considered justified when, although not affecting trade between Member States, they fulfil all other requirements for the application of a regulation adopted under Article 101 (3) of the TFEU. The Authority may, nonetheless, withdraw this benefit if, in a particular case, it ascertains that the practice at stake has effects incompatible with the conditions for justification laid down here above.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Cartel conduct outside Portugal will, in principle, be covered by the prohibition to the extent that the practice has, or is liable to have, effects in the Portuguese territory. This follows from the general rule laid down in Article 2 (2) of the Act according to which, subject to the exception of the international obligations of the Portuguese State, the Act is applicable to restrictive competition practices and concentrations between undertakings which take place or have or may have effects in the territory of Portugal.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The Act establishes, particularly in Articles 18, 19 and 20, the Authority's general investigatory powers, which include the civil/administrative investigatory powers to: (i) carry out compulsory interviews with individuals, either directly or via a legal attorney; (ii) order the production of specific documents or information; (iii) require an explanation of documents or information supplied; and (iv) require any public administrative service, including law enforcement agencies, to collaborate with the Authority as necessary to carry out its duties properly.

Furthermore, the Authority can enact the following investigatory measures if authorised by a court or another competent judicial authority: (i) to carry out an unannounced search of business premises; (ii) to carry out an unannounced search of residential premises; (iii) to "image" computer hard drives using forensic IT tools; (iv) to retain original documents; and (v) to secure premises overnight (e.g. by seal).

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

Article 42 of the general regime on administrative offences (approved by Decree-Law nr. 433/82, of 27 October and subsequently amended) establishes (in line with constitutional law) that correspondence and telecommunications are explicitly protected from intrusion, meaning they cannot be seized, recorded and consequently used as evidence in non-criminal procedures such as competition infringement procedures. The earliest case law in respect of search and seizure powers by the Authority imported from Criminal Procedural Law the distinction between opened and unopened letters and applied it to the seizure of emails. As a result, opened emails were considered (similarly to opened letters) to be mere documents and therefore subject to seizure from the Authority, whereas unopened emails (similarly to unopened letters) fell under the category of correspondence, which may not be seized in any administrative offence procedure. This understanding – expressly endorsed by the Authority in its Guidelines on the handling of antitrust proceedings – was developed under the previous Competition Act (repealed in 2012) and relied on the criminal procedural law doctrine and case law prior to the enactment of the Law on Cybercrime. The latter, however, establishes that the seizure of electronic email is subject to the same legal regime as correspondence (subject to the prior validation of an examining judge in criminal proceedings), regardless of those emails being opened or unopened, which makes the Authority's understanding that opened emails should be treated as mere documents a highly disputed one. The admissibility of seizure of emails in competition law investigations is a matter currently under dispute in pending litigation within our jurisdiction.

In the context of the transposition of Directive 2019/1/EU (the "ECN+ Directive"), the Authority made it clear that it wishes to have access to any technological device, including smartphones, tablets or cloud servers in order to seize evidence of competition infringements (please see Press Release 21/2019, available at http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201921.aspx?lst=1&Cat=2019). The final draft of the transposition (please see question 9.1) followed this recommendation and proposes to amend the Act by establishing the Authority's right to access any technological device within its new set of powers to search, examine, seize and collect.

2.3 Are there general surveillance powers (e.g. bugging)?

There are no general surveillance powers for conducts sanctioned as administrative offences (as are competition law infringements).

2.4 Are there any other significant powers of investigation?

The Act establishes the Authority's right to search private premises, which include not only the homes of company shareholders, directors and employees but also "other locations" (including vehicles). These searches must be previously authorised by an examining judge.

The Act expressly provides for the possibility of searches being carried out at lawyers' or doctors' offices, provided that the following safeguards are respected: (i) an examining judge must be present at the search; and (ii) the president of the respective professional Bar must be notified in advance in order to guarantee his presence or representation, if he so wishes.

The Authority is also empowered to seize documents located at lawyers' or doctors' offices, provided that the above-referred safeguards are respected and that the documents are not covered by professional secrecy, with one exception: documents covered by professional secrecy that constitute, in themselves, the object or elements via which the infraction is perpetrated can be seized. The exact scope of this provision is, however, not without ambiguity, as the Statute of the Portuguese Bar (Law nr. 145/2015, of 9 September) only permits seizure in cases of criminal offence.

The Act further empowers the Authority to seize documents covered by banking secrecy (regardless of whether they belong to the defendant), provided that the seizure is carried out by an examining judge and that there are well-substantiated reasons to believe that the documents are related to an infringement and are of major importance for finding out the truth or in terms of evidence.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of business premises are carried out by the Authority's duly appointed employees who shall, for that purpose, bear the credentials issued by the Authority stating the purpose of the investigation and the warrant from the competent judicial authority. The Act establishes that, whenever necessary, the Authority may request the action of the police authorities and, in practice, the Authority is usually accompanied by the police authorities.

The law does not impose any obligation for the Authority's investigators to wait for legal advisors to arrive; however, companies under inspection have the right to have legal advisors present at the diligence.

Searches at private premises have additional (stricter) requirements: the warrant must be issued by an examining judge and shall establish, *inter alia*, the date for the commencement of the search and the possibility of judicial review; if the search is conducted at an inhabited home or in a closed dependence thereof, it must be carried out between 7am and 9pm; and where the search is conducted in the offices of a lawyer or a doctor, the examining judge must be present and the president of the respective professional Bar must be notified in advance in order to guarantee his presence or representation, if he so wishes.

2.6 Is in-house legal advice protected by the rules of privilege?

Under Portuguese law, the protection given by the rules on legal professional privilege (which is protected by the Constitution, the Penal Code and the Statute of the Portuguese Bar) covers both independent lawyers and in-house lawyers who are members of the Portuguese Bar since they are subject to the same professional and ethical duties.

This view – expressly acknowledged by the General Council of the Portuguese Bar in a legal opinion issued in 2007 – was confirmed by the judiciary in 2008, when the Commerce Court of Lisbon stated that (as national procedural rules do not differentiate between in-house and external lawyers) an in-house lawyer who has been employed to exercise his activity as a lawyer and is registered with the Portuguese Bar shall be subject to the same duties and rules – and, therefore, shall benefit from the same guarantees and privileges – as external lawyers, in particular in what regards legal professional privilege.

In its March 2013 Guidelines on the handling of antitrust proceedings, the Authority expressly states that, in addition to lawyers registered with the Portuguese Bar, those registered with analogous entities in other countries will also benefit from a similar protection. Thus, the Authority indicates that, when carrying out its investigations, it will extend the scope for protection under legal privilege beyond what was acknowledged by the court (which only referred to lawyers registered with the Portuguese Bar).

This being said, the draft legislation for the transposition of the ECN+ Directive, presented by the Authority to the Government, introduced a differentiation in the scope of professional secrecy acknowledged to in-house lawyers *vis-à-vis* external lawyers in the context of competition law investigations. The final draft legislation proposed by the Government to Parliament (please see question 9.1), disregarded this recommendation and does not differentiate between the scope of professional secrecy for in-house lawyers and external lawyers.

The protection given by national rules of legal professional privilege is, for the time being, broader than that resulting from the application of the case law of EU courts and, as a result, the regime applicable to in-house legal advice may differ depending on whether Portuguese national rules or EU rules apply.

For the provisions of the Act regarding seizure of documents covered by professional secrecy, please see question 2.4.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The rights of companies/individuals being investigated comprise essentially the following: the right to access the file; the right to exercise the defence according to the adversarial principle; the right to a hearing; and the right to appeal against interlocutory and final decisions adopted by the Authority.

A significant number of the Authority's decisions condemning companies for anti-competitive practices have been appealed to court and, amongst those, a significant number (especially the earliest cases) have been quashed for violation of the right of defence.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Failure to cooperate with the Authority or obstruction of the exercise of the Authority's investigatory powers (either by wilful misconduct or negligence) is sanctioned with a fine, the amount of which may not exceed 1% of the turnover of the year immediately preceding the final decision for each of the undertakings concerned or, in the case of associations of undertakings, the aggregate turnover of the associated undertakings.

Failure to supply information or the supply of false, inaccurate or incomplete information in response to a request by the Authority in the exercise of its powers of sanction or supervision (either by wilful misconduct or negligence) shall be subject to a similar sanction. Until 2015, the only publicly known decision of the Authority in respect of "non-compliance" with information requests dating back to 2005 concerned a fine of €1,000 imposed on a professional association for supplying incomplete information during an infringement procedure – Proc. nr. 769/05.6TYLSB. The other three fining decisions issued for refusal to provide information to the Authority in the exercise of its powers of supervision were annulled on appeal due to irregularities in the requests for information – Proc. nr. 205/06.0TYLSB.

In 2015, however, the Authority issued three fining decisions for "non-compliance" with its information requests, which can be seen as an indication of the Authority's stricter enforcement of the legal provisions referring to cooperation duties with the Authority. In brief:

- CP Carga was fined €100,000 for having failed to provide the Authority with information on costs requested in the context of an investigation for an alleged abuse of dominance (which was closed in the meantime with no finding of abuse against the company). This fining decision was annulled on appeal (Case nr. 276/15.9YUSTR at the Competition, Regulation and Supervision Court). The court considered that CP Carga did not breach its cooperation duties when it replied to the Authority that a specific type of cost information did not exist within the company, even though in subsequent investigation measures the Authority found that there was cost information data available within the company that turned out to be relevant to the case. This finding by the court was largely due to the fact that the initial request was very generic and permitted its addressee different interpretations as to the specific type of cost information sought for/requested by the Authority. The court's decision was confirmed upon appeal by the Appellate Court of Lisbon.
- Peugeot Portugal was fined €150,000 for having failed to provide the Authority with a copy of its general conditions for extended warranty (which contained a potentially restrictive clause) in reply to a request by the Authority for all documentation available in respect of each of the company's warranty, in the context of an investigation into the company's extended warranty policy for motor vehicles (closed in March 2015 with the imposition, by the Authority, of mandatory conditions based on commitments offered by Peugeot Portugal) – the fining decision was confirmed on appeal by the Competition, Regulation and Supervision Court (Case nr. 273/15.4Y1FDR).
- Ford Lusitana was fined €150,000 for having failed to provide the Authority with a version of the extended warranty contract available on its website, which was different (and included a potentially restrictive clause) to the version sent to the Authority in reply to a request for information in the context of an ongoing supervision process in the automobile sector (closed in September 2015 with the imposition, by the Authority, of mandatory conditions based on commitments offered by Ford Lusitana in respect of its extended warranty policy) – the fining decision was confirmed on appeal by the Competition, Regulation and Supervision Court.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The maximum fine in a cartel case is up to 10% of the turnover of each participating undertaking, or, in the case of associations of undertakings, of the aggregate turnover of its members (which are jointly and severally liable for the fine under certain conditions). The relevant turnover refers to that of the year preceding the issuance of the Authority's final decision, although a 2015 decision by the Appellate Court of Lisbon shed some doubt on the constitutionality of such provision, considering that it makes the maximum fine vary according to market trends and the timings of the proceedings (Judgment of the Appellate Court of Lisbon of 11.03.2015, in Case nr. 204/13.6YUSTR.L1-3).

In addition to these penalties, if the seriousness of the infringement and the liability of the offender so justify, the Authority may impose ancillary sanctions of two kinds:

(i) publication in the official gazette and in a national newspaper, at the offender's expense, of the relevant parts of a decision finding an infringement; and/or

(ii) a ban on participating in procurement proceedings if the infringement found has occurred during, or as a consequence of, such proceedings. This sanction may only last for a maximum period of two years.

In the last two years, the Authority has imposed both kinds of ancillary sanctions. For the first time, in 2019, the Authority imposed an ancillary sanction upon the "Railway Maintenance Services Cartel" of a two-year ban on participating in public procurement proceedings. At the end of 2020, in the context of the "MEO and NOWO Telecommunication Cartel", the Authority applied to MEO the ancillary sanction of publishing an extract of its final decision in *Diário da República* (the official gazette) and in a national newspaper.

Moreover, and whenever deemed necessary, the Authority may impose a periodic penalty payment in cases of non-compliance with a decision imposing a fine or ordering the application of certain measures. This may result in a payment of up to 5% of the average daily turnover of the infringing undertaking in the year preceding the decision for each day of delay.

Civil law sanctions may also arise; notably, all prohibited agreements and concerted practices are null and void. In addition, parties that have suffered losses as a result of a cartel infringement may seek compensation in court (please see section 8 below).

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Penalties can be imposed not solely on members of the board of the undertaking concerned, but also on persons responsible for the management or supervision of the areas of activity where the infringement occurred.

In cartels, penalties may reach up to 10% of the individual's total annual income in the last complete year of the breach.

The liability of natural persons arises when they knew or should have known of the infringement but failed to take appropriate measures to bring it to an end. However, if a more serious penalty is applicable pursuant to other legal provisions, the latter will apply.

In Portugal, antitrust infringements are not considered criminal infractions and the authority does not have the power to remove or suspend an individual from its functions.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The Act refers to the "economic situation of the offender" as one of the aspects to be weighted by the Authority when setting a fine. Thus, financial hardship and inability to pay claims should be factored in regarding the amount of the penalty.

Even prior to the enactment of the Act, the Authority had already signalled that it would be willing to take this criterion into account. In a 2011 decision regarding alleged price fixing between driving schools established on Madeira Island, the Authority imposed a total fine of €9,865.40 on seven undertakings. To reach this figure, the Authority took into consideration, *inter alia*, the small economic scale of the companies concerned (in terms of turnover and number of employees) and the fact that they operated in a market characterised by insularity.

In 2012, the Authority published Guidelines regarding the method for establishing fines in antitrust proceedings. These Guidelines cover all major types of antitrust infringements, including cartels. In the paper, which on this point closely follows the Commission's view on the issue, the Authority states that it may take account of an undertaking's inability to pay in a specific social and economic context. However, the Authority shall not grant any reduction in the fine on the mere finding of an adverse or loss-making financial situation; a reduction may only be awarded on the basis of objective evidence that the imposition of the proposed fine would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

3.4 What are the applicable limitation periods?

As a general rule, sanctioning proceedings for cartel offences (similarly to other prohibited practices) are subject to a five-year limitation period. The issue of when this limitation period starts to run will ultimately depend on the type of infringement at stake; for instance, in the case of continuing infringements, the five-year period only starts to run from the date on which the infringement ceases.

Five years (counting from the date when the decision has become *res judicata*) is also the time limit for the enforcement of the sanctions imposed.

However, these limitation periods are suspended, *inter alia*, for as long as a judicial review is pending, and the total suspensions may last for a three-year period. The period is also interrupted whenever the Authority takes any action for the purpose of the investigation, and each interruption shall start the time running afresh.

In any event, the expiry of these limitation periods occurs on the day on which seven-and-a-half years, plus the eventual suspensions, have elapsed, i.e., a maximum of 10.5 years.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There is no specific provision preventing a company from paying the penalties and/or legal costs imposed on its (former or current) employees.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Companies are held liable for infringements committed: (i) on their behalf or account by persons occupying a leading position therein (i.e., corporate bodies, representatives and persons holding control over the company's activity); or (ii) by anyone acting under the authority of the persons mentioned in (i) when the latter have breached the supervision or control duties that are incumbent upon them.

It is also worth mentioning that the liability of an undertaking under the Act does not preclude the individual liability of natural persons, nor does it depend on the liability of the latter, in cases where there has been a breach of the duty to cooperate.

Under the general principles of labour and civil law, an employer may claim and seek damages (including legal costs and financial penalties) from an employee if he/she acted wilfully or negligently and his/her action caused the employer's engagement and punishment in the cartel.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Throughout the years, the Authority has been rather reluctant to make use of the parental liability doctrine and, for many years, this possibility was never subject to in-depth examination by the national courts.

However, in June 2017, the Appellate Court, in assessing an application lodged by the ANF Group against the Authority's abuse of dominance decision and a judgment by the first instance court, rendered an important ruling (judgment of 14.6.2017 in Case nr. 36/16.0YUSTR.L1), where it expressly stated that, under Portuguese law, a parent company cannot be held liable for competition law infringements perpetrated by a subsidiary if the parent was not itself engaged in the infraction. Given the comprehensive and substantiated reasoning of the Appellate Court in this case, we believe that the same conclusion should apply to cartel conduct.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The current Leniency Programme is provided for in the Act and further ruled by a Leniency Regulation dealing with the corresponding administrative procedure and complemented by the Authority's own accompanying Explanatory Guidelines on Leniency (covering both substantive and procedural rules). From an objective viewpoint, the scope of the leniency regime in force covers only cartel-type behaviour: the Act refers specifically to agreements or concerted practices between competitors that are aimed at coordinating their competitive behaviour on the market or influencing relevant parameters, specifically through: the fixing of purchase or selling prices 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.

From a subjective viewpoint, leniency may be granted either to companies or to individuals subject to liability for infringements of the Act. The latter includes members of the board of directors or of the supervisory board of legal persons and equivalent entities as well as individuals who are responsible for the direction or supervision of areas of activity where an infringement has occurred. Individuals may apply for leniency on behalf of the company or individually (in the last case, immunity or special reduction will only benefit the applicant).

There are two types of lenient categories: (full) immunity from the fine; or fine reduction.

Common requirements for immunity and reduction

A company or individual wishing to benefit from immunity or reduction must comply with three conditions:

(i) to cooperate fully and continuously with the Authority from the moment the application is filed, which requires the provision of all the information and evidence in its possession or under its control currently or in the future,

promptly replying to any information requests, refraining from acts that may hinder the progress of the investigation and refraining from disclosing the existence or content of its application or the intention to submit an application (unless the Authority so authorises in writing);

(ii) to terminate its participation in the infringement except to the extent deemed reasonably necessary by the Authority to maintain the effectiveness of the investigation; and

(iii) not having coerced any of the other companies to participate in the infringement.

Specific requirements for immunity

Immunity from fines is reserved for "first-in" situations, but it is no longer required (as in the previous leniency regime) for the information to be presented to the Authority at a stage where no investigation has been initiated.

Hence, immunity is granted to companies or individuals that are the first to supply information and evidence that permit the Authority to either (i) substantiate a request for search and seizure where such information was not available to the Authority, or (ii) detect an infringement (eligible for leniency) where the Authority did not have enough evidence on such infringement.

Specific requirements for the reduction of a fine and relevant thresholds

Reductions of fines are granted to companies or individuals that (despite not fulfilling the requirements for immunity) provide the Authority with evidence and information on an infringement with significant added value with respect to the information already in possession of the Authority.

The level of reduction of the fine can be set at: 30–50% (for the first company/individual to provide evidence or information with significant added value); 20–30% (for the second company/individual to provide evidence or information with significant added value); and <20% (for any subsequent companies/individuals to provide evidence or information with significant added value).

For leniency requests presented after the SO, the abovementioned thresholds shall be reduced by half.

The Act does not qualify the notion of "significant added value"; however, it provides that the criteria should be assessed taking into account the information and evidence already in the possession of the Authority. Moreover, the evidentiary value of the information and the fact that further corroboration might be (un)necessary will also play a relevant role, as emphasised in the Explanatory Guidelines on Leniency.

In addition, individuals who cooperate fully and continuously with the Authority will benefit from immunity or a reduction of the fine which would otherwise be applicable even if they do not request such benefits personally.

Up to the present, the following fining decisions by the Authority are known to have been triggered by leniency applications:

- the "Catering Cartel", the investigation of which was triggered by an individual leniency application presented in 2007 by a former director of one of the cartelists, who benefitted from full immunity while his employer and the remaining cartel members and respective directors were all fined. After a court annulment of the initial fining decision (2009) on procedural grounds and its replacement in 2012 by a second (new) fining decision (only partially upheld on appeal), the Appellate Court of Lisbon declared, in March 2015, the dismissal of the whole administrative procedure due to time limitations;
- the "Commercial Forms Cartel" (2012), which resulted in a total fine of €1,797,978.51 imposed upon three of the four companies involved and their respective directors, amounts which were significantly reduced on appeal (to a total of approximately €459,300) as the court decided to apply to the case the more favourable regime of the current Act in terms of fine calculation (please see question 7.1);
- the "Polyurethane Foam Cartel" (2013), which resulted in a total fine of €993,000 imposed upon two of the three companies involved and their respective directors. The two companies sanctioned benefitted from a further fine reduction as they agreed to a settlement during the second stage of the investigation (please see question 6.1);
- the "Pre-Fabricated Modules Cartel" (2015), which resulted in a total fine of €831,810 imposed upon four of the five companies involved. The fine reductions granted resulted not only in leniency reductions but also in reductions resulting from the settlement procedure;
- the "Office Consumables Cartel" (2016), which resulted in a fine of €440,000 imposed upon one cartel participant who applied for leniency and settled and an initial fine of €160,000 imposed upon another company who did not settle and reduced on appeal to €50,000 (this decision was confirmed on appeal by the Appellate Court of Lisbon);
- the "Insurance Cartel" (2019), an investigation which was initiated in 2017 and which resulted in the highest fine applied by the Authority until that point in time (see http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201916.aspx?lst=1&Cat=2019) totalling more than €54 million imposed upon five insurance companies and several respective directors. One of those companies gained full exemption from the fine by being the first one to come forward under the Leniency Programme, and two others benefitted from a reduction of the fine, having settled on a fine of €12 million, closing the investigation. With regard to the remaining two companies and individuals that did not settle, the investigation was only closed afterwards and a fine of approximately €42 million was imposed. This latter fining decision was appealed in court and the process is currently ongoing;
- the case on "Exchange of sensitive commercial data in the banking sector" (2019), which involved 14 banks and led to the imposition of total fines in the amount of €225 million. The investigation was triggered in 2012 by a leniency applicant which benefitted from an exemption from the fine. A second leniency applicant benefitted from a 50% fine reduction. The fining decision was subject to appeal (currently pending in court); and
- the "MEO and NOWO Telecommunication Cartel" (2020), which resulted in an €84 million fine applied exclusively to the telecommunication operator MEO (see http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202020.aspx?lst=1&Cat=2020). The case was opened by the Authority following a leniency application submitted by the telecommunication operator NOWO, which led to NOWO being exempted from the payment of a fine for its participation in the cartel. This fining decision was appealed and the respective proceeding is currently pending.

Investigations pursued by the Authority on the basis of leniency applications do not always result in fining decisions: in the course of 2017, the Authority closed with commitments two investigations of information exchange systems in the context of two associations (the "Association of Specialized Credits Institutions Portuguese" and the "Portuguese Association for Leasing, Factoring and Renting") which had been initiated as a result of leniency applications presented in separate proceedings – see http://www.concorrencia.pt/vEN/News_Events/Comunicados/

Pages/PressRelease_201721.aspx?lst=1&Cat=2017 and http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_201719.aspx?lst=1&Cat=2017.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The Leniency Regulation (issued in January 2013) expressly establishes a marker system for immunity applicants. A marker may be granted either at the Authority's own initiative or in response to the immunity applicant's request, provided that, in any event, the immunity applicant supplies the Authority with the following minimum information (in line with the ECN Model), in its initial request: name and address of the leniency applicant; information with regard to the participants in the alleged cartel; the products and/or services and territory covered; an estimate of the duration of the cartel; the nature of the alleged cartel conduct; information on any past or possible future leniency applications to any other competition authorities in relation to the alleged cartel; and a justification for the request for a marker.

The immunity applicant shall be given a period of no less than 15 days to complete the initially submitted immunity application; a different deadline may be set by the Authority if so justified for reasons of cooperation with other competition authorities within the EU, pursuant to Regulation (EC) no. 1/2003. Failure to complete the initial request within the established deadline shall lead to refusal of the leniency application and any documents that have been delivered shall be returned to the applicant or, upon express request by the latter, retained by the Authority and assessed under the cooperation criteria, to be taken into account by the latter when setting the amount of the fine.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The possibility to present oral applications was introduced with the Leniency Programme adopted in 2012.

The Leniency Regulation establishes that oral applications are initially presented at a meeting with the Authority together with all relevant evidence of the cartel in the possession or under the control of the applicant. Oral applications are recorded at the Authority's premises and, after verification of content by the applicant, are subject to transcription and signed by the applicant.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The Act rules in detail on the issue of confidentiality and access to the leniency application and related documents. It imposes upon the Authority an obligation to classify as confidential the leniency application as well as all the documents and information submitted for the purposes of immunity or reduction.

The defendant shall be granted access to the leniency application and related documents and information for the purposes of preparing its reply to the SO; however, copies of those documents will only be possible if so authorised by the leniency applicant. Access by third parties is dependent upon authorisation by the leniency applicant.

In relation to oral statements, a defendant which has orally applied for leniency shall not be given access to copies of its statements and third parties shall be prevented from accessing such information/documentation.

Law nr. 23/2018, of 5 June, which implements Directive 2014/104/EU ("the EU Private Enforcement Directive") further protects leniency applicants by establishing that courts may not determine the submission of evidence which includes leniency applications and settlement proposals (except for revoked settlements). On the contrary, supporting documents and information provided together with the leniency application are not expressly excluded from disclosure by court order even though they may benefit from a special disclosure regime if they qualify as documents prepared specifically (by an individual or undertaking) for the purposes of an Authority procedure. In that case, disclosure by the court can only be ordered after the Authority procedure has been concluded (a similar rule being applicable to revoked settlement proposals).

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The definite decision to grant or refuse immunity from a fine or a fine reduction is taken by the Authority only at the end of the proceedings. One of the requirements to benefit from leniency is to cooperate fully and continuously with the Authority from the moment the application is filed (please see question 4.1); therefore, the "continuous cooperation" should last until the final decision on the proceedings is adopted.

If, during the course of the investigation, the Authority considers that the applicant is no longer cooperating, the leniency status will be withdrawn.

However, the cooperation initially given will still be relevant for other purposes, particularly considering that the level of cooperation with the Authority during an investigation is one of the criteria used to establish the amount of a fine under the Act (please see question 3.3).

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is no "leniency plus" or "penalty plus" policy under the leniency regime currently in force.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Individual leniency is possible for members of the board of directors or the supervisory board of legal persons and equivalent entities as well as for individuals who are responsible for the direction or supervision of areas of activity within a company or equivalent legal entity where an infringement has occurred.

Individual leniency abides by similar criteria and follows the same procedure as corporate leniency. In the event of individual application, the leniency will only benefit the applicant, not the company (contrary to corporate leniency, which may benefit individuals – please see question 4.1).

Outside the scope of the Leniency Programme, any individual (either a director, an employee or any third party) may submit a complaint to the Authority implicating other individuals or companies in a suspected cartel. The Authority's approved form

(available on its website) should be used for that purpose. The practice of the Authority has also been to accept anonymous complaints.

Once the Authority has decided to initiate an investigation pursuant to a complaint, it cannot close the case without granting the complainant the opportunity to submit observations on the proposed decision beforehand (please see question 1.4).

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Apart from the Leniency Programme, the Act empowers the Authority to enter into two types of plea-bargaining arrangements in respect of antitrust infringements in general. On the one hand, the Authority may accept binding commitments from the parties in exchange for dropping the proceedings without concluding that there has been an infringement (case closure with conditions – please see question 1.4). On the other hand, it may enter into a settlement procedure that will enable a swift decision and a reduction of the fine.

According to publicly available information, the Authority has so far used the settlement procedure in the following antitrust cases: the "Polyurethane Foam Cartel" (decided in 2013); the "Pre-Fabricated Modules Cartel" (decided in 2015); the "Office Consumables Cartel" (decided in 2016); the "Insurance Cartel" (partly settled in 2018); and the "Railway Maintenance Services Cartel" (partly settled in 2018/2019). Commitment decisions are also frequent in decision-making practice. However, according to the March 2013 Guidelines regarding the conduct of antitrust proceedings, the Authority shall typically not accept commitments in cartel cases.

Settlement proceedings may pose an advantage where parties are ready to acknowledge their participation in a cartel and accept their liability for it but wish to shorten the procedure and obtain a reduction of the fine.

Neither the Act nor the Guidelines mentioned above clarify the amount of reduction expected to be received in settled cases, and this aspect has been highly criticised by practitioners. Nevertheless, reductions of fines under settlement proceedings and under the Leniency Programme are cumulative.

In the "Polyurethane Foam Cartel" (the first antitrust settlement decision), the Authority granted to the undertakings and individuals involved significant reductions, ranging from 38–40%, in addition to the discount from leniency. Those percentages were significantly reduced to 10% in the subsequent "Pre-Fabricated Modules Cartel" of 2015. In the 2016 "Office Consumables Cartel" and in the remaining settlements issued afterwards (see above), the Authority has not disclosed the reduction awarded to companies that settled the cases. This opacity in the Authority's approach to fine reductions for settlement procedures is not in line with the Authority's goal of reinforcing the transparency of its activity.

The facts to which a party in a settlement procedure has confessed cannot be judicially appealed. As a rule, third parties are not permitted to access settlement submissions contained in the file and other undertakings concerned in the case are only permitted to see those documents for the purposes of preparing their defence, but no copy of these can be made without due authorisation by the author of the settlement proposal. In the 2016 "Office Consumables Cartel", only one of the undertakings concerned accepted the settlement, whereas the remaining companies were subject to a separate decision finding an infringement. In the more recent cases mentioned above (the "Insurance Cartel" and the "Railway Maintenance Services Cartel"), there were also hybrid settlement decisions, meaning the companies which did not settle were subject to separate fining decisions (respectively, in August 2019 and March 2020).

7 Appeal Process

7.1 What is the appeal process?

Decisions handed down by the Authority in cartel cases are subject to appeal to a specialised court dealing with competition, regulatory and supervisory matters. Recently, the Constitutional Court ruled that concerning the acts carried out by the Authority in the administrative phase of the procedure, only those of a decisive nature may be subject to an appeal (Judgment nr. 175/2021 of 6 April 2021, in Case nr. 1204/2019).

Appeals against final decisions are lodged within 30 working days. The Authority will then have an additional 30-working-day period to forward the records to the public prosecution office and to enclose its own allegations or other information deemed relevant. The public prosecutor can only withdraw the accusation if the Authority gives its consent.

The court holds full jurisdiction to review decisions whereby the Authority has imposed a fine or periodic penalty payment, and thus may reduce or increase the amount of such sanctions.

Up to the present date, the court has never increased the amounts of fines prescribed by the Authority. The Competition, Regulation and Supervision Court actually ruled (in the appeal concerning the "Commercial Printed Forms Cartel") that the levels of fines provided in the current Act may be generally more favourable for companies and individuals than those resulting from the 2003 competition legislation, essentially because under the current Act: (i) the relevant year on which to base the amount of a fine is that before the adoption of the Authority's final decision, whereas under the 2003 law, the relevant year was the last full year of the infringement (this may be relevant if the economic situation of the defendants subsequently deteriorated; however, as mentioned in question 3.1, the Appellate Court deemed that the setting of the fine based on the turnover preceding the decision may raise constitutional issues); (ii) the limits of the fines applicable to individuals are now set at 10% of their annual remuneration, whilst under the 2003 legislation, individuals were liable for fines of up to half of those imposed on their companies; and (iii) there is an express requirement for the economic situation of the defendant to be taken into account in the calculation of the fine (although the general regime on administrative offences, applicable to both the 2003 and 2012 acts on a subsidiary basis, already provided for consideration of this criterion).

The court may reach a final decision in an appeal with or without a previous court hearing, but in the latter case only if the Authority, the public prosecutor and the defendant do not object thereto. If there is a court hearing, the court shall rule on the basis of the evidence presented in the hearing, as well as on the proof gathered during the administrative proceedings.

The court decision is subject to one further appeal and the Appellate Court will finally rule on the case.

The Authority has an autonomous right to appeal.

The Authority is bound to publish on its website court rulings issued on appeals lodged in antitrust cases.

7.2 Does an appeal suspend a company's requirement to pay the fine?

According to the Act, an appeal does not, as a rule, suspend a company's requirement to pay the fine. However, there is one exception and one exemption to this rule, without prejudice to the constitutional doubts that it raises.

The exception concerns decisions that impose structural measures, in which case the effects of these decisions will be automatically suspended once the appeal is lodged.

The exemption is available for appellants in the case of decisions imposing fines or other sanctions: the appellant may ask the court to suspend the effects of the decision when the execution of such decision would cause considerable harm and the appellant offers to provide a guarantee *in lieu*, in which case the suspension of effects will depend on the guarantee actually being provided within the time limit prescribed by the court.

In 2016, the Constitutional Court ruled that the absence of suspensive effect attached to the appeal did not breach the fundamental law (Judgment nr. 376/2016 of 8 June 2016, in Case nr. 1094/2015). However, later that year, the same Constitutional Court issued a second ruling on the matter and this time decided that the provision of the Act that does not suspend the obligation to pay the fine in case of appeal or requires a company to provide a guarantee instead is indeed unconstitutional (Judgment nr. 674/2016 of 13 December 2016, in Case nr. 206/16). In 2018, the Constitutional Court ruled again in favour of the unconstitutionality of the referred provision (Judgment nr. 445/2018 of 2 October 2018, in Case nr. 1378/2017). This decision was appealed to the Grand Chamber of the Constitutional Court due to an alleged contradiction with a previous ruling. The prevailing understanding since 2019 is that such provision does not breach the Constitution (Judgment nr. 776/2019 of 17 December 2019, in Case nr. 1378/2017 and Judgment nr. 173/2020 of 11 March 2020, in Case nr. 202/18).

If, as a result of future appeals, the Constitutional Court finds a provision to violate the fundamental law in three judicial reviews, the court is entitled to open an *ex officio* procedure that may result in a declaration of unconstitutionality with statutory general force, which would bar national courts from applying the provision at stake.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Testimonial evidence is permitted and the witnesses can be subject to cross-examination by the counterparty.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Under general civil law, damages actions for loss suffered as a result of any breach of law (including breaches of the Act and, therefore, for cartel conduct) follow general civil law and civil law procedures. Hence, private antitrust liability depends on the fulfilment of the five cumulative requirements established in the Portuguese Civil Code for tort liability, which are: (1) a conduct (act or omission) controllable by human resolution; (2) the conduct's unlawfulness; (3) the imputation of the conduct to a wrongdoer; (4) the existence of damages; and (5) a causal link between the conduct and the damages.

Law nr. 23/2018, of 5 June, which implements the EU Private Enforcement Directive, confers binding evidentiary value (in the form of a non-rebuttable presumption) on final decisions adopted by the Authority or on final judicial rulings on appeal. Such binding evidentiary value concerns the existence, nature, duration and material, personal and territorial scope of an antitrust infringement for the purposes of a follow-on damage action. In addition, final decisions or rulings by competition authorities or courts of other Member States are given a qualified evidentiary value (in the form of a rebuttable presumption) regarding the existence, nature, duration and material, personal and territorial scope of an antitrust infringement for the purposes of a follow-on damage action.

Finally, one should not exclude the possibility of a damages claim being brought under contractual liability in cases where a contract exists between the wrongdoer and the entity suffering the damage and there is a breach of a contractual obligation or of any ancillary duty.

8.2 Do your procedural rules allow for class-action or representative claims?

Law nr. 83/95, of 31 August, as amended by Decree-Law nr. 214-G/2015, establishes the legal framework applicable to the representative action ("*ação popular*"), which can be used in the context of a private antitrust class action. The aim of these actions is to defend collective or diffuse interests either for prevention (injunction) or for redress (claims for damages). Under this framework, any natural person, association or foundation (the latter two in cases which are directly connected with their scope) should be capable of bringing a private antitrust class action before a Portuguese court based on the breach of competition law rules. Companies, on the contrary, may not use the representative action procedure.

Our national procedure can be qualified as an opt-out system, as the claimant automatically represents by default all the holders of similar rights or interests at stake who did not opt out, following, *inter alia*, the public notice regarding the submission of the representative action before the court.

The liable party must compensate all persons who suffered damage as a result of a given practice and may have to refund the unlawful profit derived from the conduct in question.

In the representative action, the court is not bound by the evidence gathered or requested by the parties and, as a general rule, has the power to collect the evidence that it deems appropriate and necessary.

The claimant may seek redress for damages suffered; the law determines that the compensation of rights' holders that cannot be individually identified shall be determined globally. The right to compensation shall be time-barred within three years from the delivery of the court decision that has acknowledged the existence of such right.

Law nr. 23/2018, of 5 June, which implements the EU Private Enforcement Directive introduces a set of specific rules in respect of representative actions for damages claims for antitrust breaches, in particular insofar as (i) it extends the legal standing to bring forward such representative actions to associations and foundations for the defence of consumers' rights and to associations of undertakings whose associates are affected by the infringement of competition law in question, and (ii) rules on aspects such as the identification of injured parties, the quantification of damages and the receipt, management and payment of damage compensations with the purpose of facilitating the feasibility of representative actions for antitrust infringements in the context of an "opt-out system".

To the best of our knowledge, Portugal's first-ever class action for private competition law damages was lodged earlier in 2015; however, it refers to a redress claim for damages caused by an abuse of a dominant position and not by a cartel. Indeed, the collective damages claim was presented by the "Portuguese Competition Observatory" on behalf of all pay-TV consumers allegedly damaged by the conduct of pay-TV operator Sport TV, previously fined for having abused its dominant position in the market for conditional access premium sports channels by applying a discriminatory remuneration system in the distribution agreements for Sport TV television channels.

At the end of 2020, two representative actions for damages for antitrust breaches were lodged with the Competition, Regulation and Supervision Court. Both actions were filed by Ius Omnibus, a consumer protection association, and seek compensation for all Portuguese consumers harmed by alleged anti-competitive practices. The first action was lodged against Mastercard (regarding alleged anti-competitive practices identified by the European Commission) and the latter was lodged against Super Bock (regarding alleged anti-competitive practices identified by the Authority). If successful, each action will result in the payment of damages in an estimated amount of over €400 million, resulting in an average compensation right for each Portuguese consumer of around €40.

8.3 What are the applicable limitation periods?

Under the general civil law rules currently in force, the right to compensation under the tort liability regime is subject to a time limitation of three years from the moment when the injured party becomes aware of his right to make a claim for damages.

The law implementing the EU Private Enforcement Directive increases the referred limitation period to five years from the moment when the injured party becomes aware or can reasonably be assumed to have become aware: (i) of the behaviour in question and the fact that it constitutes an infringement of competition law; (ii) of the identity of the infringer; and (iii) of the fact that the infringement of competition law caused harm to it, even if it was not aware of the full extent thereof.

A different limitation period is proposed for small and medium-sized enterprises and for leniency applicants that benefitted from immunity from a fine in relation to injured parties which are not their purchasers or suppliers. Such limitation period shall be five years from (i) the date of termination of an executive action for lack of assets that may be seized, (ii) the date of the bankruptcy finding by the court, or (iii) the date of any other final court decision establishing the inability of the remaining co-infringers to pay. New rules are also proposed for the counting of and suspension of the limitation period, which are broadly in line with the solutions of the EU Private Enforcement Directive.

The foregoing is without prejudice for a general 20-year limitation period (counting from the harmful event).

If contractual liability were at stake, the time limitation would be 20 years.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The Portuguese Civil Code determines that the injured party has the right to claim for loss suffered and lost profits resulting from the illegal conduct and that reparation of damages shall only take the form of pecuniary compensation either if natural reconstitution is impossible or does not fully repair the damage suffered or is excessively costly for the debtor.

The indemnity shall be the difference between the pecuniary situation of the claimant on the most recent date that can be taken into account by the court and the pecuniary situation in which the claimant would be in the absence of those damages. Thus, the measure of loss which shall be compensated in an antitrust damage case will be the difference between the claimant's actual position and the situation the claimant would have been in were it not for the illegal conduct.

The law implementing the EU Private Enforcement Directive expressly acknowledges the right of a defendant to use a passing-on defence to sustain that the claimant did not suffer all or part of the damages claimed because of overcharges passed on to its customers and clarifies that the respective burden of proof lies with the defendant.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The general provisions of the Regulation of procedural fees apply. Procedural fees include (broadly) court fees ("*taxa de justiça*") and court expenses. Court fees are due and charged for the procedural initiative of the party and depend on the amount of the claim or claims at stake in the proceedings and the complexity of the case. Court expenses relate to the costs of certain procedural acts or services.

In light of the particulars of a given case (in particular, the amount of the claims at stake), it is possible to estimate approximately the procedural fees to be charged in the proceedings.

Procedural fees and expenses are charged at different moments throughout the procedure to both parties.

The final court decision (or a decision that finally decides any procedural incidents or appeals) will rule on the liability for costs; the general rule being that the losing party will be liable for payment of the procedural costs in the proportion of its loss.

If the court decision convicts the defendants to the fulfilment of joint and several obligations, the liability as to procedural fees shall also be joint and several.

Plaintiffs in representative actions will benefit from an exemption of court fees in accordance with Article 4 (1) (b) of the Portuguese Court Fees Regulation.

Law nr. 23/2018, of 5 June, establishes procedural fines that are specifically aimed at conduct in breach of certain rules on access to evidence in the context of damages actions.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

To the best of our knowledge, there have been no successful private antitrust damages actions so far for cartel conduct.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The competition policy priorities for 2021 set out by the Authority at the end of 2020 (see http://www.concorrencia.pt/vEN/A_AdC/Instrumentos_de_gestao/Documents/Competition%20Policy%20priorities%20for%202021.pdf) focus on ensuring the continuity of its mission in order to protect companies and consumers during the context of the COVID-19 pandemic.

Thus, the Authority pledges to remain vigilant in detecting abuses or anti-competitive behaviour that exploit the current situation, paying particular attention to practices of price fixing or market sharing, at any level of the supply chain, including in e-commerce. Essentially, the e-commerce boost that occurred in the past months, alongside the digitalisation of numerous markets, is a trend which is expected to continue at a fast pace and, therefore, the Authority's inter-departmental digital task force established in 2020 shall remain in vigorous force, with the protection and enhancement of competition dynamics in the digital economy being a priority.

Another focal point of the Authority is the coordination of competition law and labour law (see http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202106.aspx?lst=1&Cat=2021). The interaction between the competition and labour market have occupied a prominent place in the recent global discussion on competition policy and the Authority is alerting companies for the need to prevent anti-competitive agreements in the labour market (no-poach) in any sector of activity.

Additionally, the Authority has already issued an SO for an alleged anti-competitive agreement in the labour market in a case involving the Portuguese Professional Football League and 31 sports companies (see http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202104.aspx?lst=1&Cat=2021). This is the first probe regarding an anti-competitive practice in the labour market, in a context where the Authority is still alerting companies to this matter and launched a public consultation about this issue earlier this year.

Finally, it is expected that significant changes will be introduced to the Act due to the transposition of the ECN+ Directive. Portugal is currently in the process of implementing the ECN+ Directive and, after a public consultation of a preliminary proposal that took place between 26 October 2019 and 15 January 2020, and after a report of such public consultation (issued on 31 March 2020), the Government has already announced the finalised draft bill aimed at transposing said directive. In late May 2021, the draft bill entered Parliament as "Law Proposal 99/XIV/2" and is now following the regular legislative procedure (information about the ongoing legislative procedure is available in Portuguese at https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=110842).

The finalised draft legislation (available in Portuguese at https://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c324679626d56304c334e706447567a4c31684a566b786c5a79394562324e31625756756447397a5357357059326c6864476c32595338304e324d795a4449354d69316a4d444a6a4c5451355a444174596a56694e7930314f474533596d4d774d6d466-94f5759755a47396a65413d3d&fich=47c2d292-c02c-49d0-b5b-7-58a7bc02ab9f.docx&Inline=true) takes into account some of the revisions and amendments of the current Act that were proposed by the Authority in its suggested revision of the Act (available in Portuguese at http://www.concorrencia.pt/vPT/Noticias_Eventos/ConsultasPublicas/Documents/Proposta%20de%20Anteprojeto%20apresentada%20ao%20Governo%20%E2%80%93%20Vers%C3%B5es%20Comparadas%20de%20Diplomas%20a%20Alterar.pdf).

Despite the significant investigative powers already conferred upon the Authority and its institutional legal framework as an independent agency, the proposal for the revision of the Act includes several modifications in aspects that are of relevance in the context of cartel investigations, sanctioning and the respective procedures in order to allegedly apply the law more effectively.

The final proposal is still a draft of the final legislation that will implement the ECN+ Directive in the Portuguese jurisdiction and is currently subject to parliamentary assessment and discussion, meaning it may still undergo a few changes.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

Please refer to the preceding question.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Competition law in Singapore is governed by the Singapore Competition Act (Cap. 50B) (the "**Act**") and is enforced by the Competition and Consumer Commission of Singapore (the "**CCCS**").

Currently, there is no criminal liability in respect of competition law violations, and penalties are monetary in nature. The CCCS can also issue directions to bring the violation to an end and, where necessary, require action to be taken to remedy, mitigate or eliminate any adverse effects of the violation and to prevent recurrence. However, criminal liability can arise in circumstances where undertakings or individuals obstruct the CCCS in the performance of its duties or refuse to provide information requested pursuant to the CCCS's statutory powers, etc.

1.2 What are the specific substantive provisions for the cartel prohibition?

Cartel activities are prohibited by section 34 of the Act (the "**Section 34 Prohibition**"), which provides that:

> *"…agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited…"*

Section 34(2) of the Act provides examples of the types of arrangements that may fall within the ambit of this prohibition. Specifically, section 34(2) of the Act states that agreements, decisions or concerted practices may have the object or effect of preventing, restricting or distorting competition within Singapore if they:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The illustrative list in section 34(2) of the Act is not intended to be exhaustive, and the CCCS has specified in the *CCCS Guidelines on the Section 34 Prohibition 2016* (the "**Section 34 Guidelines 2016**") that other types of arrangements may have the effect of preventing, restricting or distorting competition (e.g. information sharing agreements).

Arrangements involving price-fixing, bid-rigging, market sharing or output limitation are considered by the CCCS to always have an appreciable effect on competition such that it is not necessary for the actual effects of such arrangements to be analysed before an infringement is found.

One important qualification on the application of the Section 34 Prohibition is that it does not apply to arrangements that give rise to net economic benefit (an exclusion that is provided for in paragraph 9 of the Third Schedule to the Act). In order to qualify for the exclusion, it must be demonstrated that the arrangement:

- contributes to improving production or distribution, or promoting technical or economic progress;
- does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives; and
- does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Additionally, the Section 34 Prohibition does not apply to vertical agreements unless the Minister otherwise specifies by order (paragraph 8 of the Third Schedule to the Act). To date, the Minister has not specified any vertical agreement to which the Section 34 Prohibition will apply.

1.3 Who enforces the cartel prohibition?

Competition law in Singapore is enforced by the CCCS, a statutory body established under Part II of the Act. The CCCS has the ability to investigate suspected violations of competition law and to impose sanctions in respect of such violations.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The CCCS has the power to conduct an investigation under section 62(1)(a) of the Act if it has *"reasonable grounds for suspecting that the section 34 prohibition has been infringed by any agreement"*. Any investigation will be carried out by either the CCCS or a duly appointed inspector (section 62(2) of the Act).

Following investigations, if the CCCS proposes to make a decision that the Section 34 Prohibition has been infringed,

regulation 7 of the Competition Regulations 2007 requires the CCCS to first give the parties involved notice via a proposed infringement decision ("**PID**"), which will set out the reasons for the CCCS's proposed decision and the facts that it has relied on. The parties will have the opportunity to make written and oral representations and to inspect the CCCS's file. The PID is confidential and is only issued to the parties that are subject to the proposed enforcement action.

Thereafter, and upon consideration of the representations, the CCCS will issue its infringement decision, imposing sanctions as determined by the CCCS. Following the 2018 amendments to the Act which empowered the CCCS to accept binding commitments in respect of the Section 34 Prohibition, the CCCS has proposed amendments to its guidelines that would provide clarity on the timelines and processes for commitment proposals. In particular, the amendments would clarify that while the CCCS can accept commitments at any time before making a decision pursuant to an investigation, where an undertaking seeks to offer a commitments proposal, the CCCS will generally stipulate a deadline and if the deadline is missed, the CCCS will proceed with the issuance of a PID.

1.5 Are there any sector-specific offences or exemptions?

Certain liner shipping agreements are exempt from the application of the Section 34 Prohibition, by way of a Block Exemption Order ("**BEO**"). The BEO initially took effect on 1 January 2006 for a period of five years, and its extension until 2015 was granted by the Minister for Trade and Industry on 16 December 2010. The BEO was then subsequently extended by the Minister to 31 December 2020. A further extension, granted on 26 August 2020, extended the BEO to 31 December 2021. The liner shipping BEO is the only BEO that has been granted in Singapore since the introduction of competition law.

Other specific activities and industries excluded from the application of the Section 34 Prohibition are specified in paragraphs 5, 6 and 7 of the Third Schedule to the Act, and include postal services, the supply of bus and rail services and the supply of piped potable water, amongst others.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Yes, section 33 of the Act specifically states that conduct that takes place outside of Singapore will also be prohibited by the Section 34 Prohibition if it has the object or effect of preventing, restricting or distorting competition within Singapore.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	Yes	N/A
Carry out an unannounced search of business premises	Yes*	N/A
Carry out an unannounced search of residential premises	Yes* (but limited)	N/A
Right to "image" computer hard drives using forensic IT tools	Yes	N/A
Right to retain original documents	Yes (in certain circumstances)	N/A
Right to require an explanation of documents or information supplied	Yes	N/A
Right to secure premises overnight (e.g. by seal)	Yes	N/A

Please note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The power to search premises is generally limited to business premises and vehicles. However, the CCCS does have limited power to search residential premises where they are used in connection with the affairs of an undertaking, or when documents relating to the affairs of an undertaking are kept there.

2.3 Are there general surveillance powers (e.g. bugging)?

No such power is expressly afforded to the CCCS under the Act.

2.4 Are there any other significant powers of investigation?

There is nothing of particular note.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches are carried out by officers of the CCCS, and such other officers or persons as the CCCS has authorised in writing to accompany the investigating officer. Inspectors and other such persons as the inspector requires may also be involved.

If the CCCS intends to conduct an unannounced search of a premises, but there is no one currently in the premises, the CCCS is required under section 65(10) of the Act to take reasonable steps to inform the occupier of the intended entry, and if the occupier is informed, afford him or his legal or other representative a reasonable opportunity to be present when the warrant is executed.

Regulation 20 of the Competition Regulations 2007 also provides that an officer shall grant an occupier's request to allow for a reasonable time for the occupier's professional legal advisor to arrive at the premises before continuing investigations, but only if the officer considers it reasonable in the circumstance

to do so and is satisfied that any conditions that he considers appropriate to impose in granting the occupier's request will be complied with.

Finally, the *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016* specifies that the right to consult a legal advisor must not unduly delay or impede the inspection. Moreover, where an undertaking has in-house legal advisors on the premises at the time of inspection, the search will not be postponed, in order to allow for external legal advisors to arrive. Further, a search will not be delayed for legal advice where the undertaking has been given prior notice of inspection.

2.6 Is in-house legal advice protected by the rules of privilege?

Section 66(3) of the Act provides that a professional legal advisor is not required to disclose or produce privileged communications made by them in that capacity. In-house legal advice is also protected by legal professional privilege under section 128A of the Evidence Act (Cap. 97). The *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016* also state that *"communications with in-house lawyers, in addition to lawyers in private practice including foreign lawyers, can benefit from the privilege"*.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Under section 66(2) of the Act, there is a saving provision in respect of statements that might tend to incriminate individuals. Where an individual claims, in advance of making any statement, that the information disclosed may incriminate him, that statement is then not admissible in evidence against him in criminal proceedings, other than in respect of the obstruction offences as set out in question 2.8 below. However, these statements must still be disclosed and can be used by the CCCS in its investigations. They are also admissible as evidence in civil proceedings, for instance, in appeals before the Competition Appeal Board (the "**CAB**").

Similarly, parties cannot refuse to provide information or documents on the basis that they are confidential. However, parties are permitted to claim confidentiality over any information that they furnish to the CCCS, and section 89 of the Act protects such confidential information by requiring the CCCS's officers and other specified parties handling such information to preserve and aid in the preservation of secrecy, including all matters relating to the business, commercial or official affairs of any person.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Criminal liability can arise in the context of cartel investigations where a person:

- refuses to provide information pursuant to a requirement on him or her to do so;
- destroys or falsifies documents;
- provides false or misleading information; or
- obstructs an officer of the CCCS in the discharge of his or her duties.

Offences are punishable by a prison sentence not exceeding 12 months, a fine not exceeding S$10,000, or both. To date, there have been no such criminal sanctions imposed in Singapore.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The CCCS, under section 69 of the Act, can make such directions as it considers appropriate to bring an infringement to an end, or to remedy, mitigate or eliminate any adverse effect of the infringement.

While section 69 provides a general discretion to the CCCS in making directions, the provision provides specific examples of the directions that the CCCS may make, including a direction:

- requiring parties to the agreement to modify or terminate the agreement;
- to pay to the CCCS such financial penalty in respect of the infringement as the CCCS may determine (where it determines that the infringement has been committed intentionally or negligently), but not exceeding 10 per cent of such turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of three years;
- to enter such legally enforceable agreements as may be specified by the CCCS and designed to prevent or lessen the anti-competitive effects which have arisen;
- to dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the CCCS; and
- to provide a performance bond, guarantee or other form of security on such terms and conditions as the CCCS may determine.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

There are no sanctions imposed on individuals in respect of cartel conduct or competition law violations. In relation to obstruction offences, please refer to question 2.8 above.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016* (the "**Penalties Guidelines 2016**") state that, in setting the level of a financial penalty, the *"size and financial position of the undertaking in question"* may be a relevant consideration.

However, in *Maintenance Services for Swimming Pools, Spas, Fountains and Water Features* (the "***Swimming Pools* Case**") the CCCS noted that under EU case law, the mere finding of an adverse financial situation or loss-making situation alone is not sufficient to justify a reduction in financial penalties, as that would confer an unfair competitive advantage on less efficient undertakings.

3.4 What are the applicable limitation periods?

In relation to a breach of a substantive provision of the Act, there is no limitation period within which enforcement proceedings must be brought by the CCCS.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

This is not applicable. There are no sanctions imposed on individuals in respect of cartel conduct or competition law violations.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

As far as we are aware, and based on publicly available information, the position is currently untested in Singapore.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

A parent company may be held liable even if it is not itself involved in the cartel conduct of its subsidiary.

Where the subsidiary participating in the cartel is wholly owned or effectively controlled by the parent company, the CCCS presumes that the parent company exercises decisive influence over its subsidiary, and will regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company can adduce sufficient evidence to demonstrate that its subsidiary acts independently on the market or that the parent company and subsidiary do not act as a single economic entity.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Yes. The CCCS's leniency programme is described in detail in the *CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016* (the "**Leniency Guidelines 2016**").

Where a party provides sufficient information to the CCCS to establish the existence of cartel activity before the CCCS has opened an investigation, that party may benefit from full immunity from financial penalties ("**full immunity leniency applications**"). To earn full immunity, the applicant must also ensure that it:

- provides the CCCS with all the information, documents and evidence available to it regarding the cartel activity;
- grants an appropriate waiver of confidentiality to the CCCS in respect of other jurisdictions and regulatory authorities which have been notified of the conduct and/or from whom leniency has been sought;
- unconditionally admits liability to the conduct for which leniency is sought;
- maintains continuous and complete cooperation throughout the investigation and until the conclusion of any action by the CCCS arising as a result of the investigation;
- refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCCS (except as may be directed by the CCCS);
- must not have been the one to initiate the cartel; and
- must not have taken any steps to coerce another undertaking to take part in the cartel activity.

After the CCCS has opened an investigation, the first party that provides information to the CCCS about the cartel that is sufficient for it to issue an infringement decision can benefit from lenient treatment by way of a reduction of up to 100 per cent in the level of the financial penalties ("**100 per cent reduction leniency applications**"). Subsequent applicants may benefit from a reduction in financial penalties of up to 50 per cent.

The leniency programme is also supplemented by the existence of the marker system and the Leniency Plus system.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes. As set out in the Leniency Guidelines 2016, the CCCS provides a marker system for full immunity leniency applications and 100 per cent reduction leniency applications (please see question 4.1 for details about the types of applications). If the applicant is unable to immediately submit sufficient evidence to enable the CCCS to establish the existence of the cartel activity, the applicant will be given a limited time to gather sufficient information and evidence in order to perfect the marker. If the applicant fails to perfect the marker within the given time, the next applicant in the marker queue will be permitted to perfect its marker to obtain immunity or a 100 per cent reduction in financial penalties. Once the marker has been perfected, the other applicants in the marker queue will be informed that they no longer qualify for full immunity or a 100 per cent reduction in financial penalties.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes, leniency applications may be made orally or in writing, according to the Leniency Guidelines 2016.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The Leniency Guidelines 2016 state that the CCCS will *"endeavour, to the extent that is consistent with its obligations to disclose or exchange information, to keep the identity of such undertakings confidential throughout the course of the investigation, until* [the] *CCCS issues a written notice under section 68(1)* [of the Act] *of its intention to make a decision that the section 34 prohibition has been infringed"*.

In accordance with section 89(3) of the Act, applicants can request confidential treatment to be granted over documents and information provided to the CCCS in the course of making a leniency application. However, confidentiality claims under section 89 of the Act are still subject to disclosure if lawfully required by any court, and this may include court-issued discovery orders in the context of private litigation.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The Leniency Guidelines 2016 state that continuous cooperation must be maintained until "*the conclusion of any action by [the] CCCS arising as a result of the investigation*". Accordingly, this would likely extend to the issuance of an infringement decision by the CCCS, in respect of the conduct in question.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Yes. Under the CCCS's Leniency Plus system, where a party is being investigated in respect of its involvement in Cartel A, if that party were to provide information in respect of Cartel B, it may not only stand to benefit from lenient treatment in respect of Cartel B, but may benefit from further reductions in penalties in respect of Cartel A.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

The CCCS currently has a whistle-blower programme, under which it offers financial rewards of up to S$120,000 for information relating to competition infringements (subject to certain criteria and conditions as well as the discretion of the CCCS). The CCCS has indicated that whistle-blowers should have direct, or at the very least indirect, access to inside information surrounding the competition infringements. The CCCS has also indicated that hearsay information is unlikely to be useful to the CCCS.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The CCCS introduced the *CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases* (the "**Practice Statement**") on 1 November 2016. The Practice Statement, which came into effect on 1 December 2016, sets out a framework to incentivise parties under investigation to cooperate with the CCCS to fast track proceedings. The fast track procedure essentially provides an avenue for parties to admit liability for infringements of the Act (and comply with various other conditions) in return for a reduction in the amount of financial penalty to be imposed.

The CCCS has confirmed that the fast track procedure exists in parallel to the leniency system and is distinct from the voluntary commitments process which does not involve any admission of liability by the parties under investigation and any finding of infringement under the Act. That said, the CCCS has also clarified that admissions and documents provided by a party under the fast track procedure will be deemed to be withdrawn if the fast track procedure no longer applies.

The CCCS has further stated that it will provide parties with an indicative timetable at the start of the fast track procedure and may also request parties to provide their financial information to assist in the determination of financial penalties. This is potentially helpful to parties as it would enhance the efficiency of proceedings and assist businesses in making the necessary arrangements to cooperate with the CCCS. The Penalties Guidelines 2016 state that the CCCS will also adjust the penalty to take into account the discount applicable for an undertaking that agrees to the CCCS's fast track procedure. The discount for the fast track procedure will be in addition to any applicable leniency reductions.

The fast track procedure was recently applied by the CCCS in the *Swimming Pools* Case, in which two parties who indicated their willingness to participate in the fast track procedure were granted a 10 per cent reduction of their financial penalties in addition to reductions already received under the leniency programme.

7 Appeal Process

7.1 What is the appeal process?

The appeals process is set out under the Competition (Appeals) Regulations (the "**Appeals Regulations**"). A party subject to an infringement decision by the CCCS may appeal the decision by lodging a Notice of Appeal with the CAB within two months of the infringement decision (regulation 7 of the Appeals Regulations).

The CAB may hear appeals on infringement findings by the CCCS in respect of, *inter alia*, the Section 34 Prohibition. The CAB's powers and procedures are set out primarily in section 73 of the Act, and the Appeals Regulations.

Following the lodgement of a Notice of Appeal, the CCCS then has six weeks in which to file its defence (regulation 14 of the Appeals Regulations). In the usual course, the rest of the process will proceed at the direction of the CAB, and may include the filing of written submissions, agreed core bundles of documents and skeletal submissions.

Thereafter, an oral hearing is held to hear the substantive arguments of the parties (regulation 21 of the Appeals Regulations).

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes. Under section 71(2) of the Act, an appeal suspends any direction with respect to the payment, or amount, of the financial penalty imposed. However, an appeal does not suspend any other directions made by the CCCS (e.g. relating to the suspension of the activity in question, etc.). Accordingly, in order to suspend compliance with a direction of the CCCS (unrelated to the payment of a financial penalty pending a hearing before the CAB), it would be necessary for the party to apply to the CAB for interim relief.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes. Under regulation 19(2)(h) of the Appeals Regulations, the CAB may give directions in relation to the cross-examination of witnesses. Regulation 26(4) of the Appeals Regulations also states that the CAB may *"limit the cross-examination of witnesses to any extent or in any manner it considers appropriate"*.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Section 86 of the Act provides that any person who suffers loss or damage directly as a result of an infringement (including, *inter alia*, infringement of the Section 34 Prohibition) shall have a right of action for relief in civil proceedings.

Such rights are predicated on an infringement finding by the CCCS (i.e. only follow-on claims are permitted) and may only be brought within two years following the expiry of any applicable appeal periods. Third parties do not have standing to bring such claims in other circumstances or to lodge an appeal with the CAB.

8.2 Do your procedural rules allow for class-action or representative claims?

The only form of group litigation recognised in Singapore is representative actions, governed by Order 15, Rule 12 of the Rules of Court. However, notwithstanding the fact that representative actions may be brought, it would still be necessary for parties to establish that they have suffered loss directly.

8.3 What are the applicable limitation periods?

Private actions must be brought within two years from the date that the CCCS makes a decision or upon the determination of any appeal (if an appeal is brought), as provided under section 86 of the Act.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The position is currently untested.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

In general, "costs follow the event" for most civil actions in Singapore. This means that the costs of an action are usually awarded to the successful litigant. However, any award of costs is at the discretion of the court.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

To date, there have not been any follow-on claims brought to court in respect of a violation of the Section 34 Prohibition, nor have there been any publicly available details relating to any private out of court settlements in Singapore in respect of a violation of the Section 34 Prohibition.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Pursuant to the Competition (Amendment) Act 2018, the CCCS is empowered to accept binding and enforceable commitments for cases involving the Section 34 Prohibition.

The introduction of legally binding commitments to the Section 34 Prohibition would enable entities under investigation to offer the same to the CCCS to address the anti-competitive conduct related to the Section 34 Prohibition. A breach of such commitments will enable the CCCS to enforce the commitments immediately through the Singapore courts, which is less resource-intensive than the previous framework which permitted entities to propose voluntary undertakings to address the concerns raised by the CCCS but required the CCCS to reopen the investigation into the matter in the event of a breach of such voluntary undertakings due to their non-binding nature.

Separately, also pursuant to the Competition (Amendment) Act 2018, the CCCS is empowered to conduct general interviews during inspections and searches, which are intended to make the CCCS's evidence-gathering and investigation process more efficient and effective. These powers are not an expansion of the CCCS's powers of investigation, as the questions posed will still be limited to the subject matter or purpose of the investigation, but are intended to streamline the process of service of the various documents to occupants of the premises and to minimise any potential disruption to businesses.

On 20 July 2020, the CCCS issued a Guidance Note on Collaborations between Competitors in Response to the COVID-19 Pandemic ("**COVID-19 Guidance Note**"). Under the COVID-19 Guidance Note, the CCCS recognised that collaborations between competitors during the COVID-19 pandemic may need to be put in place quickly to meet the demand for certain essential goods or services. As such, the CCCS will assume that collaborations that sustain or improve the supply of essential goods or services in Singapore, which was put in place from 1 February 2020 and expired 31 July 2021, are likely to generate net economic benefits and are therefore unlikely to infringe the Act.

However, where collaborations involve price-fixing, bid-rigging, market sharing or output limitation, the CCCS will not assume that net economic benefits are generated. According to the COVID-19 Guidance Note, for such collaborations, additional factors that must be considered include the extent of the reduction in competition arising from the agreement and the competitive constraints in the market.

In view of the expiry of the COVID-19 Guidance Note, the CCCS announced on 23 July 2021 that it intends to issue a General Business Collaboration Guidance Note to provide businesses with more clarity on common collaborations between competitors so that businesses can collaborate in compliance with competition law with greater confidence.

On 10 September 2020, the CCCS announced that it had conducted a review of its guidelines on the Act and outlined proposed amendments to, *inter alia*, the *CCCS Guidelines on Market Definition* and the *CCCS Guidelines on Remedies, Directions and Penalties* (renamed from the *CCCS Guidelines on Enforcement of Competition Cases*).

The proposed changes under the *CCCS Guidelines on Market Definition* would replace the reference to the "current price" with the "price in the absence of the agreement" as a potential benchmark level in assessing whether an agreement is anti-competitive under the Section 34 Prohibition.

The proposed changes to the *CCCS Guidelines on Remedies, Directions and Penalties* would reflect the 2018 amendments to the Act which permitted binding commitments to be accepted in respect of notifications and investigations under the Section 34 Prohibition and sets out a procedural framework for such commitments. Notably, the proposed changes make clear that the CCCS is generally not inclined to accept commitments in cases involving restrictions of competition by object (e.g. price-fixing or bid-rigging) with no accompanying net economic benefit.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

Since the Section 34 Prohibition became effective on 1 January 2006, the CCCS has issued 16 infringement decisions:

- bid-rigging in the provision of termite control services in Singapore, 9 January 2008;
- price-fixing in the provision of coach tickets for travelling between Singapore and destinations in Malaysia, 3 November 2009;
- bid-rigging in electrical and building works, 4 June 2010;
- price-fixing of monthly salaries of new Indonesian foreign domestic workers in Singapore, 30 September 2011;
- price-fixing of modelling services in Singapore, 23 November 2011;
- information sharing in the provision of ferry services between Batam and Singapore, 18 July 2012;
- bid-rigging by motor vehicle traders at public auctions, 28 March 2013;
- price-fixing of ball and roller bearings sold to aftermarket customers, 27 May 2014;

- infringement of the Section 34 Prohibition in relation to the provision of air freight forwarding services for shipments from Japan to Singapore, 11 December 2014;
- infringement of the Section 34 Prohibition in relation to the distribution of life insurance products in Singapore, 17 March 2016;
- bid-rigging in the tenders for the provision of electrical and asset tagging services, 28 November 2017;
- price-fixing and exchange of confidential sales, distribution and pricing information for aluminium electrolytic capacitors, 5 January 2018;
- price-fixing and non-compete agreements in the supply of fresh chicken products, 12 September 2018;
- exchange of commercially sensitive information between competing hotels, 30 January 2019;
- bid-rigging of quotations by contractors for Wildlife Reserves Singapore, 4 June 2020; and
- bid-rigging in tenders for maintenance services of swimming pools and other water features, 14 December 2020.

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Chambers and Partners 2021 lists Chong Kin as a Band 1 Competition/Antitrust lawyer, while noting: *"His advice is both thorough and attuned to the regulator's intentions, which is really helpful."* Chong Kin is lauded by clients as an *"innovative competition lawyer who is savvy and practical"*, and he *"understands business needs and is very responsive"*.

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Drew & Napier's Competition, Consumer and Regulatory practice, established in 1999, is the oldest and largest dedicated competition law practice in Singapore. Established six years before the enactment of the Competition Act in 2005, our experience has grown in tandem with the development of both national and sectoral competition laws in Singapore. We are the preferred competition law counsel of many regional companies, multinational corporations, associations and government bodies, and regularly assist them on competition matters in Singapore and Association of Southeast Asian Nations member countries.

The Competition, Consumer and Regulatory practice comprises lawyers that are cross-trained in competition law and economics, who are highly experienced and qualified in handling competition law matters both generally under the Competition Act as well as in the carved-out telecommunications, media, energy and postal sectors.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The cartel prohibition in the Slovak Republic is governed by Act No. 187/2021 Coll., on Protection of Competition ("Competition Act") effective from 1 June 2021. Generally, the antitrust rules follow Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The violation of these rules may result in the following sanctions:

- Administrative:
  - the Anti-Monopoly Office of the Slovak Republic ("AMO") may impose a fine of up to 10% of the turnover of the undertaking concerned; and
  - in case of bid rigging, the AMO can prohibit the participation of the undertaking concerned in public procurement for three years or for one year (in case of settlement with the AMO).
- Civil: the injured parties of antitrust infringements may seek remedies in order to receive the full compensation for damages.
- Criminal: an individual who has been demonstrably involved in a cartel.

1.2 What are the specific substantive provisions for the cartel prohibition?

Pursuant to Section 4 of the Competition Act, the agreements and concerted practices between undertakings, as well as decisions by associations of undertakings that have as their object or effect the restriction of competition, are prohibited. By way of example, the prohibited practices are:

- price fixing;
- limitation or control of production, sales, technical development or investment;
- market allocation;
- application of different terms and conditions to equivalent or comparable performance to individual entrepreneurs;
- enforcement of additional contractual obligations which have no connection with the main subject matter of such contracts; and
- collusive behaviour in public procurement and private tenders (bid rigging).

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced by the AMO, which is responsible for the protection of competition and for the maintenance of conditions for the development of competition in the Slovak Republic. The AMO is headed by a Chairman and a Vice-Chairman, who deputises for the Chairman and serves in his place during his absence or indisposition. The AMO has broad powers to facilitate the functioning of competition on the market. Among other things, the AMO monitors compliance with the competition rules, carries out investigations, decides on practices which distort competition, and imposes fines.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The basic procedural steps in the proceedings before the AMO are as follows:

- the opening of an investigation: in order to detect potential anti-competitive behaviour, the AMO is empowered, in particular, to require and gather relevant information and documentation, to make copies and extracts therefrom, to require a written or oral explanation from an entrepreneur's employees or its executives, to inspect files kept in criminal proceedings, and to carry out a dawn raid;
- the initiation of administrative proceedings: if the AMO finds strong indications of the existence of a cartel;
- the issuance of the AMO's Statement of Objections, setting forth the alleged violation and its preliminary assessment: at this phase, the AMO discloses all relevant documents to the undertakings concerned and the parties are invited to respond to the Statement of Objections, usually within 15–20 business days;
- the holding of an oral hearing: whether the AMO carries out the hearing depends on its discretion; and
- the issuance of the AMO's formal decision: if the AMO finds a violation of the antitrust rules, it imposes a sanction. The AMO's decision is subject to review by the Council of the AMO ("Council"), the ruling of which is final and enforceable. However, the Council's decision is subject to judicial review.

1.5 Are there any sector-specific offences or exemptions?

The Competition Act does not explicitly provide for any sector-specific offences or exemptions. On the other hand, its

provisions fully align with the EU regulations. Thus, pursuant to Section 4 of the Competition Act, certain practices are exempted in accordance with the European Commission block exemption regulations (e.g., automotive sector, insurance sector, research and development).

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Only those cartels influencing the market encompassing the territory of the Slovak Republic fall under the AMO's jurisdiction.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The Competition Act empowers the AMO with broad investigatory powers, which are stated below.

Request for information and documents
In connection with the performance of its duties, the AMO is authorised to request information and documents, regardless of the medium on which they are recorded, and to make copies of these documents from the undertakings as well as any other legal or natural persons. The AMO may also request oral explanations from these persons.

Inspection in business and non-business premises and vehicles
The AMO is authorised to carry out unannounced inspections (to ensure that evidence is not destroyed) in business premises and vehicles, based on authorisation by the Vice-Chairman of the AMO at first instance, and by the Chairman on appeal. In addition, the AMO may perform inspections in private premises or private vehicles of current or former employees of the undertaking, based on authorisation by the court issued at the AMO's proposal. Such inspections are carried out if there is reasonable suspicion that there are documents related to the activity or conduct of the entrepreneur in private premises or vehicles that can prove the restriction of competition.

In the course of the inspection, the AMO is entitled in particular to:

- Make copies of and seize original documents: the AMO can make copies of any documents in written form. It may retain documents, or media on which the information is recorded, only for the purpose of making copies or obtaining access to the information when the information and/or copies cannot be acquired during the inspection. The seized documents shall be kept only for the time necessary to achieve the aforementioned purpose.
- Seal premises, vehicles and/or the documents or media on which the information is recorded: the premises, vehicles and/or documents or media may remain sealed for the period and to the extent necessary to carry out the inspection.
- Ask questions: the AMO may ask questions related to the inspection to the representatives and/or the employees of the inspected undertakings. The power to ask questions is limited by the privilege against self-incrimination.

Sector inquiry
The AMO can conduct a sector inquiry in order to obtain information about the competition conditions in the given sector.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

In the Slovak jurisdiction, there are no specific or unusual features of the AMO's investigatory powers.

2.3 Are there general surveillance powers (e.g. bugging)?

No, the AMO does not have any surveillance powers. Bugging can only be executed by law enforcement authorities on the basis of a judicial authorisation (court order) in the case of criminal investigations for committing serious criminal offences.

2.4 Are there any other significant powers of investigation?

The AMO may impose a temporary (interim) measure ordering an undertaking to do something or to refrain from something:

- if there are reasonable grounds to suspect that the anti-competitive infringement has occurred and there is a risk of serious and irreparable harm to competition; or
- if it is necessary to ensure a proper and sound proceeding.

Such temporary measure may last at the latest until the end of the administrative proceedings.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Dawn raids are carried out by the AMO's officials, who may be accompanied by the police to ensure their protection. In case of searches of residential premises, in addition to the above-mentioned persons, a guardian appointed by the court, which has authorised the inspection, shall be present at the location.

The officials in charge are not obliged to wait for the arrival of legal advisors; however, the AMO usually grants approximately 30 minutes to ensure the presence of legal advisors before it commences the inspection itself. The AMO, however, proceeds without waiting for legal advisors with the blocking of email accounts. The AMO typically requests that until the blocking of email accounts has been secured, legal advisors cannot be explicitly informed by phone that an inspection of the AMO is taking place.

2.6 Is in-house legal advice protected by the rules of privilege?

No, in-house legal advice is not protected by the rules of privilege. Under Slovak law, similar to other EU Member State case law, only the correspondence between an external attorney-at-law and a client is privileged. Hence, the inspectors cannot acquaint themselves with documents containing external counsel advice.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The main limitations of the AMO, in particular during the dawn raid, are:

- the attorney-client privilege;
- the privacy of individuals;

- the prohibition of self-incriminating, suggestive and captivating questions; and
- the scope of the investigation/proceeding.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Failure to provide appropriate assistance to the AMO's officer may be considered an obstruction of the performance of the inspection, which may be fined as follows:

- up to 5% of the turnover of the undertaking concerned, or a fine of up to EUR 80,000, in case of individuals who obstruct access to the premises or vehicles under inspection or for breaking seals; and
- up to 1% of the turnover of the undertaking concerned, or a fine of up to EUR 25,000, in case of individuals who fail to cooperate with the inspectors during an inspection, who fail to answer the inspectors' questions concerning an inspection, or who obstruct access to documents, information and electronic data.

The AMO may also impose a fine of up to 1% of the turnover of an undertaking concerned, and in case of individuals up to EUR 1,650 for: failure to provide information or documents; providing false or incomplete information or documents; or obstructing their verification.

The AMO frequently imposes the sanctions for the obstruction of investigations or inspections.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The AMO may impose fines on undertakings participating in a cartel of up to 10% of their respective turnover of the previous financial year. In case an undertaking reached a turnover of less than EUR 330 or had no turnover, the AMO may impose a fine not exceeding EUR 330,000.

The amount of the fine is calculated according to the AMO's Guidelines on the Procedure for Determining Fines in cases of Abuse of Dominance and Agreements Restricting Competition, effective as of 1 September 2018.

Additionally, in cases where bid rigging is involved, the AMO shall prohibit the undertakings concerned from participating in public procurement for three years or for one year in case of settlement with the AMO. The AMO may not prohibit the undertaking from participating in the public procurement if the prohibition would significantly worsen competition.

Anyone who incurred damage in connection with a cartel may claim compensation for damages. For more information, please see section 8 below.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The infringement of competition law may result in the criminal prosecution of individuals who abuse participation in competition. An individual may be sentenced to up to six years of imprisonment. Based on publicly available information, no natural person has been sentenced for abusing competition.

Other consequences for the individual involved may be:

- a claim for damages by the undertaking as compensation for the fine; and
- the termination of employment and/or the termination of an executive function, both of which are, however, at the discretion of the undertaking concerned, as Slovak law does not provide for automatic (mandatory) director disqualification.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Generally, fines may be reduced in exceptional and justified cases only. The AMO may, upon request and at its sole discretion, reduce a fine if the undertaking concerned proves that the imposition of the full fine would lead straight to its market exit. The mere existence of a poor financial situation or a negative economic result of an undertaking does not justify a fine reduction. Recently, the AMO exceptionally reduced fines due to the COVID-19 pandemic.

3.4 What are the applicable limitation periods?

The fines may be imposed only if the respective final and enforceable decision is issued by the AMO (or by the Council, if the first-instance decision is appealed) within the following limitation periods:

- within three years of the commencement of the administrative proceedings. Should the decision of the AMO or of the Council be annulled by a court and returned to AMO for further proceedings, a new three-year limitation period starts to run; and
- at the same time, no later than within 10 years from the last day of the violation of antitrust rules set forth by the Competition Act or by Articles 101 and 102 of the TFEU.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Employees are not subject to competition law fines. Payment of legal costs related to the criminal defence of an employee is not excluded by law.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Yes, but in a limited way. Pursuant to the Slovak Labour Code, an employee shall be liable to his/her employer for any damage caused by his/her culpable breach of his/her employment duties or in direct connection therewith.

In case the damage caused is a result of negligence, the amount of damages payable by an employee cannot exceed four times his/her average monthly salary before the occurrence of such breach.

In case the damage is caused intentionally, an employer shall be entitled to full damages, including the compensation for the loss of profit in addition to the actual damage caused by such breach.

The undertaking might also sue the implicated individual if the individual is in the position of executive director under general rules on damages.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

The AMO may hold a parent company liable for cartel conduct of its subsidiary even if it is not itself involved in the cartel if the parent company exercises decisive influence over the subsidiary. This approach also stems from the application of the economic group principle.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The Competition Act permits the AMO not to impose a fine or to reduce a fine of an undertaking for the participation in a cartel, which could otherwise be imposed for its illegal conduct.

Full leniency (i.e., 100% reduction of a fine) may be granted to only one undertaking which:

- was the first to have provided the AMO with decisive evidence proving a cartel; or
- was the first to have provided, on its own initiative, information and evidence which was decisive in carrying out a dawn raid in order to obtain decisive evidence proving a cartel.

Partial leniency (i.e., up to a 50% reduction of a fine) may be granted in case the cartel participants provide the AMO with significant evidence, which alone is insufficient to prove a cartel, but in connection with information already available to the AMO enables it to be proved.

In addition, a leniency applicant must meet the conditions for participation in the leniency programme, specified in the Competition Act:

- the applicant admits its participation on the horizontal cartel;
- the applicant ceased to participate in the cartel no later than when it provided the evidence to the AMO (except for participation with the AMO's consent, when it is necessary to preserve the effectiveness of inspections);
- the applicant did not coerce another undertaking into participating in a cartel (this is not applicable to a partial leniency);
- the applicant provided the AMO with all evidence available to it and duly cooperated with the AMO throughout the investigation and subsequent administrative proceedings; and
- the applicant did not disclose a leniency application or its content to other undertakings participating in a cartel.

More information about the leniency programme is available in the Decree on Leniency Programme and in the AMO's Guidelines on the Application of the Leniency Programme.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

If an undertaking decides to file a leniency application but is unable to submit any or all of the evidence immediately due to objective reasons, it may benefit from the 'marker' system, which permits the undertaking to 'reserve the order' of its application on the condition that the evidence will be submitted within a period specified by the AMO. An applicant must meet the conditions for participation in the leniency programme, specified in the Competition Act, in order to benefit from the 'marker' system.

If the evidence is submitted in a timely manner, the leniency application will be deemed to have been filed at the time when the marker was placed. However, upon vain expiry of the period specified by the AMO, the applicant loses the reservation of the order.

In addition to the 'marker' system, a person acting on behalf of the applicant ('contact person') may submit a hypothetical application, which is an application containing the evidence and information intended to be provided to the AMO in order to benefit from the immunity advantage, by providing a descriptive list of evidence which the applicant proposes to provide later.

A hypothetical application enables the undertaking to confirm whether the evidence at its disposal can provide it with immunity before revealing its identity, while the marker system 'reserves the order' of its application when an applicant is unable to provide all the evidence (information and documents) necessary to apply for the leniency programme.

The 'marker' system cannot be combined with a hypothetical application.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes, leniency and marker applications can be made orally. In case of an oral application, the AMO prepares the minutes of a leniency applicant's declarations.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

A leniency application is kept confidential by the AMO until it provides the parties to the administrative proceedings with its Statement of Objections. At this phase, the AMO may disclose all documents to the undertakings concerned, including the content of a leniency application and any related evidence (except for business secrets and other confidential information).

The leniency statements cannot be disclosed in cartel damages proceedings neither to the parties to the proceedings nor to third parties.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

An applicant who wants to benefit from the leniency programme must provide continuous cooperation throughout the entire administrative proceedings, i.e., until the issuance of the AMO's formal decision.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is no such policy in the Slovak Republic.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes, cartel conduct may be reported by any individual who is neither an undertaking nor an employee of an undertaking

applying for the leniency programme. A whistle-blower, who first provides the AMO with significant evidence on cartel conduct, or who provides information and evidence decisive in carrying out a dawn raid in order to obtain decisive evidence proving a cartel, is entitled to a reward of 1% of the total sum of fines imposed on all cartel participants, up to a maximum of EUR 100,000, provided that the AMO's formal decision is final and enforceable and all the fines were paid.

If the fine has not been paid within 100 days of the decision of the AMO or the court becoming final, the whistle-blower's reward is reduced to 50% of the original amount and cannot exceed EUR 10,000.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Competition Act provides for a 'settlement' procedure, which enables the undertaking concerned to benefit from a fine reduction of 30% in case of horizontal agreements and in case of abuse of dominance, and of 50% in case of vertical restraints.

In order to qualify for a settlement, the undertaking concerned must meet the following conditions:

- both the AMO and the undertaking concerned agree to the settlement terms; and
- the undertaking concerned voluntarily acknowledges its participation in a cartel and assumes liability for it.

A 'settlement' procedure is widely used by both the AMO and the undertakings concerned. For more information about the settlement procedure, please see the Decree on Settlement.

7 Appeal Process

7.1 What is the appeal process?

The Council is an appellate body of the AMO and, as the second-instance body, decides on appeals against the AMO's first-instance decisions. The Council's decisions are final and enforceable; however, they can be challenged in a judicial review by the Regional Court in Bratislava, which can be subsequently challenged by a cassation complaint before the Supreme Court of the Slovak Republic.

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes, filing an appeal to the Council suspends the requirement to pay a fine imposed by the AMO. An appeal against an interim measure does not have a suspensory effect.

On the other hand, filing for a judicial review of the Council's final and enforceable decision to the Regional Court in Bratislava does not *per se* suspend the duty to pay a fine imposed by the Council's decision, unless the suspension is granted by the Regional Court in Bratislava on the basis of a well-substantiated petition.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Although theoretically asking the witnesses questions with the consent of the AMO is possible, the AMO rarely has recourse to witnesses in cartel cases. This is similar with the judicial review which is primarily a written procedure. There is no cross-examination in the common law sense.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

The civil damages actions for loss suffered as a result of cartel conduct are governed by special legislation, in particular by the Damages Act which was enacted in 2016.

The Damages Act confers the right to compensation to any person who has suffered damage as a result of cartel conduct. A claim for damages may be brought by any:

- individual (consumer or end-customer);
- legal entity; and/or
- undertaking at any level of the supply chain (in case of vertical agreements).

All matters concerning the protection of competition fall under the exclusive jurisdiction of the District Court Bratislava II for the entire territory of the Slovak Republic. The appellate body is the Regional Court in Bratislava.

Slovak law does not specifically deal with 'stand-alone' actions.

8.2 Do your procedural rules allow for class-action or representative claims?

Opt-out class actions are not available in the Slovak Republic. However, the Slovak law enables a large number of plaintiffs, who have all been injured by the same cartel, to bring an action by filing a single suit through their common representative. As a result, only those plaintiffs who were represented in such a suit may benefit from a court judgment awarding the damages.

8.3 What are the applicable limitation periods?

The limitation period for cartel damages claims is typically five years, commencing at the earliest on the day when all of the following conditions are met:

- the infringement of competition law has ceased;
- a plaintiff learns or it can be reasonably presumed that he/she could have learnt that the conduct caused an infringement of competition law;
- a plaintiff has suffered damage by the infringement of competition law; and
- a plaintiff learns or it can be reasonably presumed that he/she could have learnt who the violator is.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Yes. When a damages claim is brought by a direct purchaser, a defendant must prove that a plaintiff 'passed on' a price increase caused by the cartel to his purchasers (i.e., indirect purchasers) in order to benefit from the defence.

On the other hand, indirect purchasers as plaintiffs must prove that a price increase was transferred onto them by a direct purchaser.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

A plaintiff is obliged to pay a court fee when lodging an action. The amount of the court fee depends on the value of the dispute's subject matter. Following a court's final and enforceable decision on the merits, a court shall allocate the costs (primarily a court fee and legal fees) between the parties. Generally, an unsuccessful party bears all costs of litigation, including the costs of legal representation of a successful party.

A plaintiff who is a consumer is exempted from the duty to pay a court fee. Nevertheless, an unsuccessful party is generally obliged to pay legal fees of a successful party, regardless of whether a plaintiff is a consumer or not.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

To our knowledge, there is no relevant case law concerning damages caused by infringements of competition law in the Slovak Republic.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

On 1 June 2021, the Competition Act entered into effect, replacing the previous Act. No. 136/2001 Coll. Its main goal is to apply the rules of competition in line with European standards and European settled case law. Similarly, related by-laws and soft law have been updated or are in the process of being updated.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

The Government of the Slovak Republic recently named four new members of the Council.

Ivan Gašperec is one of the founding partners of the law firm URBAN STEINECKER GAŠPEREC BOŠANSKÝ ("USGB") and is responsible for the key practice areas of competition law, state aid and EU law.
Ivan specialises in cartels and vertical agreements restricting competition, leniency procedures, abuse of dominance, merger control and state aid, where he gained extensive experience from both national and international cases, not only as legal counsel but also from the perspective of a competition authority.
Ivan also provides legal advice in regulated areas, mostly in matters relating to privacy and data protection, public procurement, life sciences and pharmaceuticals.
Over the years, Ivan has worked as an attorney at several major law firms and has also served on a long-term basis as a lawyer for the European Commission in Brussels in the Directorate-General for Competition.

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Juraj Steinecker is one of the partners of USGB and is responsible for the key practice areas of competition law, commercial law and mergers and acquisitions.
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Juraj also provides legal advice in other areas of law such as corporate/M&A and commercial law in general.
Over the years, Juraj has worked at several leading local and international law firms where he specialised in competition law matters.

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Competition law is one of the key practice areas of USGB. Our lawyers have gained substantial knowledge and experience throughout many years of practising law, as well as serving at the European Commission in Brussels at the Competition Directorate-General.
In the field of cartels and vertical agreements restricting competition, as well as leniency applications, we provide comprehensive legal advice and represent our clients before the Slovak Anti-Monopoly Office. When it comes to mergers, abuse of dominance and state aid, we handle all kinds of challenging cases, including representation of clients before the Supreme Court of the Slovak Republic.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The relevant legislation is the Slovenian Act on Prevention of the Restriction of Competition (hereinafter the Competition Act), published in the Official Journal of the Republic of Slovenia No. 36/2008. The Competition Act is enforced by the Slovenian Competition Agency (hereinafter the Agency), which acts as an administrative authority and as a minor offence authority.

Violation of the prohibition of restrictive agreements may amount to a criminal offence, regulated by the Slovenian Criminal Code and the Slovenian Liability of Legal Persons for Criminal Offences Act.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article 6 of the Competition Act prohibits as null and void agreements between undertakings, decisions by associations of undertakings and concerted practices of undertakings (hereinafter also agreements) which have as their object or effect the prevention, restriction or distortion of competition in the territory of the Republic of Slovenia, in particular the following non-exhaustive list of agreements:

- direct or indirect fixing of purchase or selling prices or other trading conditions;
- limiting or controlling production, sales, technical progress or investment;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of their contracts; and
- sharing markets or sources of supply.

When an agreement may affect trade between European Union (hereinafter the EU) Member States, the provisions of Article 101 of the Treaty on the Functioning of the European Union (hereinafter the TFEU) shall also apply.

Acting in contravention of the prohibition of restrictive agreements in Article 6 of the Competition Act or Article 101 of the TFEU may represent a minor offence pursuant to the Competition Act.

Cartels may also amount to a criminal offence pursuant to Article 225 of the Slovenian Criminal Code, which defines an illegal restriction of competition as a criminal offence.

1.3 Who enforces the cartel prohibition?

The cartel prohibition is primarily enforced by the Agency, which acts as an administrative authority and as a minor offence authority.

The Agency may also bring an action before the competent court for the nullity of prohibited restrictive agreements.

Criminal offences are prosecuted by state prosecutors and adjudicated before the competent regular court having jurisdiction over criminal matters.

Civil actions for damages may be brought by private parties that have suffered harm caused by cartel infringements, and are adjudicated by courts of general jurisdiction.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The Agency initiates the procedure *ex officio* with an order on the commencement of procedure, although it may exercise certain investigative powers prior to that. An extract of the order on the commencement of procedure is published on the Agency's website.

The Agency is obliged to perform a fact-finding procedure in accordance with the principle of material truth and free assessment of evidence. The Agency shall make a decision without an oral hearing unless established otherwise. In cases of urgency, interim measures may be adopted.

The Agency notifies the parties about its findings on the relevant facts and evidence prior to issuing a decision with a statement of objections, on which parties may comment within a time limit set by the Agency and not longer than 45 days.

At the closing of the administrative procedure, the Agency may issue a decision establishing the existence of an infringement and requiring the undertaking to bring such infringement to an end, or a decision by which the Agency accepts the commitments offered by the undertaking and makes them binding. The Agency may terminate the procedure with an order if an infringement is not found or if the procedure would not be reasonable.

Liability for minor offences is established and fines are imposed by the Agency in a minor offences procedure that is typically initiated after the administrative decision becomes final.

1.5 Are there any sector-specific offences or exemptions?

There are no industry-specific infringements or industry-specific defences foreseen in the Competition Act.

The Competition Act recognises the following exemptions: Article 6(3) exemption; *de minimis* exemption; and block exemption.

According to Article 6(3) of the Competition Act, similar to Article 101(3) of the TFEU, the undertaking invoking the exception must demonstrate and bears the burden of proving the following cumulative conditions for the exception to the prohibition of restrictive agreements in Article 6(1) of the Competition Act. The agreements must: contribute to improving the production or distribution of goods or to promoting technical and economic progress; allow consumers a fair share of the resulting benefit; not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services that are the subject of the agreement.

Under the *de minimis* exemption, regulated in Article 7 of the Competition Act, the prohibition of restrictive agreements shall not apply to agreements of minor importance, which are agreements between undertakings whose cumulative market share does not exceed: 10 per cent in the case of horizontal agreements and mixed horizontal-vertical agreements or agreements where it is difficult to determine whether they are horizontal or vertical; or 15 per cent in the case of vertical agreements. In the case of cumulative effects, the thresholds are decreased by five per cent. However, even if these thresholds are not met, the *de minimis* exemption shall not apply to horizontal agreements which have as their object the fixing of prices, the limiting of the production or sales, or the sharing of markets or sources of supply, or to vertical agreements which have as their object the fixing of resale prices or the granting of territorial protection to the participating undertakings or to third persons.

Regarding the block exemptions, the provisions of the Regulations of the European Commission or the Council of the EU shall apply with the necessary changes, even if there is no indication of an effect on the trade between EU Member States. The Agency may withdraw the benefit of the block exemption if it finds that an agreement has certain effects incompatible with Article 6(3) of the Competition Act or Article 101(3) of the TFEU.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The Competition Act prohibits restrictive agreements which have as their object or effect the prevention, restriction or distortion of competition in the territory of the Republic of Slovenia, irrespective of where they occurred or were entered into.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The majority of cartel cases are investigated by the Agency through the administrative procedure regulated by the Competition Act and Administrative Procedure Act. The Agency may address a request for information to each undertaking, partners, members of management or supervisory boards and persons employed by the undertaking. In the event that the Agency requests the information with a special order, an undertaking is obliged to submit all requested documents and information, but not to admit an infringement. If an undertaking to which such an order was issued provides incorrect, incomplete or misleading information or does not supply the requested information within the set time limit, a penalty of up to EUR 50,000 may be imposed.

The Agency may also carry out an inspection on the premises of an undertaking, either upon the consent of the undertaking or the person whose data is being inspected, or upon a court order issued by the judge of the District Court of Ljubljana upon the Agency's proposal if there are reasonable grounds for suspicion of an infringement and there is a probability of finding relevant evidence with the investigation.

During the investigation, authorised persons are also empowered to:

- enter and inspect the premises (premises, land and means of transport) at the registered office of the undertaking and at other locations at which the undertaking itself or another undertaking authorised by the undertaking concerned performs the activity and business for which there is a probability of an infringement;
- examine the business books and other documentation;
- take or obtain in any form copies of or extracts from business books and other documentation;
- seal any business premises and business books and other documentation for the period and to the extent necessary for the inspection; and
- ask any representative or member of staff of the undertaking to give an oral or written explanation of facts or documents relating to the subject-matter and purpose of the inspection.

The Agency may also conduct the investigation on other premises, on the basis of a prior court order, if there are reasonable grounds to suspect that business books and other documentation relating to the subject-matter of the inspection are being kept at the premises of an undertaking against which the procedure has not been initiated, or on the residential premises of members of the management or supervisory bodies or of staff or other associates of the undertaking against which the procedure has been initiated.

In the event that a criminal investigation is initiated by the authorities, the full set of criminal investigatory powers may be applicable.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The investigatory powers depend on the type of proceedings initiated against the undertaking. In a criminal investigation, the investigatory powers are vested in the police and the prosecutor and are regulated by the Criminal Procedure Act. In an administrative investigation initiated by the Agency, the Agency's investigatory powers are generally regulated by the Competition Act. While in a criminal investigation, the undertaking has the privilege against self-incrimination and is not obliged to cooperate with the authorities. However, an obligation to cooperate and to provide certain information to the authority (i.e. the information on company turnover) may apply.

2.3 Are there general surveillance powers (e.g. bugging)?

General surveillance methods are not envisaged by the Competition Act and the Agency does not have such powers. Some of the investigative measures provided for by the Criminal Procedure Act may be used by the police and the prosecution if a criminal investigation is initiated.

2.4 Are there any other significant powers of investigation?

Cartel infringement may be investigated by the police as a criminal offence. In such case, the full set of tools available in criminal investigations may be used under the conditions prescribed by the Criminal Procedure Act.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

A dawn raid shall be conducted by the employees of the Agency, whereby specific professional tasks may be carried out by specialised organisations, institutions or individuals.

Persons employed by the Agency shall prove their authorisation for conducting an inspection with an official identity card; specialised organisations, institutions or individuals shall produce a written authorisation from the director of the Agency, which shall specify the scope of their powers to conduct the inspection.

The inspection must be conducted in the presence of two witnesses.

2.6 Is in-house legal advice protected by the rules of privilege?

No, the rules of privilege apply to communications with external counsel – an attorney and member of the Bar.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Investigatory powers are strictly limited to the object of the investigation and may only be conducted in accordance with and under the conditions provided by the law.

The procedural rights and safeguards depend on the type of proceedings initiated against the undertaking. In a criminal investigation, the rights and limitations of the Criminal Procedure Act shall apply. In administrative proceedings initiated by the Agency, the undertaking's right of defence is safeguarded by the Competition Act and Administrative Procedure Act.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

In the case of an obstruction of an inspection, a penalty of up to one per cent of the turnover in the preceding business year may be imposed on an undertaking, and a penalty of up to EUR 50,000 on a natural person. Fines for obstructions of investigations have already been used in practice by the Agency.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Pursuant to the Competition Act, a fine for a minor offence of up to 10 per cent of the annual turnover of the undertaking in the preceding business year shall be imposed on a legal entity, an entrepreneur or an individual who performs economic activity in contravention of the prohibition of restrictive agreements in Article 6 of the Competition Act and Article 101 of the TFEU.

A fine of at least EUR 50,000 and up to 200 times the amount of damages caused or illegal benefit obtained through the criminal offence may be imposed on a legal entity found liable for the criminal offence. If certain stipulated conditions are met, the winding-up of a legal person and the prohibition of a specific commercial activity for not less than six months and no more than five years as a safety measure may also be ordered pursuant to the provisions of the Liability of Legal Persons for Criminal Offences Act.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Pursuant to the Competition Act, a fine of between EUR 5,000 and EUR 10,000, or in the case of offences of a particularly serious nature, between EUR 15,000 and EUR 30,000, shall be imposed on the responsible person of a legal entity or of an entrepreneur.

Pursuant to the Criminal Code, a penalty of not less than six months and not more than five years of imprisonment is foreseen for the illegal restriction of competition as a criminal offence. The court may in certain cases waive the penalty if it was the perpetrator who announced the criminal offence. The granting of immunity by the Agency does not necessarily mean that immunity shall also be granted in the criminal procedure.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Since there are no special guidelines for the calculation of the fine, the Agency is obliged to act in accordance with the provisions of the Minor Offences Act, which stipulates that, when imposing a fine on a legal person or an entrepreneur, the authority shall take into account the economic power of the entity and any sanctions which have previously been imposed. It follows that the financial condition of the perpetrator may be taken into account when setting the fine.

3.4 What are the applicable limitation periods?

A minor offence procedure shall not be permitted after a period of five years has expired from the day on which the offence has been committed, whereby the running of the limitation period shall be interrupted in certain cases prescribed by law. For example, any action of the competent authority aimed at the persecution of the offender shall interrupt the course of the limitation period.

In any case, no fines under the Competition Act may be imposed after the expiry of 10 years from the day on which the offence has been committed.

The limitation period applicable to the criminal offences is 10 years from the day on which the offence has been committed.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

The applicable legislation does not contain any express prohibition in this respect; however, certain tax and justification issues regarding such expenses may arise.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Depending on the circumstances, the employer could make a claim for damages against the employee on the basis of the general provisions of the Employment Relationship Act, as well as in the Companies Act (if the employee in question is a management board member or a supervisory board member).

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Based on the case-law of the Supreme Court, the case-law of the EU courts concerning the concept of parental liability shall also be used in proceedings before Slovenian authorities. A parent company may therefore be held liable if it directly or indirectly exerted decisive influence on a subsidiary which participated in a cartel. However, the procedural rights of defence of the parent company should be duly respected.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The leniency programme was implemented with the amendment of the Competition Act in 2009 and the Decree on the procedure for granting immunity from, and reduction of, fines for offenders who are parties to cartels (Official Journal of the Republic of Slovenia No. 112/09 and 2/14) (hereinafter the Decree), which entered into force in January 2010. The Agency can grant either immunity from fines or a reduction of fines with a minor offence decision.

Only the offender involved in a prohibited agreement who is the first to submit information and evidence may be granted full immunity from a fine, provided that all the below-mentioned conditions are met:

- the offender fully and completely discloses his or her participation in an alleged cartel;
- the offender is the first to submit information and evidence which, in the Agency's view, will enable an inspection in connection with the alleged cartel or the finding of an infringement of Article 6 of the Competition Act or Article 101 of the TFEU in connection with the alleged cartel;
- the offender cooperates with the Agency throughout the procedure;
- the offender ends his or her involvement in the cartel immediately after the beginning of his or her cooperation with the Agency, unless this would, in the Agency's view, be against the interest of the inspection; and
- the offender did not coerce other undertakings to join the cartel or to remain in it.

An applicant that does not meet all the above-mentioned conditions required for a grant of full immunity may still apply for a reduction of the fine, provided that the following conditions are met:

- the offender provides evidence of his or her participation in the alleged cartel, which represents significant added value with respect to the evidence which the Agency already possesses;
- the offender cooperates with the Agency throughout the procedure; and
- the offender ends his or her involvement in the cartel immediately after the beginning of his or her cooperation with the Agency, unless this would, in the Agency's view, be against the interest of the inspection.

If an offender meets all the conditions required for a reduction of the fine and is the first to provide evidence, the offender shall be granted a reduction of the fine of 30 to 50 per cent. If an offender meeting all the conditions is the second to provide evidence, the reduction of fine will be 20 to 30 per cent. For subsequent offenders meeting all the conditions and submitting evidence, the reduction of the fine will be up to 20 per cent.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

An application for a marker is only possible in applications for immunity from a fine. An offender, who is not in possession of information that would enable him or her to submit the complete application, may apply for a marker in writing with a substantiated request on a form given in the Decree. The Agency may grant a marker if it considers the application to be adequately substantiated, and shall also determine the period in which the application must be completed in order to be considered in the ranking order granted by the marker.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

An immunity applicant may submit an application to the Agency either in writing (by mail, fax or personally) in three copies (one original and two copies) or by making an oral statement on the record at the Agency premises.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

A leniency application shall be considered a business secret of the leniency applicant. The Agency may disclose information and evidence from the leniency application to the undertakings under investigation, but only after the statement of objections has been issued. Even then, the Agency must first ascertain that the disclosure is required due to the fact that the right of defence of the respective undertaking subject to the investigation objectively outweighs the interest of the leniency applicant to keep such information and evidence confidential. The Decree also contains provisions on the sharing of leniency applications with other competition authorities in the EU.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The leniency applicant is under the obligation of "continuous cooperation" from the time of submitting the application and throughout the administrative and minor offences procedures.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There are no "leniency plus" or "penalty plus" options.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Any individual may report cartel conduct to the Agency and file a leniency application. Unless explicitly stated in the leniency application, such an application by an individual does not extend to the company.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Pursuant to the Competition Act, an undertaking against which an administrative procedure has been initiated may offer commitments with a view to eliminating the circumstances leading to the likelihood of the existence of an infringement. Commitments may be proposed until the expiry of the time limit set by the Agency for comments on the statement of objections. If, in the view of the Agency, the proposed commitments are capable of eliminating the circumstances leading to the likelihood of the existence of an infringement, the Agency shall make the offered commitments binding by adopting a decision.

7 Appeal Process

7.1 What is the appeal process?

Judicial protection against the decisions of the Agency before an administrative court is ensured against all decisions and orders of the Agency if not expressly excluded. The party or other participant to the procedure is obliged to file a lawsuit against the decision of the Agency within 30 days. New facts or evidence, which have not already been presented in the procedure before the Agency, are not permitted. The court shall test the decision within the limits of the claim and within the limits of the grounds stated in the lawsuit, and shall *ex officio* pay attention to certain essential procedural infringements pursuant to the Administrative Disputes Act. Matters shall be considered urgent and a priority. In certain cases, a further extraordinary legal remedy, namely revision by the Supreme Court, is possible.

Decisions issued in minor offence procedures are subject to judicial review before the District Court of Ljubljana pursuant to the provisions of the Minor Offences Act. Matters are considered a priority. The court may dismiss the request for judicial protection as unfounded, or abolish or change the decision of the Agency. Further appeal against the court decision is possible.

Court decisions in criminal procedures may be appealed before the competent higher court, and further appealed before the Supreme Court pursuant to the provisions of the Criminal Procedure Act.

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes; if the decision of the Agency is appealed, the fine only becomes payable when the decision becomes final.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes; at the hearing before the court, the examination of witnesses is possible.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Antitrust damages cases may be brought before the civil courts on the basis of the general principles of civil liability.

Any person who suffered harm as a consequence of a cartel infringement may claim material damages for actual loss and loss of profit with interest since the occurrence of the damages according to the full compensation principle. Immaterial damages may be claimed for the defamation of reputation or good name.

Cartel damages cases can be brought regardless of whether the Agency has already adopted any decision in respect of the alleged cartel. In cases where such final decision finding an infringement has been issued by the Agency or the European Commission, the courts are bound by the decision to the extent that it establishes that an infringement has been committed. In such cases, a presumption that the cartel has caused harm will apply.

8.2 Do your procedural rules allow for class-action or representative claims?

The Collective Actions Act entered into force on 21 April 2018; however, class actions can also be filed in cases of mass harm situations that occurred prior to the aforementioned date. The Act permits class actions to be brought on behalf of multiple individual consumers. So far, only two collective actions have been filed in Slovenia and neither of them has a basis in competition law.

8.3 What are the applicable limitation periods?

A claim for damages for infringements of competition law shall become statute-barred within five years from the cessation of the infringement and from the time when the claimant learned or is reasonably expected to have learned of: a) the conduct of the infringer and the fact that the conduct constitutes an infringement of competition law; b) the damage caused by the infringement of competition law; and c) the offender.

In any case, the claim for damages shall become statute-barred within 10 years from the date on which the damage occurred. This limitation period shall not begin to run until the infringement of competition law has ceased.

The limitation periods are suspended by any investigatory action of the Agency.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Where, in an action for damages, the existence of a claim for damages or the amount of compensation depends on the degree of an overcharge passed on to the claimant as an indirect purchaser, the claimant bears the burden of proving the existence and the amount of such passing on. The claimant must prove

that: the defendant has committed an infringement of competition law; the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and the claimant as an indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them. This shall not apply where the defendant proves that the overcharge was not passed on.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Each party must advance the payment of their own costs. At the end of the proceedings, the successful party is entitled to recover their costs, to the extent that they were necessary.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

We are not aware of any cartel damages cases decided in court. However, a few stand-alone and follow-on antitrust damages cases were tried in court for alleged abuse of dominance.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

In the past few years, proposals have been made to remove the dual proceedings (please see question 9.2 below) from the legislation and provide the Agency with the legal basis to impose fines in administrative proceedings.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

An interesting peculiarity of the Slovenian system is the duality of the proceedings led by the Agency. The Agency may initiate an administrative proceeding in order to find that an infringement has been committed; however, in order to impose a fine, a separate minor offences proceeding, based on the Minor Offences Act and the principles of criminal proceedings, must be conducted by the Agency. In practice, the Agency does not conduct the minor offences proceedings until the administrative decision has become final.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Cartel prohibition is enshrined in Spanish law under Article 1 of Law 15/2007 on Defence of Competition (Spanish Competition Act or SCA) which prohibits "*all agreements, collective decisions or recommendations, or concerted or consciously parallel practices [that] have as their object, produce or may produce the effect of prevention, restriction or distortion of competition in all or part of the national market*". This applies to undertakings only, i.e. any natural or legal person, provided they are engaged in economic or commercial activity.

As to the nature of the prohibition, Spanish law broadly provides civil sanctions for undertakings, including compensation for damages. The Spanish Criminal Code provides a few exemptions whereby a cartel conduct is punished by imprisonment, although these are rarely applied (*cf. infra* question 1.2).

1.2 What are the specific substantive provisions for the cartel prohibition?

The prohibition of anti-competitive agreements is enshrined in Article 1(1) of the SCA, which prohibits three different forms of conduct, namely:

- agreements, both horizontal and vertical (between competitors and non-competitors), notwithstanding whether they are multilateral or bilateral (e.g. S/0629/18: *ASISTENCIA TÉCNICA VAILLANT*);
- collective decisions or recommendations (e.g. S/DC/0587/16: *COSTAS BANKIA*); and
- concerted practices, i.e. any direct or indirect contact between competitors with the object or effect of influencing the conduct on the market of a competitor and the coordination between undertakings which knowingly replaces the risks of competition with practical cooperation (e.g. S/DC/0607/17: *TABACO*).

This classification is not rigid; when faced with a "*whole complex of schemes and arrangements*", the National Markets and Competition Commission (CNMC) does not need to characterise each undertaking's conduct within it as an agreement or a concerted practice; it must only demonstrate that the undertakings took part in an overall plan with a single anti-competitive objective, constituting a single infringement.

Conduct is prohibited when it has as its "*object, produces or may produce the effect of prevention, restriction or distortion of competition in all or part of the national market*". In particular, Article 1 of the SCA provides a non-exhaustive list of practices considered anti-competitive, specifically: directly or indirectly fixing prices or any other commercial or service terms; limiting or controlling production, distribution, technical development or investments; sharing markets or sources of supply; applying dissimilar conditions to equivalent transactions, thereby placing some competitors at a competitive disadvantage; and subjecting the conclusion of contracts to unrelated additional obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The additional provision four of the SCA defines a cartel as "*a secret agreement between two or more competitors which has as its object fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports*".

Furthermore, apart from the fines which can be imposed by the (central or regional) antitrust authorities (*cf. infra* section 3 below), pursuant to Article 1(2) of the SCA, prohibited agreements or any other conduct falling under the scope of Article 1 are automatically void and unenforceable.

However, under Article 1(3), any agreement, decision or concerted practice covered by the scope of Article 1(1) can be exempted if it satisfies each of the following conditions: (i) it improves the production or distribution of goods or promotes technical or economic progress; (ii) it grants a fair share of the benefit to consumers; (iii) the restrictions are necessary in order to achieve those objectives; and (iv) it does not eliminate competition as to a substantial part of the market concerned. Exemptions can be granted individually or in blocks, by category of agreement (*cf. infra* question 1.5). It is to be noted that while object restrictions can in theory benefit from an individual exemption, practice shows it is unlikely that they will meet the conditions set out above.

The prohibitions under Article 1 of the SCA do not apply to agreements resulting from the application of a law (Article 4) (*cf. infra* question 1.5).

In addition, the CNMC is authorised to apply Article 101 of the Treaty of the Functioning of the European Union (TFEU) in cases in which restrictive practices undertaken in Spain potentially affect trade between European Union (EU) Member States. Under the system of parallel competences established by EU Regulation 1/2003, the CNMC can simultaneously apply Article 101 of the TFEU and Article 1 of the SCA to any competition infringement.

Finally, although Spanish criminal cartel prosecutions are rather rare, the Spanish Criminal Code contains a limited number of provisions regarding unlawful competitive behaviour. For instance: (i) Article 284 refers to price distortion which prevents free competition, providing imprisonment penalties

from six months up to two years with fines from one to two years; (ii) Article 262, which refers to bid-rigging in auctions and public tenders, and provides imprisonment penalties from one to three years together with daily fines from one to two years and loss of licence for public bidding; and (iii) Article 281, which may be applied to unlawful competition conduct consisting of withdrawing raw materials or essential goods from the market in order to limit supplies or distort prices, with an imprisonment penalty of one to five years and fines of one to two years.

1.3 Who enforces the cartel prohibition?

The SCA modernised competition law and optimised the institutional framework of competition enforcement in Spain reflecting the changes introduced at the time at EU level, particularly Regulation 1/2003, which decentralised the enforcement of EU competition law, fostering the role of National Competition Authorities (NCAs) in its application and enforcement. Later, Law 3/2013 provided for the creation of a new authority in charge of both competition (e.g. the cartel prohibition among others) and regulatory matters: the CNMC.

Since the enactment of Law 1/2002, which reflects the decentralised administrative structure of Spain, the enforcement of Spanish competition rules (except for merger control) is shared with the Regional Competition Authorities (e.g. *Autoritat Catalana de la Competència* (ACCO), *Lehiaren Euskal Agintaritza*, *Autoridad Vasca de la Competencia* and *Tribunal para la Defensa de la Competencia de CyL*). Competition law can be applied by regional authorities provided that the conduct in question is regional in scope. To date, most of the Spanish regions have enacted rules but not all of them have established *ad hoc* authorities. The SCA establishes that the CNMC is required to obtain a non-binding report from the Regional Competition Authority in connection with competition law matters which have a significant impact on the regional territory.

The CNMC is an autonomous authority, organically and functionally independent from the Government. The CNMC consists of a Chairman, Council and four different Directorates: a Directorate for Competition (DC); a Directorate for Telecommunications and the Audio-visual Sector; a Directorate for Energy; and a Directorate for Transport and the Postal Sector.

The Council is composed of two chambers: a chamber dealing with competition-related matters; and a chamber dealing with regulatory matters. The chamber for competition matters is chaired by the President and comprises four additional members. The President holds managerial and representation duties. In June 2021, some of the positions of the Council were renewed and the presidency was given to a highly reputed competition law professional.

In its Action Plan for 2020, the CNMC declared as one of its objectives "*the application of new artificial intelligence techniques (algorithms, machine learning, neural networks, etc.) and data machine learning, neural networks...) and data analysis for a better understanding of both traditional and new types of both traditional competition infringements (e.g. cartel) and new types of behaviour such as algorithmic collusion*". Since the adoption of the current SCA in 2007, more than 60 cartels have been discovered and subjected to fines in Spain, with total fines in excess of €1 billion.

One of the most important changes introduced by the SCA is the possibility that certain provisions may be directly reviewed by the Commercial Courts (i.e. the prohibition of anti-competitive agreements and the abuse of a dominant position). Furthermore, the Commercial Courts will be able to award damages based on the SCA without requiring a prior administrative decision finding an infringement. In view of the increased importance of the Commercial Courts, the SCA introduces an *amicus curiae* system inspired by EU Regulation 1/2003, under which the CNMC and the antitrust regional bodies may submit observations regarding the application of the SCA (*cf. infra* section 8 below).

The merger of the competition regulators (except the National Securities Market Commission (CNMV)) into the CNMC aims at increasing coordination and avoiding discrepancies in the enforcement of competition rules. If an investigation affects a regulated sector, the respective chamber of the Council dealing with that regulatory matter must issue a non-binding report. After the non-binding report is issued, in the event of a discrepancy between the Council's chambers for competition and for regulatory matters, the matter will be discussed and decided during a plenary session of the Council. It is in this framework that the CNMC issued a notice permitting the use of short-form notifications in specific cases in which a report from other regulators was required, as opposed to the situation before.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The SCA sets up a two-phase procedure: an investigation is opened and carried out by the DC; and the decision is taken by the Council.

Proceedings are initiated by the Director of the Investigation (DI) either *ex officio*, at the request of the Council or as a result of a non-binding third-party complaint, which can be brought in the following ways: (i) by a written form; (ii) by a secret mailbox (by telephone or by email); or (iii) by the new Anonymous Competition Whistleblower System (SICA) which works as an encrypted chat room to which only the claimant and the CNMC's Economic Intelligence Unit (EIU) have access. Prior to the opening of formal sanctioning proceedings, the DI opens a preliminary and initial investigation phase (*información reservada*). During this preliminary phase, the DI may carry out inspections and submit formal requests for information (RFIs). This preliminary phase is not subject to formal deadlines or time constraints for the DI, which can investigate, in principle, for as long as it wants without any formal indictment.

Royal Decree 7/2021 dated 27 April, which implements into Spanish law the ECN+ Directive, gives the CNMC the power to reject complaints on the basis of its enforcement priorities (e.g. because they do not provide sufficient evidence and therefore require an extensive evidentiary effort of investigation by the DI, or they refer to unlawful conducts with low impact or conducts that can be addressed through other legal instruments to promote or preserve competition such as the private application of competition law). If the DI decides not to prioritise a complaint and, therefore, not to initiate the procedure, it will inform the Council and, if the latter has not objected within 15 days, the DI will inform complainants to enable them to use other channels to lodge the complaints.

Once proceedings have been formally initiated (*incoación*), because the DI has *prima facie* evidence of an infringement being committed, the companies under investigation are heard, and submit observations on the statement of objections (*Pliego de Concreción de Hechos*). The DI can resort to various investigatory powers: carry out inspections in the homes of directors, managers and other staff members; seal any business premises; and make copies of and seize original documents, etc. (*cf. infra* section 2 below).

The Council can adopt interim measures at any time during the course of the proceedings. Once the DI has finished its investigation, it will adopt a proposal for resolution (*Propuesta de*

Resolución), granting the parties the opportunity to submit observations in their defence once again. Thereafter, the DI will refer its motion together with the observations submitted by the undertakings (*Informe de Propuesta de Resolución*) to the Council, which will assess the case and adopt a final decision on the infringement and imposition of fines. The Draft reform of the SCA, which aims to complete the changes introduced by Royal Decree 7/2021 and to modernise the SCA (Draft), proposes to eliminate this *Informe de Propuesta de Resolución*.

The SCA provides that the maximum length of the procedure is 18 months (however, under certain circumstances this deadline can be extended). The Draft proposes to increase said time limit to 24 months. Royal Decree 261/2008 establishes the time limit of the investigation phase: 12 months (the final decision must be issued in the remaining six months). The expiration of the 12-month term of the investigation phase does not have any relevant legal consequence for the companies under investigation, as determined by the National High Court's judgments of 25 February 2013 and 9 July 2013. In turn, the lapse of the 18-month maximum time limit may entail that the administrative procedure lapses. As a result, the CNMC may once again initiate proceedings, but must do so in the five-year limitation period (the limitation period was increased from one to five years as a result of the Damages Directive).

In case of the suspension of the 18-month maximum period, once the suspension has been lifted, the final day of the period will be set by adding to the end of the initial period the calendar days during which the period has been suspended. In a judgment issued on 26 July 2016, the Supreme Court ruled that any suspension of the proceedings, even if the Order comes after the initial 18-month period, shall be taken into account in order to calculate the maximum duration of the proceedings.

1.5 Are there any sector-specific offences or exemptions?

One of the main features of the SCA in this field is the abolition of the system of individual exemptions, in line with Regulation 1/2003. Therefore, the prohibitions described in the SCA will not automatically be applicable, provided that the criteria in Article 101(3) of the TFEU are fulfilled. Furthermore, the "EU block exemptions regulations" exist in relation to certain categories of arrangements (vertical agreements, technology transfers, specialisation agreements and research and development), providing agreements that meet the criteria of a safe harbour from an infringement of Article 101, and will also be applicable to those agreements even if they do not affect trade between Member States. The European Commission (EC) is currently reviewing the Vertical Block Exemption Regulation (VBER) and the accompanying Guidelines on Vertical Restraints (VGL), as well as the two Horizontal Block Exemption Regulations, Commission Regulations (EU) No. 1217/2010 (Research & Development Block Exemption Regulation) and 1218/2010 (Specialization Block Exemption Regulation), and the respective guidelines (together, HBERs). The evaluations of VBER, VGL and HBERs have demonstrated that they are still relevant and useful to businesses, but that certain areas of these rules need to be adapted.

The Spanish Government can also adopt block exemptions. For instance, under the 1989 Competition Act, the Government implemented Royal Decree 602/2006, which established a block exemption on information exchange agreements relating to late payments.

In Article 6 of the SCA, there is a similar provision to Article 10 of Regulation 1/2003, which permits findings of inapplicability. In addition, an exemption may be granted for certain agreements, decisions or concerted practices if they improve the production or distribution of goods or promote technical or economic progress, subject to specific requirements set out in Article 1(3) of the SCA.

Moreover, Article 4 of the SCA establishes that the prohibition in Article 1 is not applicable to conduct arising from the application of law (Act of Parliament). Naturally, this exception on applying Spanish competition rules shall not apply when EU competition law provisions are also applicable.

Similarly, the prohibition is not applicable to conduct of minor importance that qualifies as *de minimis*, according to the criteria established in Article 3(1) of Royal Decree 261/2008. The former National Competition Commission (CNC) used this provision for the first time in the case S/0105/08: *CORRAL DE LAS FLAMENCAS*. In a judgment on 24 June 2013, the National High Court also used the *de minimis* exemption to annul the fine imposed by the former CNC in the case S/0231/10: *PRODUCTOS HORTOFRUTÍCULAS*, with regard to agreements reached within a small farmers' association from the south of Spain. The National High Court annulled the CNC's reasoning in relation to an alleged price-fixing agreement between competitors, since it concluded that it was not strictly speaking a horizontal price-fixing agreement, but rather the defence of the interests of small producers within the framework of a trade union organisation, which had a positive effect on competition since it increased their bargaining power *vis-à-vis* trading companies whose market power was greater.

The *de minimis* provision has been invoked by the CNMC itself in past decisions to justify not initiating sanctioning proceedings (e.g. case S/DC/0592/16: *LABORATORIOS MARTÍ TORS*).

At the height of the COVID-19 outbreak, some Competition Authorities, such as those of the United Kingdom and Norway, published transitional sector exemptions to competition rules in order to facilitate collaboration in particular sectors which were considered strategic amidst the global pandemic (i.e. transport, pharmaceuticals or food retail). Conversely, the CNMC announced that it had heightened its scrutiny of competition rules to counter abuses that might be committed by companies throughout the public health crisis to raise prices or interfere with the supply of products required to protect people's health (i.e. excessive pricing cases or refusals to supply), and also launched a mailbox for citizens to report practices of this kind.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Since Article 1 of the SCA already prohibits any conduct "*which has as its object or effect the prevention, restriction or distortion of competition in all or part of the Spanish market*", any cartel conduct happening outside Spain which has or may have an impact on all or part of the Spanish market may fall under the cartel prohibition. Moreover, according to the SCA, any conduct which restricts imports or exports is regarded as a cartel (please see question 1.2). For instance, in the case S/0454/12: *TRANSPORTE FRIGORIFICO*, the restrictive practices related to products which originated in the Spanish market and were to be exported to the European market (primarily to France, Germany, Italy, the Netherlands and the United Kingdom).

The 2009 CNMC's guidelines (deemed illegal by a number of Supreme Court judgments) on the calculation of fines establishes that when an infringement has effects beyond the borders of Spain, only the turnover realised in the European Economic Area is taken into account for the fine calculation. Royal Decree 7/2021 has modified the aforesaid geographic interpretation of turnover which the CNMC uses in its calculation of fines, since it expressly refers to the worldwide turnover of the sanctioned company.

In connection with private claims, on the other hand, EU Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Regulation) establishes that persons domiciled in a Member State must, as a general rule, be sued in the courts of that Member State. On the other hand, Article 8 of the Brussels Regulation establishes that when there are several defendants, a person may also be sued in the courts of the place where any one of them is domiciled, provided that 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 infringing undertakings are domiciled in several different Member States, enabling the claimant to initiate actions against several defendants in Spain if any of them is domiciled there.

Additionally, Article 7(2) of the Brussels Regulation provides an exception for the aforesaid general rule in matters related to tort, enabling a claimant to sue a person domiciled in one Member State in the courts of another Member State where the harmful event occurred. In April 2021, the Advocate General (AG) Richard de la Tour presented his opinion in the *AB Volvo* case in which the European Court of Justice (ECJ) will have to rule whether Article 7(2) designates the appropriate forum in which national damages actions must be brought. The AG proposed that, specifically in the context of an action for damages caused by an infringement of Article 101 of the TFEU comprising, in particular, collusive agreements on fixing and increasing prices of goods, the place where the damage materialises is the Member State of the market affected by the infringement (i.e. the market in which the overcharges have been suffered). The competent court is, therefore, located in the place where the trucks were purchased, if the claimant is active in the same Member State. The AG also noted that Member States are entitled to establish specialised national courts for the purposes of dealing with specific types of damages claims, subject to compliance with both the principles of equivalence and effectiveness.

The abovementioned questions have been clarified in Spain through various first-instance court judgments rendered in damages claims regarding the *AB Volvo* case. Even if none of the companies addressed in the ECJ's decision were domiciled in Spain, Spanish courts have affirmed jurisdiction. The Supreme Court shed light on this matter in its Order of 26 February 2019, appeal number 262/2019. The Supreme Court concluded that Article 52.1.12º of the Law on Civil Procedure was applicable, which deals with jurisdiction in unfair competition claims. According to this provision, the courts having jurisdiction to hear unfair competition claims in Spanish territory are those located in either: (i) the place where the defendant has its domicile; (ii) if it has no domicile in Spain, its place of residence; or (iii) the place of occurrence of the tort or where its effects are deployed.

Nevertheless, this issue has been recently brought to the attention of the ECJ through a request for a preliminary ruling lodged by the *Audiencia Provincial de Barcelona*, *Sumal* case, in connection with the issue of liability of subsidiary companies in a group. In essence, the court sought clarification on which legal entities within an undertaking are liable for damages stemming from an infringement of Article 101 of the TFEU. The court of first instance had previously dismissed the action against the Spanish subsidiary of Mercedes Benz because the company lacked the standing to be sued. The court considered that only legal entities that were addressed in the decision may be held liable for damages. On 15 April 2021, AG Pitruzzella proposed in his opinion that EU law does not prevent the attribution of liability on a subsidiary, despite the fact that only its parent company has been sanctioned by the EC. The AG confirms that a subsidiary can be held liable for a parent company's infringing conduct to the extent that the following two conditions are met: (i) the parent company and its subsidiary form a single economic unit at the time of the infringement; and (ii) the conduct of the subsidiary contributed substantially both to the infringing conduct of the parent company and to the effects of the infringement.

Moreover, foreign companies are subject to sanctions under the SCA for antitrust infringements committed by their subsidiaries. Specifically, under Article 61(2) of the SCA, 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. If a parent company owns directly or indirectly 100% of the shares of its subsidiary and the latter infringed antitrust provisions, it is understood that the parent company was able to exercise decisive influence over the conduct of its subsidiary. Hence, there is a rebuttable presumption (*iuris tantum*) that the parent company exercised such decisive influence over its subsidiary. The CNMC repeatedly cites the aforesaid EU law principle to extend liability of cartel members to their parent companies (for instance, judgment of the Supreme Court of 19 July 2018, appeal number 2773/2016).

The CNMC cooperates with the EC and other national EU Competition Authorities throughout the European Competition Network (ECN). Similarly, the CNMC collaborates with other NCAs outside of the EU. For instance, on 6 November 2017, the CNMC entered into a Memorandum of Understanding (MOU) with the Chinese Ministry of Commerce. The MOU contains several provisions aiming to increase cooperation and coordination between the CNMC and other NCAs or the EC in terms of merger control (Article 3), mutual assistance (Second Final Provision) and limitation periods (Article 29).

It is not clear whether Spanish courts would enforce extradition requests from foreign jurisdictions on this matter, as penalties are limited to fines and antitrust conduct can only be criminal in the narrow circumstances of the Spanish Criminal Code (*cf. supra* question 1.2).

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The DC is the authority in charge of investigations, while the Council has the ultimate decision-making power. The DC does not have any powers in connection with criminal investigations, which are rare in Spain except for in narrow and unlikely circumstances (*cf. supra* question 1.2).

Table of General Investigatory Powers

Investigatory Power	Civil/ administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	Yes	No
Carry out unannounced search of business or residential premises	Yes*	No
Right to collect digital/forensic evidence	Yes	No

Investigatory Power	Civil/ administrative	Criminal
Right to retain original documents	Yes	No
Right to require an explanation of documents or information supplied	Yes	No
Right to seal premises	Yes*	No

Please note: * In the event that the affected party does not give its consent to a dawn raid into its premises or its premises to be secured by the CNMC or Regional Competition Authorities' officials, the investigatory Order is required to be supported with the authorisation by the competent Court for Contentious-Administrative Proceedings where the defending party has its registered office or domicile. In practice, the SCA usually requests judicial authorisation before taking action in order to avoid delays and/or denials.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The investigatory powers of the CNMC are mainly the following: inspections; interviews; and RFIs, which have been reinforced by Royal Decree 7/2021.

Inspections (Article 40 of the SCA/Articles 6 and 7 of the ECN+ Directive): The inspection powers vested in the CNMC enable its authorised staff to enter not only any business premises of the undertakings under investigation, but also all land and means of transport owned by them. They can enter not only the private homes of entrepreneurs, but also those of managers and other members of staff of the undertakings concerned. Royal Decree 7/2021 reinforces those powers even further by, for instance, including the power to inspect headquarters or offices of third parties, where relevant information of the investigated company may exist, or conduct interviews with any representative of a company or association of companies, or natural persons, when they may be in possession of relevant data and information. Thus far, surprise inspections in private homes have been rare (e.g. the *Wooden Pallets* case), and one such inspection occurred only because the trade association under investigation was headquartered in the private residence of one of its managers. Interviews taking place during inspections with representatives and staff of the companies under investigation have also been regulated by Royal Decree 7/2021.

Under Spanish law, all inspections carried out by Competition Authorities in the business premises of an undertaking are viewed as encroaching upon the fundamental right of inviolability of domicile. Consequently, they are subject to strict legal and procedural requirements. In particular, as mentioned in question 2.1, access to premises requires the express consent of the affected party or, failing that, a court warrant. Access to premises is only mandatory if authorised by a court through a warrant. In the absence of a court warrant, undertakings are entitled to deny access to their premises. In practice, the CNMC usually requests a warrant in advance to secure access to premises. The Supreme Court nullified a decision of the CNC that had dismissed Repsol's administrative appeal against a dawn raid, declaring the inspection invalid as well as ordering the return of the seized documents (judgment of the Supreme Court of 17 September 2018, appeal number 2922/2016). The Supreme Court found that the inspection of Repsol's business premises was illegal because the inspectors did not reveal that a court had rejected the CNMC's application for a warrant, even while questioned by the company in this regard, and, therefore, the company's consent to the inspection was considered flawed.

During the inspection, CNMC officials are permitted to verify, seize (for a maximum period of 10 days) and make copies of all documents (whether physical or electronic) located at the company's premises (excluding private or legally privileged documents) and seal the books and other records relating to the business activity under investigation regardless of the medium on which such records are stored. Personal and privileged documents must be identified during the inspection. Inspections may be declared null and void by courts in cases in which the inspection orders are considered too wide in scope, constituting a breach of the fundamental right to the inviolability of the home (*Fishing Expeditions*). For instance, the Supreme Court overturned a decision of the CNMC after finding that the seizure of the evidence on which it was based had been mistakenly considered a "*chance discovery*" when, in reality, it had been unlawfully obtained during an inspection conducted with an inspection Order defined too broadly (see the Supreme Court judgment of 26 February 2019, appeal number 2539/2018).

Interviews (Article 39 of the SCA and Article 9 of the ECN+ Directive): Similarly, the CNMC has the right to conduct interviews with any representatives of a company or association of companies, or natural persons, when they may be in possession of relevant data and information (*cf. infra* question 2.7). Royal Decree 7/2021 regulates said prerogative which has already been recognised by courts (Article 8). Interviews may be conducted by telematic means or at the companies or the CNMC's headquarters. The authority may record them and provide a copy to the interviewee. Employees are legally obliged to cooperate with the inspectors by providing them with all the information requested and answering all questions unless the questions posed directly incriminate the company or the individual. They have the right to receive legal assistance.

RFIs: Royal Decree 7/2021 states a duty to cooperate with the administration that obliges suspected undertakings and third parties to respond to RFIs within a general period of 10 days, although this may be extended under certain circumstances. For the first time, the new Royal Decree mentions the principle of proportionality (i.e. the CNMC has the right to request all the information it deems necessary, but always under the principle of proportionality) and the right not to incriminate itself – something that was implicit in the previous amendment. If the subjects receiving the RFI do not respond to the CNMC's concerns or provide incomplete or misleading information to CNMC officials, they may be fined an amount of up to 1% of their total turnover. For instance, the CNMC fined Mediapro €200,000 on 31 July 2012 and Cementos Portland €1,285,649 on 31 May 2012. In April 2016, the CNMC also fined a company for providing a lower turnover figure than the figure in its annual accounts (SNC/DC/008/16: *URBAN*).

Finally, it is worth noting that even though Article 40.2 provides a list of the investigative powers of the CNMC, this list is not exhaustive. Therefore, the DC is entitled to use other means of investigation to collect evidence, provided that the Spanish constitutional and jurisdictional rules are respected. For instance, we are aware that in some of its inspections, CNMC officials have seized and explored the smartphones of persons involved in the infringing conduct and gathered information present in SMS and messaging applications such as WhatsApp (R/AJ/003/20: *TRANSMEDITERRÁNEA*).

2.3 Are there general surveillance powers (e.g. bugging)?

The SCA enables the CNMC to monitor undertakings' compliance with its decisions and the obligations provided for therein. There is a specialised Enforcement Unit, which ensures proper compliance with antitrust decisions. Strengthening its role is one of the CNMC's objectives.

The SCA does not include any provision regarding bugging. Bugging is used in criminal investigations with a prior court mandate. To our knowledge, it has not been used in CNMC investigations.

It is relevant to point out that the CNMC may exceptionally require a leniency applicant to continue participating in a cartel agreement in order to preserve the effectiveness of its inspections.

2.4 Are there any other significant powers of investigation?

Article 13.1 of Royal Decree 261/2008 establishes that CNMC staff may be accompanied by experts (i.e. IT operatives) duly accredited by the DI. Indeed, the CNMC is supported in its powers of investigation by the Information and Communications Technology Department, which is a specialised IT unit. The IT support unit works very closely with the DC during on-site inspections.

The IT unit and the DC jointly compile a catalogue of search criteria to be used during inspections together with software tools specifically designed for that aim. If the undertaking obstructs the inspection, CNMC officials may also contact the police. One example occurred during an investigation of a suspected bid-rigging cartel for road construction (S/0226/10: *LICITACION DE CARRETERAS*). On 15 October 2009, when officials of the former CNC were conducting an inspection of the construction company Extraco, Extraco refused to open a safe box, and so the officials called the police in order to open it.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Investigations in business and residential premises will be carried out by CNMC officials (or officials of the Regional Competition Authorities). They will have been duly authorised by the DC, with the corresponding judicial authorisation should the affected party fail to provide its consent (*cf. supra* questions 2.1 and 2.2). The Royal Decree introduces the possibility of designating authorised accompanying persons (not necessarily officials) for support and assistance tasks.

In principle, CNMC staff do not have to wait for the arrival of legal advisors before beginning the search; however, CNMC staff usually inform the investigated companies that they may be assisted by external or in-house legal representatives if they wish. CNMC officials usually wait a reasonable period of time for lawyers before starting the searches.

In line with EU Regulation 1/2003, Royal Decree 261/2008 provides that the CNMC is the competent authority to collaborate on inspections of the EC and the Competition Authorities of other Member States. Similarly, the officials of Regional Competition Authorities may collaborate on inspections.

2.6 Is in-house legal advice protected by the rules of privilege?

Spanish law does not explicitly discuss whether in-house legal advice is protected by the principle of legal privilege. Nevertheless, there are no Spanish cases recognising legal privilege for in-house counsel. Quite the opposite, pursuant to a decision of 22 July 2002 of the former Spanish Competition Court and the judgments of the National High Court and Supreme Court related to inspections carried out by the DI in the *Stanpa*, *Salvat Logistica*, *Unesa* and *Consenur* cases, the current position is that only external legal advice is covered by legal privilege; *sensu contrario*, that in-house legal advice would not be privileged.

Likewise, in the *Altadis 2* case, the CNMC expressly stated that only communications with external lawyers are protected by legal privilege on the basis of national and EU case law (R/AJ/060/17: *ALTADIS 2*). This would be in line with EU case law (ECJ judgment of 14 September 2010, C-550/07 P, *Akzo Nobel*).

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

For the CNMC to enter premises, private homes, land and means of transport, the affected party must provide its explicit prior consent or, failing this, the CNMC must obtain judicial authorisation. To avoid delays and/or denials, the CNMC, in practice, usually asks for judicial authorisation before taking action, as discussed above.

Moreover, in conducting their inspections, CNMC personnel are restricted to the scope of the investigation. The information found cannot be used for any other purposes. As mentioned in question 2.6, legal privilege covers documents written by external lawyers. In addition, personal documents shall be excluded from the inspection or redacted appropriately, as the case may be.

On 4 December 2012, in the *Stanpa* case (a cartel of perfumes and cosmetics), a judgment of the Supreme Court decided that the former CNC was permitted to copy certain electronic documents on the basis of a key word search, including personal communications and other documents unrelated to the investigation, but was obliged to return said documents once they had been identified. Likewise, the ECJ has recently decided that Competition Authorities are entitled to make copies of data without carrying out a meaningful examination of those documents beforehand and that said inspection prerogative is compatible with the companies' rights of defence (judgment of the Court of Justice of 16 July 2020, *Nexans France and Nexans v Commission*, case C-606/18 P).

The former CNC's powers and practices of investigation have been confirmed by the National High Court, for example in the judgments of 21 July 2014 (*Renault* case) and 12 June 2014 (*BP* case), and the Supreme Court, in the judgments of 9 June 2012, May 2011 (*Unesa* case) and April 2010 (*Salvat Logistica* case).

However, the approach of the Supreme Court has been stringent when scrutinising search warrants. The Court strictly assesses whether the CNMC's inspections comply with the scope and aim of the search warrants (CNMC's Orders of investigation and judicial authorisations). In this regard, the Supreme Court's judgments of 10 December 2014 (*UNESA* case and *Campezo* case), 27 February 2015 (*Transmediterránea* case) and 12 March 2019 (*Uder* case) annulled the CNMC's respective Orders of investigation. The Court ruled that said Orders were too imprecise, did not clearly indicate the scope and aim of the investigation and were not consistent with the judicial authorisation. These annulments have led to further appeals on the merits, cancelling the fines imposed by the CNMC.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

According to Article 62 of the SCA, the following types of conduct, amongst others, constitute obstruction of an investigation: (i) failing to submit documents requested by the CNMC, or submitting incorrect, misleading or incomplete documents; (ii) refusing to answer the questions of CNMC officials, or providing incomplete, imprecise or misleading answers; and (iii) breaking the seals put in place by CNMC officials.

The CNMC has extended the concept of obstruction in some of its resolutions (*Caser*, *Caser-2*, *Extraco*, *Grafoplas*, *Saneamiento Martinez-Transmediterranea*, *Florencio Barrera E Hijos*) to the following conduct: (i) delaying the start of the inspection; (ii) hindering the inspection; and (iii) taking away documentation.

Royal Decree 7/2021 considers this a serious infringement, punishable by a fine of up to 5% of the infringing undertaking's total turnover in the preceding year.

In the case discussed in question 2.4, *Licitaciones de carreteras*, a fine of €300,000 was imposed on Extraco for obstructing the inspections of the former CNC, hiding documents and providing misleading information. However, in a judgment of February 2015, the Supreme Court decided that the fine should be adjusted to account for the circumstances of the case. The Court granted a reduction of the fine to €100,000.

Similarly, on 1 March 2011, the former CNC imposed a fine of €161,600 on the manufacturer of office supplies and stationery Grafoplas del Noroeste for obstructing the aforesaid authority's inspection of its business premises. This decision was confirmed by the National High Court (judgment of 29 November 2016, appeal number 31/2013).

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

In the SCA, there is a classification of infringements on the basis of their seriousness (minor, serious and very serious). The size of the fine varies depending on the seriousness of the infringement. The fines for very serious infringements are up to 10% of the total turnover of the infringing undertaking during the business year immediately prior to the year of the imposition of the fine. Serious infringements are fined by up to 5% of the turnover, and minor infringements by up to 1%. If it is not possible to calculate the turnover, Article 63 of the SCA permits setting a fine of up to €500,000 for a minor infringement, up to €10 million for a serious infringement and more than €10 million for a very serious infringement.

Royal Decree 7/2021 strengthens sanctions:

1. Some substantive infringements of competition rules (i.e. anti-competitive agreements and abuses of a dominant position) are placed at the higher end of the infringement scale, and are always regarded as very serious infringements and therefore subject to penalties of up to 10% of turnover. Previously, agreements between non-competitors (i.e. vertical agreements) and unqualified abuses of dominance were considered serious infringements subject to penalties of up to 5% of turnover.
2. Infringements of companies' duties to cooperate (e.g. to respond appropriately to RFIs or not to obstruct an inspection) are now considered serious infringements subject to a penalty of up to 5% of turnover. Prior to the reform, these infringements were considered minor infringements with a penalty of up to 1% of turnover.

As established in the SCA, during the calculation of the exact amount of the fine, the following criteria are considered: the scope and characteristics of the affected market; the market shares of infringing undertakings; the scope of the infringement; its duration; the effects of the infringement on consumers or other undertakings; and unlawful profit. A series of mitigating and aggravating factors is also provided in the SCA.

On 29 January 2015, the Supreme Court declared that the CNMC's method for the calculation of fines (a method similar to that of the EC) was contrary to Spanish law. As a result, the fining method applied by the CNMC had to be modified to comply with the proportionality principle and the CNMC adopted a new two-tier process methodology to calculate the amount of the fines, relying first on the infringement's seriousness and secondly on the particular circumstances of each fined company. The CNMC then calculates a percentage that is applied to each undertaking's overall turnover to determine the fine. When the undertaking benefits from a reduction through the application of the leniency programme, the reduction is applied to the final figure determined by application of these criteria. The application 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 some legal uncertainty, as undertakings cannot foresee the amount of the fine that they could be facing. Some summary indications on fines have been published by the CNMC; however, they have not provided sufficient clarification for that purpose.

The Royal Decree has modified the geographical scope for the calculation of sanctions and the SCA now sets up the "worldwide turnover" to determine maximum fines, meaning that a company's turnover outside Spain is included in the calculation of the upper limit. In the case of periodic penalties, the previous upper limit (€12,000 per day) is replaced by a ceiling of 5% of the company's total daily turnover.

In the case of fines on trade associations, members can ultimately be liable, much in line with what happens under EU law. Subsidiaries may also be forced to pay for conduct carried out by their parent company.

On 12 November 2009, in the case S/0037/08: *COMPANIAS DE SEGUROS DECENAL*, the former CNC fined several insurance companies €120,728,000. The High Court overturned the fines for all companies; however, the Supreme Court, in May and June 2015, confirmed the existence of anti-competitive conduct for four of the six companies. The Court referred those four cases to the CNMC in order to recalculate the fines according to the new method for the calculation of fines. The EC intervened *ex officio* as *amicus curiae* for the first time in Spain.

There are many examples of the CNMC imposing large fines, such as the fine in July 2015 on car distributors amounting to €171 million for cartel practices, the largest to date. Large fines have been issued in sectors such as ports, milk production and television advertising, to name but a few.

In Spain, public authorities have also been fined once in the case S/0167/09: *PRODUCTORES UVA Y MOSTO DE JEREZ*, as well as professional associations, which have often been on the radar.

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 SCA. For the prohibition to be effective, the antitrust decision must be final. The CNMC made use of this prerogative for the first time in March 2019 in connection with tenders of railway infrastructure (S/DC/0598/2016: *ELECTRIFICACIÓN Y ELECTROMECÁNICAS FERROVIARIAS*). In May 2021, the CNMC fined 22 consulting firms and several of their executives a total of €6.3 million, applying such a prohibition to

most undertakings (S/0627/18: *CONSULTORAS*). However, two companies were exempted: (i) the leniency applicant; and (ii) a subsidiary of Indra that had implemented a compliance programme that was effective for the CNMC *ex ante* as it helped to identify the liable directors responsible, and *ex post* as it contained effective measures for the CNMC to fight against these infringements.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

Legal representatives or members of the management body of the infringing companies may be fined up to €60,000. The Draft foresees raising fines for individual directors to up to €400,000.

Although the CNMC had not applied this provision strictly for a long time, in 2016 it resumed its practice in connection with this type of fine. For instance, in March 2019, the CNMC fined 15 companies and 14 managers for several cartels for the allocation of public tenders of railway infrastructure. The total amount imposed on the directors was €666,000.

In April 2019, the Supreme Court decided that the CNMC can fine managers and, furthermore, publish their names in the decision without infringing the individual's fundamental right to honour or privacy. The Supreme Court has also made it clear that two cumulative requirements must be met under Article 63(2) of the SCA for an individual to be fined: (i) that the individual is a legal representative or member of the management body of the offending company, understood as one who could adopt decisions that "mark, condition or direct" the actions of the company; and (ii) that the individual has intervened in the anti-competitive agreements or decisions.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

This is not expressly foreseen; however, it is not impossible as the CNMC is bound by the proportionality principle.

Even in times of financial turmoil, the former CNC notably did not seem particularly keen to reduce fines following requests for reductions on the basis of financial hardship.

On the other hand, the CNMC has taken into consideration the situation of insolvency of companies in order to exclude their liability for anti-competitive practices when the turnover amounted to zero (e.g. S/DC/0505/14: *CONCESIONARIOS CHEVROLET*).

3.4 What are the applicable limitation periods?

The limitation periods are four years for very serious infringements, two years for serious infringements and one year for mild or less serious infringements.

Regarding damages claims under the new regime following the implementation of the Damages Directive, anyone who has suffered harm caused by an infringement of competition rules has up to five years to claim full compensation for that harm in court.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes, subject to the constraints that may arise in connection with good corporate governance.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Yes (*cf. supra* question 3.2).

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Yes (*cf. supra* question 1.6).

There is a strong presumption (almost equivalent to a *iuris et de iure* presumption that admits no evidence to the contrary) that the mother company determines the conduct of the wholly owned subsidiary (judgments of 23 May 2019, appeal number 2117/2018 and 27 May 2019, appeal number 5326/2017).

The CNMC repeatedly cites this EU case law in cartel cases to extend the liability of cartel members to their parent companies (e.g. S/0428/12: *PALES* or S/471/13: *FABRICANTES DE COCHES*).

Likewise, the parent company will also benefit from the leniency programme if the subsidiary meets the requirements (*cf. infra* section 4 below).

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Yes. The leniency programme is regulated by Royal Decree 261/2008, and came into force in February 2008. In order to provide further guidance for leniency applicants and improve the transparency of its decisions, the former CNC also published guidelines on the leniency programme on 21 June 2013.

Similar to European practice, the leniency programme provides immunity from fines or a reduction of the fine. Leniency is open both to undertakings and individuals. Leniency may be granted to individuals either because the original applicant is an individual or because the undertaking requests its employees to be included.

Participants in a cartel may report information before or after the opening of an investigation. Applicants for immunity, on the one hand, must be the first to report the information. For undertakings or individuals applying for partial leniency, meanwhile, the timing determines the size of the reduction of the fine. The reductions are as follows: 30–50% for the second party to report information; 20–30% for the third party; and up to 20% for subsequent parties.

Immunity, therefore, is granted only to the first undertaking which provides evidence that, in the view of the CNMC, will permit CNMC officials to carry out an inspection or find an infringement of Article 1 of the SCA. However, full immunity will not be granted if the CNMC already has sufficient evidence on the infringement, or if the applicant was an instigator of the cartel.

In order to benefit from immunity, moreover, the applicant is required to: cooperate fully for the duration of the CNMC's investigation; end its involvement in the alleged cartel immediately after its application, unless otherwise directed by the CNMC to ensure that its investigation is effective; not destroy any evidence which is relevant to its application; and not disclose its intention to submit an application or the content of the application to third parties other than the EC or other NCAs. Royal Decree 7/2021 reinforces the duty of confidentiality attached to leniency statements. As a result, only investigated parties will have access to them and for the only purpose to prepare their defence against accusations based on them or in judicial review proceedings relating to the file in which the leniency statement was submitted.

If companies or individuals later provide additional evidence, their fines may be reduced by up to 50%. In order to benefit from a reduction, the undertaking's evidence of the alleged infringement must represent significant "added value" compared with the evidence which the CNMC already has. Furthermore, the applicant must meet all the conditions listed above *mutatis mutandis*.

In regions where a Regional Competition Authority has been established, leniency applications may also be submitted before this authority. Once received, the Regional Competition Authorities provide details of all such applications to the CNMC.

If legal representatives or members of management bodies have participated in the alleged infringement, they are also eligible for immunity or a reduction of the fines, provided they cooperate with the CNMC.

In line with CNMC practice prior to the reform, Royal Decree 7/2021 clarifies that leniency applicants are also exempt from disqualification from public tenders. In the case of companies with reduced fines (i.e. those who did not receive immunity or because the CNMC already had information on the cartel), the SCA indicates that the leniency "may include" not being disqualified from public tenders, but does not provide guidance on when this exemption will be granted.

In the event that the infringement affects multiple Member States and, consequently, multiple Competition Authorities can act against the infringement, the EC encourages undertakings to apply for leniency with all relevant Competition Authorities. Applicants generally resort to the ECN Model Leniency Programme. When the EC is particularly well placed to act on an infringement, applicants typically submit summary applications with those NCAs which might similarly take action.

According to the most recent annual report (2019), since 2010, when the first leniency resolution was published, 14 cartels have been identified and sanctioned pursuant to the leniency programme. Up to 2020, fines of nearly €550 million were imposed in relation to the programme.

The CNC's first decision resulting from a leniency application related to a cartel in the Bath and Shower Gel Manufacturing Sector (27 January 2010, S/0084/08). The proceedings were initiated on the day when the leniency programme first entered into force. On that day, Henkel and Sara Lee, two undertakings participating in the cartel, submitted respective statements to the CNC, in which they disclosed the existence of the cartel and their participation, as well as the participation of three other undertakings (Puig, Colgate and Colomer). Leniency applicants receive no immunity in connection with damages claims under Spanish law. However, the new provisions in the SCA resulting from the implementation of the Damages Directive foresee that the liability of leniency applicants shall be limited to the harm caused to their own direct and indirect purchasers (nonetheless, there is an exception in cases where the remaining co-infringers are unable to fully compensate the other victims). The SCA also limits claims from other co-infringers to the harm caused to their own direct and indirect purchasers.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

The SCA does not have a "marker" system. However, the CNMC may grant, upon an applicant's prior justified request, additional time for submitting evidence in relation to the cartel.

Pursuant to the Draft, a marker system will be introduced under which the CNMC will hold the place in line of the first leniency applicant while it gathers documentation.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

The CNMC accepts oral applications for leniency if requested.

In these cases, the applicant organises a meeting at the CNMC offices and the application is registered by the CNMC once the recording of the meeting has been transcribed. When submitted orally, applications for both immunity and a reduction of the fine must be recorded at CNMC premises with a transcript entered into the register. Applicants must also provide all information and evidence relevant to the application. The Order of receipt of the leniency application is determined by the entry date and time of the transcript in the CNMC register.

However, according to the SCA, the CNMC cannot provide the information obtained through leniency applications to the commercial courts. This provision ensures that the leniency system remains effective, and also provides applicants with a degree of protection in damages actions. Whereas EU case law practice is ambiguous in this respect (e.g. *Pfleiderer* case), under Spanish law all documentation and declarations in a leniency application, as well as the application itself, are confidential, as established by Article 15 *bis* of the Spanish Civil Procedure Act, Article 50 of the SCA and Article 51 of Royal Decree 261/2008.

The transcript of an oral application may only be accessed by the interested parties. When requesting access to the CNMC's file, mechanical and electronic copies of oral submissions are prohibited.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The filing of a leniency application, as well as all application data and documents, will be treated confidentially until the issuance of the statement of objections. After this point, interested parties will have access to the information if this is necessary to submit a response to the statement of objections.

The CNMC opens a special separate file of all documents and data deemed confidential (including the applicant's identity). However, the interested parties can access all non-confidential information necessary to respond to the statement of objections (with the exception of the oral leniency statements).

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The full, continuous and diligent cooperation includes bringing the alleged conduct to an end, not destroying any evidence, not disclosing any information to third parties and not forcing other parties to take part in the infringement. The implementing regulation, Royal Decree 261/2008, states that the leniency applicant should cooperate with the CNMC for the full duration of the proceedings.

The CNMC applies high standards when determining whether undertakings have fully and continuously cooperated. In several cases in which the applicants provided information with added value, the former CNC nevertheless withheld the benefits of the leniency programme on the basis that they had not complied with their obligations to cooperate.

Therefore, cooperation must be full, continuous and diligent until the conclusion of the proceedings. Nevertheless, during the course of the proceedings, the applicant has the right to be informed about whether the CNMC intends to maintain the conditional immunity that has been granted.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

No, there is no "leniency plus" or "penalty plus" policy.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

The SCA explicitly states that the exemption granted to an undertaking also benefits its legal representatives or the persons comprising the management bodies, provided they have cooperated with the CNMC. While the SCA does not expressly foresee employees of the undertaking being the whistle-blowers, this scenario may be considered covered.

To the best of our understanding, no whistle-blowing actions have been independently brought by employees before the CNMC to date.

Since 2014, any company or citizen may submit relevant information about anti-competitive practices to the CNMC through an online and confidential mailbox. Since this mailbox is anonymous, there is no need for the whistle-blower to provide his/her name to the CNMC. During the COVID-19 outbreak, the CNMC launched a mailbox for citizens to report those competition rule infringements that may be committed by companies throughout the public health crisis to raise prices or interfere with the supply of products required to protect people's health (i.e. excessive pricing cases or refusals to supply).

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

There is no settlement procedure applicable for cartels in Spain. Currently, there is only conventional termination, but this is a closing of the procedure without a declaration of infringement and no fine.

However, the Draft proposes to include settlement proceedings in Spain antitrust law, permitting the companies under investigation to benefit from a reduction of up to 15% in the amount of the fine if they acknowledge their participation in the infringement. As with the EC, this reduction is cumulative to the reduction received for participation in the leniency programme.

7 Appeal Process

7.1 What is the appeal process?

Firstly, during the CNMC's formal proceedings, the resolutions and acts of the Directorate leading to non-defendable or irreparable damage can be appealed before the Council within 10 days (administrative appeal) and subsequently before the National High Court and (if the conditions for the cassation appeal are met) before the Supreme Court in the last instance. For example, in 2019, the Council resolved 18 appeals against the acts of the Directorate and only partially admitted one of them.

Secondly, the decisions – including fining decisions – and acts of the Chairman and the Competition Chamber of the Council may only be appealed before the Administrative Chamber of the National High Court within two months (judicial appeal). In a second review, appeal is possible in certain cases (e.g., where there is a cassation interest) before the Supreme Court.

A recent study for the period 2014–2018, released in May 2019, reveals that the National High Court has confirmed on average 73.8% of the Competition Authority's antitrust decisions.

This percentage rises to 83% in the case of the Supreme Court. These statistics only include judgments which confirm or reject the existence of the infringement observing due process.

Meanwhile, rulings quashing lower decisions on grounds such as the calculation of fines, interim measures or the dismissal of appeals for fundamental rights were not included; for these rulings, the confirmation percentages decrease to 71.5% and 52%, respectively.

During 2019, the National Court reviewed 147 appeals and the Supreme Court issued 27 judgments reviewing antitrust-related decisions.

7.2 Does an appeal suspend a company's requirement to pay the fine?

No, an appeal does not suspend the requirement unless interim relief is sought from the court to stay payment of the fine.

In practice, interim suspension is granted if it is indicated to the satisfaction of the court that immediate payment of the fine can cause harm, whereas the public interest is not served by immediate payment. If interim suspension is granted, a bond must be posted by the requesting party to ensure eventual future payment of the fine in full, along with the judgment on the merits. Alternative guarantees (share or asset pledge) can be accepted.

While the High Court has traditionally granted interim suspension, there are recent examples of refusals to grant the interim relief. For example, on 8 June 2020, the National High Court rejected a request for the suspension of a €215,592 fine payment brought by a company involved in the *Volvo dealer* cartel, as the Court considered that the *periculum in mora* had not been sufficiently proven (judgment of the National High Court of 8 June 2020, appeal number 476/2016). Likewise, through its Order of 10 January 2020, the National High Court rejected a request for the suspension of a €3 million fine on the same grounds (judgment of the National High Court of 10 January 2020, appeal number 2297/2019).

The bank fees associated with a bank bond paid for the constitution and maintaining of that guarantee can be recovered if the appeal is successful.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Administrative litigation is mostly in writing. Regarding evidence, the general rules apply and it is possible to examine witnesses and experts in court.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Royal Decree 9/2017 has transposed the EU Damages Directive, and the main changes introduced are as follows:

(i) increasing the limitation period from one to five years. This period is suspended when a Competition Authority initiates a proceeding;
(ii) introducing a presumption of harm in cartel infringements, which generally facilitates claims. Claimants are permitted to obtain full compensation for the damages suffered, comprising the right to be indemnified for actual loss and loss of profit, plus interest;
(iii) introducing a presumption of harm to indirect purchasers. In Spanish civil law, 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 Royal Decree 9/2017, this rule is reversed, introducing a presumption of harm in favour of indirect purchasers. Notably, Spanish courts have recognised the "passing-on" defence when considering a defendant's position in damage claims involving cartel infringements (e.g., judgments of the Supreme Court of 8 June 2012 in *Acor/Gullón*, 7 November 2013 in *Nestlé España/Ebro Foods*);
(iv) introducing specific mechanisms to facilitate claimants' access to relevant documents before substantiating the claim. The pre-trial disclosure process in Spain was rather limited, and courts have been reluctant to award broad disclosures of documents to claimants. Royal Decree 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, and must identify specific items or, at least, relevant categories of evidence. Thus, Royal Decree 9/2017 does not foresee the introduction of a discovery system in Spain. Moreover, the party which requests access is expected to provide 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 is guaranteed, and specific mechanisms are foreseen to ensure the confidentiality of business secrets of entities called to reveal documentary evidence;
(v) in line with the Directive, making the CNMC's final decisions declaring infringements of competition law binding on Spanish courts. A final decision made by any other Member State's NCA creates a presumption that a competition law infringement exists;
(vi) going beyond the Directive, extending the liability of parent companies for damage caused by their subsidiaries to civil proceedings, and declaring the joint-and-several liability of all co-infringers in relation to damages caused as a result of anti-competitive behaviour. This principle of joint liability is exempted in cases involving small and medium-sized enterprises that meet certain requirements and benefits of immunity; and
(vii) declaring the effective compensation of the damages before the adoption of a decision by the CNMC to be a mitigating factor when setting the amount of the antitrust fines.

Some of the reforms advocated (such as the system requiring the production of evidence by the infringer) are still to be appropriately applied and developed. However, Royal Decree 9/2017 has fostered awareness among claimants and is expected to incentivise them to bring damages actions for antitrust infringements in Spain.

Both follow-on and stand-alone actions are possible in Spain. Follow-on claims with a precedent administrative decision contain relevant data about the unlawful conduct that may come to reduce the burden of proof or even exempt the claimant from proving the unlawful practices. If there has been no administrative decision, a stand-alone claim is available, in which the court will need to make a deeper assessment to confirm the legality of the business conduct as a prerequisite for a damages award.

Prior to the current SCA, there was an anomaly in that national competition law provisions could only be invoked in administrative proceedings, not in civil proceedings, whereas Articles 101 and 102 of the TFEU could be invoked in private litigation as they have direct effect. Under the new SCA, mercantile courts acquired jurisdiction to adjudicate on both stand-alone and follow-on actions.

The general rule to claim damages is found in Article 1902 of the Civil Code: "[A]ny person who by action or omission causes harm to another by fault or negligence is obliged to repair the damage caused."

Prior to the SCA, damages cases for a breach of the SCA were very rare. The reason for this may have been that, under the law in force prior to the SCA, a final judgment (by the highest court competent in the case to decide on appeal) was required, which erected a very high barrier to damages claims. There were some cases of follow-on actions on the basis of antitrust decisions confirmed by the Supreme Court by resorting to the unfair trade laws (i.e. unfair conduct based on infringement of Articles 101 and 102 of the TFEU).

The first time that the Supreme Court decided on a damages claim was in the judgments of 10 May 2012 and 7 November 2013 in relation to the *Sugar Cartel* case. The Court approached the case from a victim-friendly perspective. It included a number of guidelines for companies and consumers affected by cartel conduct and seeking compensation due to such conduct.

More recently, thousands of individual damages claims have been lodged against the *Trucks* Cartel before first instance courts all over Spain. Since the first judgment was given in October 2018, there have been several first and second instance decisions; however, the decisions vary. Those unfavourable to the interests of the claimants were often caused by poor economic expert evidence. It seems likely that these cases will end up in higher courts and, in some cases, even before the Supreme Court (*cf. supra* question 1.6).

8.2 Do your procedural rules allow for class-action or representative claims?

No. In Spain, collective actions can only be lodged by groups and legal entities on behalf of consumers and end-users. The Civil Procedure Act sets out various ways to submit collective actions. The most straightforward collective action involves the consolidation of the claims of multiple claimants; however, this is not always straightforward.

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", which grant standing to sue to consumers' associations to protect not only the interests of their associates, but also the general interests of all consumers and final users. This could potentially be applicable to antitrust cases.

However, actions by consumer associations to claim damages for antitrust infringements have been lacking. As an exception, on 30 July 2015, the Spanish consumer association, the Organisation of Consumers and Users (OCU) announced its potential intentions to bring collective damage claims against the car dealers of various car brands that had been fined by various CNMC decisions in 2015. No information is available as to whether any of these have become final.

Finally, it is possible for affected groups to bring a joint action (for instance, an association of companies claiming damages after the abuse of a dominant position by a competitor) or for third parties, having a direct and legitimate interest, to join proceedings that have already been initiated, as co-claimants. Only the parties represented during the proceedings benefit from the judgment.

8.3 What are the applicable limitation periods?

As asserted in question 8.1, following the implementation of the Damages Directive, the limitation period for antitrust infringements is five years. Nevertheless, recently, the Regional Court of Leon submitted a preliminary ruling on the temporal application of the provisions implementing limitation period and qualification of harm (C-267/20, *RM v Volvo and DAF Trucks*). In particular, the ECJ will have to determine whether the application of these national provisions to claims that are presented to a court after the implementation of the Directive but relate to an antitrust infringement which had ended prior to the Directive's entry into force would be precluded by Article 22 (non-retroactivity) of the Directive.

However, for infringements committed and declared by the CNMC before Royal Decree 9/2017 entered into force, the Civil Code applies, which provides for a limitation period of one year from the time when the infringement became known. This refers to damages claims based in non-contractual liability, or tort, which is the form of damages claim contemplated under Royal Decree 9/2017.

The limitation period for contractual claims is 15 years from the moment when there is a civil judgment declaring the invalidity of the contract or alternatively from the moment when the action could be lodged.

In both cases (i.e. non-contractual and contractual obligations), the limitation period can be interrupted by lodging an extrajudicial claim.

It can sometimes be difficult to determine whether contract or tort law is applicable to a given case and, therefore, whether the limitation period applies. For example, this difficulty was seen in the civil damages claim lodged against Azucarera Ebro, in relation to the *Sugar Cartel* case. The judgment of the Court of First Instance No. 50 of Madrid (Autos 735/07) did not clearly establish the type of liability. However, the tort liability of the damages (*responsabilidad extracontractual*) resulting from a cartel (*Sugar Cartel* case) was eventually confirmed by the Supreme Court. This was also confirmed for other antitrust infringements such as abuse of a dominant position (*Centrica* case).

A difficult question can arise regarding the exact date at which the limitation period starts to run. In follow-on cases, this will typically be the day when the administrative antitrust decision becomes available, containing the main information items enabling preparation of the damages claim. In order to avoid having its action time-lapsed, the claimant must either sue or interrupt the limitation period by serving an out-of-court claim before it expires.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Under Spanish law, 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. Under Royal Decree 9/2017, this rule is reversed, introducing a presumption of harm in favour of indirect purchasers. While the passing-on defence is now expressly regulated in the SCA following the transposition of the Damages Directive, the Supreme Court had already accepted the possibility of establishing this defence in *Nestle España/Ebro Foods* (judgment of 7 November 2013, appeal number 2472/2011). However, the Court rejected the passing-on defence in that case by establishing a stringent standard of proof of harm in quantitative terms, including loss of goodwill.

This matter is also at stake in the *Trucks* Cartel litigation in Spain. For instance, the judgment of the Provincial Court of Bilbao of 4 June 2020, appeal number 1606/2019, referring to the reasoning of the Provincial Court of Valencia in its judgment of 16 December 2019, has confirmed that the passing-on defence as foreseen in Directive 2017/104/EU, similarly to the new limitation periods, cannot apply to the case, since it would mean a retroactive application of Royal Decree 9/2017. In any case, the judge stated that the economic report failed to meet the burden of proof to demonstrate passing on.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The judge will generally order the losing party to pay the costs, unless the case is found to present serious doubts. When the judge does not rule entirely in favour of either party, the judge might not expressly determine who is to pay the legal costs, in which case each party will bear its own costs.

When the unsuccessful party is ordered to pay legal costs, it will only have to pay the lawyers' fees and those of other professionals whose fees are not fixed by official fee scales, which, in any event, cannot exceed one-third of the amount of the proceedings in question. If the amount of the proceedings cannot be calculated, the Bar Association may ultimately step in and issue a ruling on costs.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

Due to the fact that the follow-on rule under the former SCA required that a Competition Authority must have previously issued a final decision, it was difficult for private parties to bring actions based on antitrust infringement proceedings, since a final decision might only be available after several years. Most of the damages claims actions brought before the Spanish courts have been based on abuse of dominance cases in the energy and telecoms sectors. Examples include the *3C v Telefónica* case in 2007 (follow-on action), the *Conduit v Telefónica* case in 2006 (stand-alone action), the *Cableuropa v AVS and Sogecable* case in 2010 and the *Centrica v Endesa* case in January 2011.

The two abovementioned judgments of the Supreme Court in the *Sugar Cartel* case (*cf. supra* question 8.1) were the first two damages actions derived from cartel conduct in Spain (both follow-on actions).

Under the current SCA, individuals may bring actions for antitrust infringements before the commercial courts. As a result, the number of successful civil damages claims is expected to increase significantly in the near future.

Besides the *Trucks* Cartel, where claims are generally successful, there have also been recent rulings from the Madrid and Barcelona Provincial Courts in follow-on damages claims deriving from the *Envelope* Cartel. During the first instance

phase, while the Courts of Barcelona upheld the claim, the claims for damages submitted before the Madrid courts were dismissed for lack of evidence in the applicants' economic reports. However, the Provincial Court of Madrid has reversed the rulings, siding with the claimants (see rulings of the Provincial Court of Madrid of 3 February 2020, appeal numbers 165/2019 and 99/2019). Similarly, the Provincial Courts of Barcelona have confirmed the first instance rulings, although limiting the percentage of overcharge calculated for the compensation and restricting the liability of one of the cartel members who did not participate in the cartel throughout all of its duration (see judgments of the Provincial Court of Barcelona of 13 January 2020, appeal numbers 1197/2019, 236/2019, 1127/2019, 1963/2018 and 1128/2019, and of 10 January 2020, appeal numbers 1964/2018 and 1965/2018).

Out-of-court settlements are private and there is little information available to the public. However, we do know first-hand that out-of-court settlements are taking place in Spain.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

Royal Decree 7/2021 has introduced a number of amendments that have strengthened the investigative powers of the CNMC and will increase the deterrent power of sanctions associated with breaches of antitrust rules in Spain. In addition to the changes mentioned throughout this chapter, the following changes have been introduced:

(i) In the framework of investigations, NCAs can now exchange information and may assist each other in carrying out interviews and inspections outside their jurisdictions.

(ii) Likewise, NCAs can also now assist each other in notifying in their respective national territories the acts (RFIs, statements of objections, final decisions) of other Member States' authorities. The CNMC can also enforce the decisions of other Competition Authorities, and *vice versa*.

(iii) Finally, regarding limitation periods, the Royal Decree introduces two additional grounds for interrupting the limitation period for administrative liability: (a) investigations by other EU Competition Authorities; and (b) the judicial review of the infringement decision. This means that if the courts quash a CNMC decision on purely procedural grounds, the infringement will probably not be time-barred when the judgment is handed down and the CNMC could re-open the case.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

The changes introduced by Royal Decree 7/2021, mentioned throughout this chapter, may have relevant implications in practice (e.g. substantial increase of sanctions, more interviews, access to information of a digital nature either in the framework of an inspection or an RFI).

However, it is still unclear how the other major amendments, which were proposed in the summer of 2020 and which have been welcomed for adapting the regulation to the current reality, will be dealt with (i.e. an extension of 18 to 24 months to resolve the sanctioning procedures, 15 more days to reply to both the Statement of Objections and the Proposal for Resolution, increasing penalties for individuals from €60,000 to €400,000, or the introduction of the Settlement Procedure with the declaration of infringement and reduction of fines of up to 15%.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal bases of the cartel prohibition are Articles 4(1) and 5 of the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (CA), the equivalent to Article 101 of the Treaty on the Functioning of the European Union. The basis for fines is Article 49a CA. The Ordinance on Sanctions imposed for Unlawful Restraints of Competition of 12 March 2004 regulates details regarding the imposition of fines.

The legal nature of the Swiss cartel prohibition is civil.

1.2 What are the specific substantive provisions for the cartel prohibition?

Article 4(1) CA defines the notion of "arrangements affecting competition" as binding or non-binding agreements and concerted practices between undertakings operating at the same or at different levels of trade which have a restraint of competition as their object or effect. Recently, the Competition Commission (ComCo) has increasingly resorted to the notion of an "overall arrangement" to capture several infringements in one overall infringement. This notion resembles the notion of the single and continuous infringement of the European Commission; its contours are, however, less clear.

Article 5(3) CA presumes that arrangements between actual or potential competitors (a) to directly or indirectly fix prices, (b) to limit the quantities of goods or services to be produced, purchased or supplied, and/or (c) to allocate markets, geographically or according to trading partners, in order to eliminate effective competition.

Furthermore, Article 5(4) CA presumes that two kinds of vertical arrangements presumptively eliminate competition: (a) arrangements regarding fixed or minimum resale prices; and/or (b) arrangements regarding the restriction of passive sales.

The presumption of elimination of effective competition can be rebutted. However, according to the practice of the Federal Supreme Court, arrangements within the meaning of Articles 5(3) or (4) CA are generally significant restrictions of competition. To be lawful, such arrangements must be justified on grounds of economic efficiency. Arrangements are justified on grounds of economic efficiency if: (a) they are necessary to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and (b) they will, under no circumstances, enable the parties involved to eliminate effective competition.

1.3 Who enforces the cartel prohibition?

The cartel prohibition is primarily enforced by ComCo and its Secretariat (the investigate body of ComCo). Civil courts may also enforce the cartel prohibition, but they have no power to impose fines. ComCo's decisions are subject to judicial review by the Federal Administrative Court and the Federal Supreme Court.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Some investigations are opened after the Secretariat has conducted a preliminary investigation. A preliminary investigation is a procedure in which the Secretariat investigates whether the case is worth being pursued in a formal investigation.

Investigations can be triggered as a result of leniency applications, whistleblowers (individuals), complaints by customers or competitors, press reports, through the Secretariat's own market intelligence or through a chance find of ComCo in another investigation.

Many cartel investigations start with unannounced inspections and interrogations of the representatives of the undertakings subject to the investigation. Often, undertakings file for leniency as immunity is generally also available after an investigation has been opened.

Following the opening of the investigation, the Secretariat will review the evidence gathered in dawn raids and/or leniency applications, send out requests for information and/or interrogate further persons.

After having concluded the review of the evidence, the Secretariat drafts the so-called "motion" (which corresponds to the Statement of Objections of the European Commission). With the motion, the Secretariat requests ComCo to discontinue the investigation, or to impose a fine or to approve a settlement with the parties, etc.

The parties can also negotiate a settlement with the Secretariat (please see question 6.1).

Once drafted, the motion is circulated to the parties to the investigation for comments.

After having received the comments of the parties, the Secretariat decides whether to conduct further investigative steps or to submit the motion to ComCo for a decision. If the Secretariat deems the motion to be complete, it submits the

motion to ComCo together with the comments of the parties. This is the latest point prior to which a party can request the Secretariat to conclude a settlement.

After the Secretariat has submitted its motion to ComCo, ComCo decides whether the case is ripe for a decision or whether it must be referred back to the Secretariat for further investigation. If ComCo deems the case ripe for a decision, it conducts a hearing, at which the parties can orally defend their case. After the hearing, ComCo decides on the case (or refers it back to the Secretariat for further investigation). ComCo then drafts the decision based on the motion of the Secretariat.

1.5 Are there any sector-specific offences or exemptions?

No. To the extent that the regulatory framework does not permit competition, that sector is exempted from the cartel prohibition.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

To fall under the jurisdiction of the CA, it is sufficient that the alleged conduct has potential effects in Switzerland. It is not necessary that such effects are direct, substantial or reasonably foreseeable.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

The Secretariat has the power to order the production of specific documents or information and the power to carry out compulsory interviews with individuals. However, these powers are limited by the privilege against self-incrimination (Article 6 of the European Convention on Human Rights (ECHR)); please see question 2.7.

The Secretariat can also carry out an unannounced search of business and residential premises. The Secretariat has the right to secure premises overnight (e.g. by seal). The Secretariat claims the right to "image" computer hard drives using forensic IT tools (i.e. not only those parts of the file that relate to the investigation). In most cases, it will be regarded as disproportionate to retain the original documents. The Secretariat also has (within the limits of the privilege against self-incrimination) the right to require an explanation of the documents or information supplied.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

Unannounced inspections of the Secretariat require the approval of the president of ComCo and not of a court.

2.3 Are there general surveillance powers (e.g. bugging)?

There are no general surveillance powers.

2.4 Are there any other significant powers of investigation?

There is a cooperation agreement in place between Switzerland and the European Commission which allows for the exchange of confidential information.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The Secretariat carries out unannounced searches. It is typically accompanied by the police and a neutral person (notary). The Secretariat does not wait for legal advisors to arrive.

2.6 Is in-house legal advice protected by the rules of privilege?

No, in-house legal advice is not protected by the rules of privilege.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Undertakings enjoy the privilege against self-incrimination (Article 6 ECHR). They may refuse to produce documents, explain documents and/or provide information relating to the alleged conduct. Arguably, this privilege goes further than the privilege against self-incrimination as interpreted by the European Court of Justice, which considers that "purely factual" questions must be answered. However, the Federal Administrative Court has held that undertakings would have a duty to provide turnover data which are the basis to calculate the fines.

The same is true for members of the formal or factual body of the company. Members of the formal or factual body of the company cannot be compelled to incriminate the undertaking which they represent. With regard to other employees and former (e.g. retired) officers, they can be interrogated as witnesses and can be compelled to incriminate the undertaking which they are or were working for.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Yes. Obstruction of an investigation (beyond the privilege against self-incrimination) has been taken into account as an aggravating circumstance when calculating the fine. For example, the fines of undertakings that deleted or moved aside documents during an unannounced inspection were increased by 10%. The authorities' approach has not changed in recent years. In addition, an obstruction of an inspection can be subject to criminal sanctions.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The cap of the fine is 10% of the turnover of the respective group generated in Switzerland in the last three business years prior to the decision of ComCo.

The fine is calculated as follows:

- The starting point for the fine is the basis amount. The basis amount is up to 10% of the turnover generated in Switzerland in the relevant market during the last three business years before the end of the infringement. Hard-core cartels are usually fined with a basis rate of 6–10%. Unlawful resale price maintenance and the restriction of passive sales are usually fined with a basis rate of 3–6%.

- If the infringement lasted more than one year, this basis amount is generally increased by 0.8333% for each month the infringement lasted.
- This amount is then increased and/or reduced for aggravating/mitigating circumstances.
- To this resulting amount, a potential leniency rebate is applied.
- Furthermore, aside from ordering the parties to bring the infringement to an end, ComCo usually orders the parties to refrain from engaging in conduct like the infringement in the future.
- In the case that the parties violate such order, ComCo can impose fines.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

There are no sanctions for individuals unless they violate an order of ComCo. Fines are up to CHF 100,000.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Yes. Fines can be reduced on the basis of "financial hardship" or "inability to pay" grounds based on the principle of proportionality. In order to benefit from such a reduction, the undertaking must demonstrate that it would be likely to exit the market as a result of the fine.

3.4 What are the applicable limitation periods?

The limitation period is five years. This limitation period starts to run when "the restraint of competition has not been exercised anymore". In the case of a so-called overall infringement, ComCo is of the view that the five-year period starts when the overall infringement has come to an end. ComCo is of the view that it can impose a fine against any undertaking participating in the infringement, provided ComCo has opened the investigation against any undertaking participating in the infringement within the five-year period. This means that if ComCo opens an investigation against some members of a cartel within the five-year period but not against others, the latter cannot argue that a fine should be time-barred.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

This is not applicable; please see question 3.2.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

In theory, an employee could be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer. In practice, however, it would be challenging to recover the full legal costs and financial penalties or even a fraction of them. Depending on the degree of negligence, courts may limit the liability to the amount of one monthly salary or a multiple of this. Furthermore, the employee may argue that the compliance programme (if any) was not robust enough, the infringement was tolerated by his/her superiors, etc.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

Yes. A parent company can be held jointly and severally liable for the cartel conduct of a subsidiary, even if it is not itself involved in the cartel, if it is capable of exerting a decisive influence over the subsidiary. The case law is not consistent as to what extent a buyer can be held liable for the conduct of the target that the target engaged in prior to its acquisition.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Immunity from a fine is granted if an undertaking reports its participation in conduct within the meaning of Articles 5(3) and/or (4) CA and if it is the first undertaking to: (a) provide information that enables ComCo to open an investigation; or (b) provide evidence that enables ComCo to establish an infringement within the meaning of Articles 5(3) or (4) CA.

In addition, immunity is only granted if the applicant: (a) has not coerced any other undertaking into the infringement and has not played the instigating or leading role; (b) voluntarily submits all information and evidence relating to the infringement available to it; (c) continuously cooperates with the Secretariat/ComCo; and (d) ceases its participation in the infringement upon submitting the application or upon being requested to do so by the Secretariat.

If ComCo has already opened an investigation, immunity is only granted if (a) no other undertaking already fulfils the requirements for immunity, and (b) the competition authority does not already possess sufficient evidence to prove the infringement.

An immunity application must include the name and address of the applicant, a request for immunity, a declaration that the applicant engaged in an arrangement (concerted practice or agreement) and whether the arrangement had as its object or effect a restriction of competition, a description of the conduct, its duration, the affected products and territories, as well as the names and addresses of the other undertakings and their contact persons.

An undertaking that is not entitled to full immunity can still be granted a reduction of up to 50% in the case that it voluntarily cooperates and terminates its participation in the infringement at the time of its application. The size of the rebate depends on the added value which the undertaking provides. As there is no system of chairs, several undertakings can qualify for a 50% rebate in principle.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

There is a marker system. In order to obtain the marker, the applicant must submit a form that includes the name and address of the applicant, a request for immunity, a declaration that the applicant engaged in an arrangement (concerted practice or agreement) and whether the arrangement had as its object or effect a restriction of competition, a description of the conduct, its duration, the affected products and territories, as well as the names and addresses of the other undertakings and their contact persons. In addition, the applicant must declare that it will fully cooperate with the Secretariat/ComCo.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Applications can be made orally.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The Secretariat keeps the identity of the leniency applicant confidential at least during the beginning of the investigation. Generally, the Secretariat will give access to any leniency application at the latest when it circulates the motion.

ComCo and its Secretariat do not disclose leniency statements or pre-existing documents to private litigants.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

Any leniency applicant must cooperate until the end of the investigation of ComCo; in the case of a hybrid procedure, the applicant must cooperate until the end of the contentious procedure.

Arguably, the requirement of continuous cooperation also applies after the end of the investigation, i.e. in the case of an appeal.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is a leniency plus programme. A leniency applicant that does not qualify for immunity can be granted a rebate of up to 80% if it provides information or submits evidence on another infringement within the meaning of Articles 5(3) or (4) CA. In other words, such leniency applicant can obtain an 80% reduction for the cartel where it does not qualify for immunity, and obtain immunity for the second cartel that it reported as the first undertaking.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Whistleblowers can revert to designated contact persons at the Secretariat or use a special email address to report suspected infringements. ComCo will keep his/her identity confidential to the extent possible.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Parties can conclude a settlement with the Secretariat. The Secretariat then submits this settlement to ComCo for approval. ComCo remains free as to whether to approve such settlement, but in practice regularly approves it.

There is no uniform process for settlement negotiations. However, negotiations typically involve the following steps:

The parties first sign the so-called framework rules. These rules state, among others, that both the undertaking and the Secretariat remain free to leave the negotiations at any time, and that they will not use statements made by the other party in the negotiations in a subsequent potential appeal.

At the beginning of the negotiations, the Secretariat presents its preliminary findings to the undertaking. The undertaking can then usually submit comments on these findings, which the Secretariat will take into account. Later in the process, the Secretariat discloses the proposed fine. After each discussion, the Secretariat usually asks the undertaking to say whether it intends to remain in the negotiation process.

When the discussions reveal sufficient progress, the settlement agreement is negotiated. A settlement agreement has the following cornerstones: (a) the undertaking commits not to engage in a certain conduct in the future (anymore) – these behavioural commitments are often the subject of lengthy discussions as they apply for an indefinite duration and must be clear and practically implementable; (b) the Secretariat declares (in a vague fashion) to issue a decision that is shorter than a contentious decision in an ordinary procedure; (c) the Secretariat commits to request ComCo to impose a fine of a certain range; and (d) the undertaking declares that it will not appeal the approval decision of ComCo, if ComCo approves the settlement and does not exceed the fine requested by the Secretariat. Unlike in the EU, the undertaking does not need to admit an infringement. However, if the undertaking admits the facts presented by the Secretariat, it can obtain a further reduction of the fine (up to 20%).

Unlike in other jurisdictions, an undertaking must sign the settlement without knowing the exact description of the alleged conduct and its legal qualification in the motion. Consequently, the undertakings must live with the risk of signing the settlement without knowing the exact content of the motion.

The reduction available for a settlement is 20%, 15% or 10%, depending on how early in the process the settlement is concluded. If a settlement is concluded only after the motion has been sent to the undertaking, the reduction is *ca.* 5% only.

A settling party can still appeal the approval decision, as the declaration not to appeal the approval decision of ComCo is not binding.

ComCo increasingly uses settlements to conclude cases. Moreover, ComCo has gone into hybrid procedures, i.e. settles the case with only some of the undertakings and concludes the investigation against the rest of the undertakings that did not settle in a contentious procedure.

7 Appeal Process

7.1 What is the appeal process?

Decisions of ComCo are able to be appealed at the Federal Administrative Court within 30 days of the decision. The Federal Administrative Court has full jurisdiction to review the decision both on points of fact and law. It can cancel any fine or decrease it. It can also increase the fine, but then must notify the appealing party so it can withdraw the appeal.

Judgments of the Federal Administrative Court can be appealed at the Federal Supreme Court within 30 days on points of law.

7.2 Does an appeal suspend a company's requirement to pay the fine?

During an appeal at the Federal Administrative Court, the duty to pay the fine is suspended. In the case of an appeal at the

Federal Supreme Court, the appeal does not suspend a company's requirement to pay the fine.

7.3 Does the appeal process allow for the cross-examination of witnesses?

No. Witnesses are questioned by the court and not the appellants.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Plaintiffs may claim damages for loss suffered as a result of cartel conduct. To do so, plaintiffs essentially must prove that they suffered a certain damage as a result of an unlawful arrangement. There is no specific legislation for "follow-on" actions as opposed to "stand-alone" actions. Follow-on actions may be partly easier to pursue, given that a decision of ComCo establishes that there was an infringement. However, ComCo's decision is not binding for a civil court and will often not elaborate on the damage suffered.

8.2 Do your procedural rules allow for class-action or representative claims?

No, they do not.

8.3 What are the applicable limitation periods?

If the claim is based on tort law, the limitation period is three years. The three-year period starts when the plaintiff learns about the damage and the defendant responsible for it. Irrespective of this knowledge, damage claims are time-barred 10 years after the end of the infringement.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Yes; however, the defendant must prove the passing on.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The cost rules are the same as in other civil litigation. This means that the plaintiff must pay the court fees and the fees of external counsel of the defendant if the plaintiff loses. The court fees depend on the dispute value and vary depending on the Canton in which the case is litigated.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

There are no publicly known follow-on claims that have been successfully litigated in court. So far, follow-on cases have been settled by the parties. Recently, the parties to an alleged construction bid-rigging cartel settled the claims of the state that claimed to have suffered damage. As this settlement was concluded before ComCo handed down the decision on the fines, ComCo reduced the fines.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The government is discussing amendments of the CA that should facilitate follow-on litigation. These include a suspension of the limitation period during the investigation of ComCo and subsequent appeals, a binding effect of ComCo's decisions for the civil courts, access to documents in the possession of the defendant or third parties (with the exception of leniency applications), as well as a reduction of fines due to civil settlements. So far, however, no concrete proposals have been published.

The government has also published a proposal for an amendment of the general procedural rules. Among others, the advances on court fees shall be halved and parties shall no longer be liable for court fees of the other insolvent party.

The introduction of instruments of collective redress is discussed in Switzerland. However, given the strong political opposition, the success of this project is uncertain.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

There is a trend at ComCo for an analysis that disregards effects and applies formal criteria following the so-called *Gaba* judgment of the Federal Supreme Court. In this judgment, the Federal Supreme Court held that arrangements falling under Articles 5(3) and/or (4) CA would generally be significant restrictions of competition.

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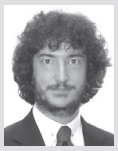
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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The statutory basis for cartel prohibition is the Law on the Protection of Competition No. 4054, dated 13 December 1994 ("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 in order to secure the free-market economy. The Turkish cartel regime is "administrative" and "civil" in nature, not criminal. That being said, certain antitrust violations, such as bid rigging in public tenders and illegal price manipulation, may also be criminally prosecutable, depending on the circumstances. The Competition Law applies to individuals and companies alike, if and to the extent that they act as an undertaking within the meaning of the Competition Law.

After rounds of revisions and failed attempts of enactment spanning several years, the proposal for an amendment to the Competition Law ("Amendment Proposal") has finally been approved by the Turkish Parliament, namely the Grand National Assembly of Turkey. On 16 June 2020, the amendments passed through Parliament and entered into force on 24 June 2020 ("Amendment Law"). (The Amendment Law was published in the Official Gazette dated 24 June 2020 and numbered 31165.) According to the recital of the Amendment Proposal, these amendments aim at reflecting in the Competition Law (No. 4054) the Turkish Competition Authority's ("Authority") experience in over 20 years of enforcement and in bringing Turkish competition law closer to EU law. (Available at: https://www2.tbmm.gov.tr/d27/2/2-2875.pdf, last accessed on 22 June 2021.)

(Please refer to question 1.5 for the definition of "undertaking".)

1.2 What are the specific substantive provisions for the cartel prohibition?

The applicable provision for cartel-specific cases is Article 4 of the Competition Law, which lays down the basic principles of cartel regulation. The provision 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 which 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. Similar to Article 101 (1) of the TFEU, the provision does not give a definition of "cartel". Rather, it prohibits all forms of restrictive agreements, which would include any form of cartel agreement. Therefore, the scope of application of the prohibition extends beyond cartel activity.

One of the most important amendments in the Amendment Law is the introduction of the *de minimis* principle, bringing Turkish competition law closer to EU law. With this amendment, the Turkish Competition Board ("Board") will be able to decide not to launch a fully fledged investigation for agreements, concerted practices and/or decisions of associations of undertakings which do not exceed the thresholds (e.g. a certain market share level or turnover) that are determined by the Board. Pursuant to the Communiqué On Agreements, Concerted Practices And Decisions And Practices Of Associations Of Undertakings That Do Not Significantly Restrict Competition ("Communiqué No. 2021/3") published on 16 March 2021, the principle will apply to (i) agreements between competitors if the total market share of the parties to the agreement does not exceed 10% in any of the relevant markets affected by the agreement, and (ii) agreements between non-competing undertakings, if the market share of each of the parties does not exceed 15% in any of the relevant markets affected by the agreement. This principle will not be applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply. With this new mechanism, the Authority appears to aim at steering its direction, as well as public resources, to more significant violations.

Article 4 also prohibits any form of agreement which 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 Board.

As is the case with Article 101 (1) of the TFEU, Article 4 brings a non-exhaustive list of restrictive agreements. It prohibits, in particular, agreements which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- share markets or sources of supply;
- limit or control production, output or demand in the market;
- place competitors at a competitive disadvantage or involve exclusionary practices such as boycotts;
- aside from exclusive dealing, apply dissimilar conditions to equivalent transactions with other trading parties; and
- make the conclusion of contracts, in a manner contrary to customary commercial practices, subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The list is non-exhaustive and is intended to generate further examples of restrictive agreements.

The prohibition on restrictive agreements and practices does not apply to agreements which benefit from a block exemption and/or an individual exemption issued by the Board. To the extent not covered by the protective cloaks brought by the respective block exemption rules or individual exemptions, vertical agreements are also caught by the prohibition laid down in Article 4.

The block exemption rules currently applicable are: (i) Block Exemption Communiqué No. 2002/2 on Vertical Agreements; (ii) Block Exemption Communiqué No. 2017/3 on Vertical Agreements and Concerted Practices in the Motor Vehicle Sector; (iii) Block Exemption Communiqué No. 2008/3 for the Insurance Sector; (iv) Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements; (v) Block Exemption Communiqué No. 2013/3 on Specialisation Agreements; and (vi) Block Exemption Communiqué No. 2016/5 on R&D Agreements, which are all modelled on their respective equivalents in the TFEU. Restrictive agreements that do not benefit from: (i) the block exemption under the relevant communiqué; or (ii) 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 *per se* illegal.

The Turkish antitrust regime also condemns concerted practices, and the Authority easily shifts the burden of proof in connection with concerted practice allegations through a mechanism termed "the presumption of concerted practice". The definition of concerted practice in Turkey does not fall far from the definition used in EU competition law. A concerted practice is defined as a form of coordination between undertakings which, without having reached the stage where a so-called agreement has been properly concluded, knowingly substitutes practical cooperation between them for the risks of competition. Therefore, this 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 does not need to be in writing; it is sufficient if the parties have expressed their joint intention to behave in a particular way, perhaps in a meeting, via a telephone call or through an exchange of letters. The special challenges posed by the proof standard concerning concerted practices are addressed under question 9.2.

1.3 Who enforces the cartel prohibition?

The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Turkey is the Authority. The Authority has administrative and financial autonomy. It consists of the Board, Presidency and Service Departments, including six divisions with sector-specific work distribution that handle competition law enforcement work through approximately 160 case handlers. A research and economic analysis department, leniency unit, decisions unit, information technologies unit, external relations unit, management services unit, strategy development unit, internal audit unit, consultancy unit, media and public relations unit, human resources unit and a cartel and on-site investigation support unit assist the six technical divisions and the Presidency in the completion of their tasks. As the competent body of the Authority, the Board is responsible for, *inter alia*, investigating and condemning cartel activity. The Board consists of seven independent members, according to Article 22 of the Competition Law. The Presidency handles the administrative works of the Authority.

A cartel matter is primarily adjudicated by the Board. In addition, administrative enforcement is supplemented with private lawsuits. In private suits, cartel members are adjudicated before regular courts. Due to a treble-damages clause permitting litigants to obtain three times their loss as compensation, private antitrust litigations are increasingly making their presence felt in the cartel enforcement arena. Most courts wait for the decision of the Authority, and build their own decision on that decision (please see section 8 below for further detail on private suits).

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

As provided above, the Amendment Law has introduced the *de minimis* principle, bringing Turkish competition law closer to EU law. With this amendment, the Board will be able to decide not to launch a fully fledged investigation for agreements, concerted practices and/or decisions of associations of undertakings which do not exceed the thresholds (e.g. a certain market share level or turnover) that will be determined by the Board. This principle will not be applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply. With this new mechanism, the Authority appears to aim at steering its direction, as well as public resources, to more significant violations.

The Amendment Law refers to "turnover" and "market share" thresholds for the *de minimis* exception and leaves the setting of the threshold to the Board. Pursuant to Communiqué No. 2021/3, the Board set the thresholds for the safe harbour as 10% for agreements between competitors and 15% for agreements between non-competitors.

The Board is entitled to launch an investigation into an alleged cartel activity *ex officio* or in response to a notice or complaint. A notice or complaint may be submitted verbally or through a petition. The Authority has an online system in which complaints may be submitted via the online form on the official website of the Authority. In case of a notice or complaint, the Board rejects the notice or complaint if it deems it not serious. Any notice or complaint is deemed rejected in cases where the Board remains silent for 60 days. The Board decides to conduct a pre-investigation if it finds the notice or complaint to be serious. It may then decide not to initiate an investigation. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (i.e. unannounced on-site inspections – please see section 2 below), and other investigatory tools (e.g. formal information request letters), are used during this pre-investigation process. The preliminary report of the Authority experts will be submitted to the Board within 30 days after a pre-investigation decision is taken by the Board. The Board will then decide within 10 days whether to launch a formal investigation. If the Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended by the Board only once for an additional period of up to six months.

The investigated undertakings have 30 calendar days, extendable for another 30 calendar days, as of the formal service of the notice to prepare and submit their first written defences (first written defence). Subsequently, the main investigation report is issued by the Authority. Once the main investigation report is served on the defendants, they have 30 calendar days

to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days which, as per the recent amendments, is extendable for another 15 calendar days, to prepare an opinion concerning the second written defence (additional opinion). The defending parties will have another 30-day period, extendable for another 30 calendar days, to reply to the additional opinion (third written defence). When the parties' responses to the additional opinion are served on the Authority, the investigation process will be completed (i.e. the written phase of investigation involving the claim/defence exchange will close with the submission of the third written defence). An oral hearing may be held upon request by the parties. The Board may also *ex officio* decide to hold an oral hearing. Oral hearings are held within at least 30, and at the most, 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings before the Board. The Board will render its final decision within: (i) 15 calendar days from the hearing, if an oral hearing is held; or (ii) 30 calendar days from the completion of the investigation process, if no oral hearing is held. It usually takes around three to six months (from the announcement of the final decision) for the Board to serve a reasoned decision on the counterpart.

1.5 Are there any sector-specific offences or exemptions?

There are no industry-specific offences or defences in the Turkish jurisdiction. The Competition Law applies to all industries, without exception. To the extent they act as an undertaking within the meaning of the Competition Law (i.e. a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services), state-owned entities also fall within the scope of application of Article 4. Due to the "presumption of concerted practice" (further addressed under question 9.2), oligopoly markets for the supply of homogenous products (e.g. cement, bread yeast, etc.) have constantly been under investigation for concerted practices. Nevertheless, whether this track record leads to an industry-specific offence would be debatable. There are some sector-specific block exemptions (such as the block exemption in the motor vehicle sector and the block exemption regulations in the insurance sector).

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Turkey is one of the "effect theory" jurisdictions, where what matters is whether the cartel activity has produced effects on Turkish markets, regardless of: (i) the nationality of the cartel members; (ii) where the cartel activity took place; or (iii) whether the members have a subsidiary in Turkey. The Board refrained from declining jurisdiction over non-Turkish cartels or cartel members (see, for example, *Şişecam/Yioula*, 28 February 2007, 07-17/155-50; *Gas Insulated Switchgear*, 24 June 2004, 04-43/538-133; and *Refrigerator Compressor*, 1 July 2009, 09-31/668-156) in the past, provided there is an effect in the Turkish markets. In recent years, the Board concluded an investigation conducted in relation to the allegation that nine international companies active in the railway freight forwarding services market have restricted competition by sharing customers (*Railway Freight Forwarding*, 16 December 2015, 15-44/740-267). The Board explained that the practices of foreign undertakings may be subject to the Competition Law if they have any effect on the Turkish markets in the meaning of Article 2, regardless of whether these undertakings have any subsidiaries or affiliated entities in Turkey; and that such anticompetitive activities of foreign undertakings should have "direct", "significant" and "intended/foreseeable" effects on the Turkish markets. The Board concluded that the agreements have not produced effects on the Turkish markets within the meaning of Article 2 of the Competition Law and, therefore, the allegations in question did not fall within the scope of the Competition Law. The decision establishes that the Authority's jurisdiction is limited to conducts that create an effect in any given product market in Turkey, notwithstanding whether the agreement, decision or practice takes place in or outside of Turkey. It should be noted, however, that the Board is yet to enforce monetary or other sanctions against firms located outside Turkey without any presence in Turkey, mostly due to enforcement handicaps (such as difficulties of formal service to foreign entities).

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Table of General Investigatory Powers

Investigatory Power	Civil/ administrative	Criminal
Order the production of specific documents or information	Yes	No
Carry out compulsory interviews with individuals	Yes	No
Carry out an unannounced search of business premises	Yes	No
Carry out an unannounced search of residential premises	Yes*	No
Right to "image" computer hard drives using forensic IT tools	Yes	No
Right to retain original documents	No	No
Right to require an explanation of documents or information supplied	Yes	No
Right to secure premises overnight (e.g. by seal)	Yes	No

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

The Competition Law provides vast power to the Authority on dawn raids. A judicial authorisation is obtained by the Board only if the subject undertaking refuses to authorise the dawn raid, which would also result in a monetary fine. While the mere wording of the Competition Law permits verbal testimony to be compelled from employees, case handlers do accept the delaying of an answer provided there is quick written follow-up correspondence. Therefore, in practice, employees can avoid

providing answers on issues that are uncertain to them, provided that a written response is submitted in a mutually agreed timeline. Computer records are fully examined by the experts of the Authority, including but not limited to the 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 which do not fall within the scope of the investigation (i.e. that which is written on the deed of authorisation).

In addition to the above, the Amendment Law also includes an explicit provision that during on-site inspections, the Authority can inspect and make copies of all information and documents in companies' physical records as well as those in electronic spaces and IT systems, which the Authority already does in practice. This is also confirmed in the Amendment Proposal's preamble as it indicates that the amendment provides "further" clarification on the powers of the Authority, which are particularly important for discovering cartels. Based on the Authority's current practice, therefore, this does not constitute a novelty.

Similarly, the Authority published its Guidelines on Examination of Digital Data During On-site Inspections on 8 October 2020, which set forth the general principles with respect to the examination, processing and storage of data and documents held in the electronic media and information systems, during the on-site inspections ("Guidelines on Examination of Digital Data"). According to the Guidelines on Examination of Digital Data, the Authority can inspect portable communication devices (mobile phones, tablets, etc.) if, as a result of a quick review, it is understood that they include digital data about the undertaking. The inspection of the digital data obtained from mobile phones must be completed at the premises of the undertaking, hence the data cannot be copied for the continuation of the inspection at the Authority's premises.

2.3 Are there general surveillance powers (e.g. bugging)?

No, there are no general surveillance powers.

2.4 Are there any other significant powers of investigation?

No, there are no other significant powers of investigation.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The sole people participating in on-site inspections are the Authority's case handlers. Case handlers are not obliged to wait for a lawyer to arrive. That said, they may sometimes agree to wait for a short while for a lawyer to arrive but may impose certain conditions (e.g. to seal file cabinets and/or to disrupt email communications).

2.6 Is in-house legal advice protected by the rules of privilege?

Attorney-client privilege under Turkish competition law has been discussed in several decisions of the Board in the recent past. Specifically, in *Sanofi Aventis* (20 April 2009, 09-16/374-88), the Board indirectly recognised that the principles adopted by the Court of Justice of the European Union in *AM&S v. Commission* (Case no. 155/79 *AM&S Europe v. Commission* [1982] ECR 1575) might apply to attorney-client-privileged documents in Turkish enforcement in the future, and in *CNR/NTSR* (13 October 2009, 09-46/1154-290), the Board elaborated in detail the privilege rules applied in the European Commission ("EC") and tacitly concluded that the same rules would apply in Turkish antitrust enforcement.

In addition, according to more recent decisions of the Board (*Dow Turkey*, 2 December 2015, 15-42/690-259; *Enerjisa*, 6 December 2016, 16-42/686-314; *Istanbul Department of Customs Association*, 20 June 2019, 19-22/352-158), the attorney-client protection covers the correspondence made in relation to the client's right of defence and documents prepared in the scope of an independent attorney's legal service. Correspondence that is not directly related to the use of the client's right of defence or that aims to facilitate/conceal a violation is not protected, even when it is related to a pre-investigation, investigation or inspection process. For example, while an independent attorney's legal opinion on whether an agreement violates the Competition Law can be protected under the attorney-client privilege, correspondence on how the Competition Law can be violated between an independent attorney and client do not fall within the scope of this privilege. On a final note, correspondence with an independent attorney (i.e. without an employment relationship with her/his client) fall into the scope of attorney-client privilege and shall be protected.

That said, the Eighth Administrative Chamber of the Ankara Regional Administrative Court issued a decision that put further limitations on the scope of the privilege on attorney-client privilege in 2018 (*Enerjisa*, 10 October 2018, 2018/1236). The decision concerned an internal review report of outside counsel for competition law compliance purposes, which had been prepared before the Authority opened an investigation against Enerjisa. The report was taken by the case handlers during a dawn raid conducted in the scope of the investigation against this company at a later stage. The court held that while the document comprised correspondence "between an independent attorney and the undertaking", it was not protected under attorney-client privilege given that "it was not directly related to the right to defence", due to its preparation prior to an investigation. In a similar vein, in *Warner Bros* (17 January 2019, 19-04/36-14), the Board decided that documents produced before the date that pre-investigation was made are not directly related to the right to defence and would not benefit from the privilege.

Communications with in-house counsel are not covered by this privilege (*Çiçek Sepeti*, 2 July 2020, 20-32/405-186).

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

This is not applicable.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. Failure to comply with

a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1% of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine is TL 34,809 (around EUR 3,371 at the time of writing) for the year 2021. In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Similarly, refusing to grant the staff of the Authority access to business premises may lead to the imposition of a daily-based periodic fine of 0.05% of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine to be applied in such case is also TL 34,809 (around EUR 3,371 at the time of writing).

In 2020, the Board fined a number of undertakings for hindering on-site inspections. In this respect, in its *Groupe SEB İstanbul* decision (9 January 2020, 20-03/31-14), Groupe SEB İstanbul was fined 0.05% of its turnover generated in 2018 for hindering an on-site inspection. Similarly, the Board imposed a fine of 0.5% upon Unilever for not granting access to Unilever's email system for a search by using "eDiscovery" for approximately eight hours during the on-site inspection (*Unilever*, 7 November 2019, 19-38/584-250).

In 2020, the total amount of fines imposed on undertakings that obstructed on-site inspections was TL 2,550,979.70 (around EUR 247,044,325 at the time of writing).

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

In case of proven cartel activity, the companies concerned shall be separately subject to fines of up to 10% of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Employees and/or managers of the undertaking/association of undertakings who had a determining effect on the creation of the violation are also fined up to 5% of the fine imposed on the undertaking/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 level of fault and the amount of possible damage in the relevant market; the market power of the undertaking(s) within the relevant market; the duration and recurrence of the infringement; the cooperation or driving role of the undertaking(s) in the infringement; the financial power of the undertaking(s); and compliance with the commitments, etc. in determining the magnitude of the monetary fine.

In line with this, the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance ("Regulation on Fines") was enacted by the Authority in 2009. The Regulation on Fines sets out detailed guidelines as to the calculation of monetary fines applicable in the case of an antitrust violation. The Regulation on Fines applies to both cartel activity and abuse of dominance, but does not cover illegal concentrations. According to the Regulation on Fines, fines are calculated by first determining the basic level, which in the case of cartels is between 2% and 4% of the company's turnover in the financial year preceding the date of the fining decision (if this is not calculable, the turnover for the financial year nearest the date of the decision); aggravating and mitigating factors are then factored in. The Regulation on Fines also applies 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.

As for the highest monetary fines imposed by the Board as a result of a cartel investigation, two decisions stand out:

(i) The highest monetary fine imposed by the Board on a single company as a result of a cartel investigation is TL 213,384,545.76 (around EUR 20,665 million at the time of writing). This monetary fine was imposed by the Board on the economic entity composed of Türkiye Garanti Bankası A.Ş., Garanti Ödeme Sistemleri A.Ş. and Garanti Konut Finansmanı Danışmanlık A.Ş. ("Garanti") in its decision dated 8 March 2013 and numbered 13-13/198-100. This amount represented 1.5% of Garanti's annual gross revenue for the year 2011.

(ii) The highest monetary fine imposed by the Board for an entire case (i.e. total fine on all companies covered by the cartel conduct) as a result of a cartel investigation was TL 1,116,957,468.76 (around EUR 108 million at the time of writing) for the same case (8 March 2013, 13-13/198-100). The total fine was imposed on 12 undertakings active in the banking sector.

In addition to the monetary sanction, the Board is authorised to take all necessary measures to terminate the restrictive agreement, to remove all *de facto* and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures in order to restore the same level of competition and status as before the infringement. Under Article 9, besides an Article 7 violation, in determination of an infringements of Articles 4 and 6, the Board may order behavioural as well as structural remedies to re-establish the competition and end the infringement. Overall, the Board may order to end practices and/or adopt remedies to restore the *status quo* without imposing an administrative fine. Furthermore, a restrictive agreement shall be deemed legally invalid and unenforceable with all its legal consequences. Finally, the Competition Law authorises the Board to take interim measures until the final resolution on the matter, in case there is a possibility of serious and irreparable damage.

The sanctions that could be imposed under the Competition Law are administrative in nature. Therefore, the Competition Law leads to administrative fines (and civil liability) but not criminal sanctions. That said, there have been cases where the matter had to be referred to a public prosecutor after the competition law investigation has been completed. On that note, bid rigging activity may be criminally prosecutable under Sections 235 *et seq.* of the Turkish 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 civil monetary fine under Section 237 of the Turkish Criminal Code. (Please see section 8 below for private suits, which may also become an exposure item against the defendant.)

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The sanctions specified in question 3.1 may apply to individuals if they engage in business activities as an undertaking. Similarly, sanctions for cartel activity may also apply to individuals acting as the employees and/or board members/executive committee members of the infringing entities in case such individuals had a determining effect on the creation of the violation. Apart from these, there are no other sanctions specific for individuals. On

that note, bid-rigging activity may be criminally prosecutable under Sections 235 *et seq.* of the Turkish Criminal Code. Illegal price manipulation (i.e. manipulation through disinformation or other fraudulent means) may also be punished by up to two years' imprisonment and a civil monetary fine under Section 237 of the Turkish Criminal Code. (Please see section 8 below for private suits, which may also become an exposure item against the defendant.)

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

No. The enforcement record indicates that the Board fined entities that had gone bankrupt before the fining decision without a reduction. However, Section 17 of the Law on Minor Offences provides that the fining administrative entity (i.e. the Board) may decide to collect the fine in four instalments (as opposed to one) over a period of one year, on the condition that the first instalment is paid in advance. Additionally, the Regulation on Fines provides that the Board may reduce the fine by one-quarter to three-fifths, if the turnover that is linked to the violation represents a very small portion of the fined undertaking's entire turnover.

3.4 What are the applicable limitation periods?

The Board's right to impose administrative monetary fines terminates upon the lapse of eight years from the date of infringement. In the event of a continuous infringement, the period starts running on the day on which the infringement has ceased or was last repeated. Any action taken by the Board to investigate an alleged infringement cuts the eight-year limitation period. The applicable periods of limitation in private suits (please see section 8) are subject to the general provisions of the Turkish Code of Obligations, according to which the right to sue violators on the basis of an antitrust-driven injury claim terminates upon the lapse of 10 years from the event giving rise to the damage of the plaintiff. Prosecution of offences of a criminal nature (such as bid-rigging activity and illegal price manipulation) is subject to the generally applicable criminal statutes of limitation, which would depend on the gravity of the sentence imposable.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Yes. This does not constitute advice on tax deductibility or the accounting/bookkeeping aspects of such payment.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

The Competition Law does not provide any specific rules regarding the liability of implicated employees for the legal costs and/or financial penalties imposed on the employer. On the other hand, much would depend on the internal contractual relationship between the employer and the implicated employee, as there is no roadblock against the employer claiming compensation from the implicated employee under the general principles of Turkish contracts or labour laws. This does not constitute tax advice.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

The Board has a consistent approach of fining the legal entity which was involved in cartel behaviour rather than fining the parent company as a whole.

Article 16 of the Competition Law makes a reference to the term "undertaking" when it identifies the entity on which the monetary fine is to be imposed. Article 3 of the Competition Law defines undertakings as natural and legal persons who produce, market and sell goods or services in the market, and entities which can decide independently and constitute an economic entity. Therefore, it can be argued that it technically leaves the impression that the Board is empowered to go up to the ultimate parent for the calculation of turnover rather than solely focusing on the local turnover of the entity that actually violates the Competition Law.

That said, in practice, the Board does not tend to calculate the revenue by taking into consideration the whole group's (i.e. the undertaking's) revenue, and imposes monetary fines on the basis of the actual infringing legal entity's (infringing subsidiary's) revenue (e.g. *Automotive* 18 April 2011, 11-24/464-139; *Cement* 6 April 2012, 12-17/499-140; and *Financial Institutions* 28 November 2017, 17-39/636-276).

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Amendments to the Competition Law, which were enacted in February 2008, brought about a stricter and more deterrent fining regime, coupled with a leniency programme for companies.

The secondary legislation specifying the details of the leniency mechanism, namely the Regulation on Active Cooperation for Discovery of Cartels ("Regulation on Leniency"), came into force on 15 February 2009.

With the enactment of the Regulation on Leniency, the main principles of immunity and leniency mechanisms have been set. According to the Regulation on Leniency, the leniency programme is only available for cartelists. It does not apply to other forms of antitrust infringement. A definition of "cartel" is also provided in the Regulation on Leniency for this purpose. A cartelist may apply for leniency until the investigation report is officially served. Depending on the application order, there may be total immunity from, or reduction of, a fine. This immunity or reduction includes both the undertaking and its employees/managers, with the exception of the "ring-leader" which can only benefit from a second-degree reduction of a fine. The conditions for benefitting from the immunity/reduction are also stipulated in the Regulation on Leniency. Both the undertaking and its employees/managers can apply for leniency.

Additionally, the Authority published the Guidelines on the Clarification of Regulation on Leniency on 19 April 2013. The perspective of the Board stands parallel with the perspective of the EC, since the leniency applications are quite minimal; however, it is not yet possible to say that Turkish competition law regulation has caught up with EU regulation concerning leniency procedures and reviews.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Although no detailed principles on the "marker system" are provided under the Regulation on Leniency, pursuant to the relevant legislation, 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.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

There is no legal obstacle to conducting a leniency application orally. The Regulation on Leniency provides that information required for making a leniency application (information on the products affected by the cartel, information on the duration of the cartel, names of the cartelists, dates, locations and participants of the cartel meetings, as well as other information/documents about the cartel activity) might be submitted verbally. However, it should be noted that in such a case, the submitted information should be put into writing by the administrative staff of the Authority and confirmed by the relevant applicant or its representatives.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

According to the principles set forth under the Regulation on Leniency, the applicant (the undertaking or employees/managers of the undertaking) must keep the application confidential until the end of the investigation, unless it is otherwise requested by the assigned unit.

Articles 6 and 9 of the Regulation on Leniency provide that unless stated otherwise by the authorised division, the principle is to keep leniency applications confidential until the service of the investigation report. Nevertheless, to the extent the confidentiality of the investigation will not be harmed, the applicant undertakings could provide information to other competition authorities or institutions, organisations and auditors. The applicant is in any case obliged to maintain active cooperation until the final decision is taken by the Board following the conclusion of the investigation. As per paragraph 44 of the Guidelines on the Clarification of Regulation on Leniency, if the employees or personnel of the applicant undertaking disclose the leniency application to the other undertakings and breach the confidentiality principle, the Board will evaluate the situation on a case-by-case basis based on the criteria of whether the person at issue is a high-level manager, and whether the Board was notified promptly after the breach.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

Pursuant to the principles set forth under the Regulation on Leniency, the active (continuous) cooperation shall be maintained until the Board renders its final decision after the investigation is completed.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Amnesty Plus is regulated under Article 7 of the Regulation on Fines. According to Article 7 of the Regulation on Fines, the fines imposed on an undertaking which cannot benefit from immunity provided by the Regulation on Leniency will be decreased by one-quarter if it provides the information and documents specified in Article 6 of the Regulation on Leniency prior to the Board's decision of preliminary investigation in relation to another cartel.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

A manager/employee of a cartelist may also apply for leniency until the "investigation report" is officially served. Such an application would be independent of applications – if any – by the cartelist itself. Depending on the application order, there may be total immunity from, or a reduction of, a fine for such manager/employee. The requirements for such individual application are the same as those stipulated under question 4.1 above.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Amendment Law introduces two new mechanisms that are inspired by EU law and aim to enable the Board to end investigations without going through the entire pre-investigation and investigation procedures.

The first mechanism is the commitment procedure. It permits the undertakings or association of undertakings to voluntarily offer commitments during a preliminary investigation or fully fledged investigation to eliminate the Authority's competitive concerns in terms of Articles 4 and 6 of the Competition Law, prohibiting restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the Board can now decide not to launch a fully fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. However, commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing and the restriction of supply. In other words, the commitment mechanism is not applicable to cartels. Additionally, the Board may reopen an investigation in the following cases: (i) substantial change in any aspect of the basis of the decision; (ii) the relevant undertakings' non-compliance with the commitments; or (iii) realisation that the decision was decided on deficient, incorrect or fallacious information provided by the parties. The secondary legislation, entitled "Communiqué on Commitments to be Submitted during Preliminary Investigations and Investigations regarding Agreements, Concerted Practices and Decisions Restricting Competition and the Abuses of Dominant Position" and providing details on the process and procedure related to application of the commitment mechanism, came into force on 16 March 2021.

Secondly, the Amendment Law also introduces the settlement procedure. The settlement mechanism is applicable to cartels. It appears that it is also applicable to "other infringements" under Article 4 and abuse of dominance cases under Article 6, since the relevant provision is added to Article 43 concerning investigations of anticompetitive conduct in general, and considering that the Amendment Law does not limit the settlement option to cartels only. The new law enables the Board,

ex officio or upon the parties' request, to initiate the settlement procedure. Unlike the commitment procedure, settlement can only be offered in fully fledged investigations. In this respect, parties that admit an infringement can apply for the settlement procedure until the official service of the investigation report. The Board will set a deadline for the submission of the settlement letter and, if settled, the investigation will be closed with a final decision including the finding of a violation and an administrative monetary fine. If the investigation ends with a settlement, the Board can reduce the administrative monetary fine by up to 25%. The parties may not bring a dispute on the settled matters and the administrative monetary fine once an investigation concludes with a settlement. Other procedures and principles regarding settlement will be determined by the Board's secondary legislation. On 18 March 2021, the Authority published the "Draft Regulation on Settlement Procedure to be Used During Investigations Regarding Agreements, Concerted Practices and Decisions Restricting Competition and the Abuses of Dominant Position" and initiated the public consultation process. Following the inquiry phase, the Authority is expected to enact the secondary legislation for the settlement mechanism.

7 Appeal Process

7.1 What is the appeal process?

As per Law No. 6352, the administrative sanction decisions of the Board can be submitted for judicial review before the Administrative Courts in Ankara by the filing of an appeal case within 60 days upon receipt by the parties of the justified (reasoned) 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 by the plaintiff, the court, providing its justifications, may decide the stay of execution of the decision if such execution is likely to cause serious and irreparable damage, and if the decision is highly likely to be against the law (i.e. the showing of a *prima facie* case).

The judicial review period before the Ankara Administrative Courts usually takes approximately 12 to 24 months. After exhausting the litigation process before the Administrative Courts of Ankara, the final step for the judicial review is to initiate an appeal against the Administrative Court's decision before the regional courts. The appeal request for the Administrative Courts' decisions will be submitted to the regional courts within 30 calendar days of the official service of the justified (reasoned) decision of the Administrative Court.

Since 2016, administrative litigation cases are subject to judicial review before the newly established regional courts (appellate courts), creating a three-level appellate court system consisting of Administrative Courts, regional courts (appellate courts) and the High State Court.

The regional courts go through the case file both on procedural and substantive grounds. The regional courts investigate the case file and make their decision considering the merits of the case. The regional courts' decisions are considered final in nature. In exceptional circumstances laid down in Article 46 of the Administrative Procedure Law, the decision of the regional court will be subject to the High State Court's review and therefore will not be considered a final decision. In such a case, the High State Court may decide to uphold or reverse the regional courts' decision. If the decision is reversed, it will be remanded back to the deciding regional court, which will in turn issue a new decision to take account of the High State Court's decision.

Decisions of courts in private suits are appealable before the Supreme Court of Appeals. The appeal process in private suits is governed by the general procedural laws and usually lasts 24 to 36 months.

7.2 Does an appeal suspend a company's requirement to pay the fine?

No. As stipulated under question 7.1 above, 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 on a stay of execution.

7.3 Does the appeal process allow for the cross-examination of witnesses?

The Administrative Courts and High State Council do not cross-examine witnesses.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Similar to US antitrust enforcement, the most distinctive feature of the Turkish competition law regime is that it provides for lawsuits for treble damages. That way, administrative enforcement is supplemented with private lawsuits. Articles 57 *et seq.* of the Competition Law entitle any person who is injured in his business or property, by reason of anything forbidden in the antitrust laws, to sue the violators for three times their damages plus litigation costs and attorney fees. The case must be brought before the competent general civil court. In practice, courts usually do not engage in an analysis as to whether there is actually a condemnable agreement or concerted practice, and wait for the Board to render its opinion on the matter, therefore treating the issue as a prejudicial question. Since courts usually wait for the Board to render its decision, the court decision can be obtained in a shorter period in follow-on actions.

8.2 Do your procedural rules allow for class-action or representative claims?

Turkish procedural law denies any class action or procedure. Class certification requests would not be granted by Turkish courts. While Article 25 of Law No. 4077 on the Protection of Consumers permits class actions by consumer organisations, these actions are limited to violations of Law No. 4077 on the Protection of Consumers, and do not extend to cover antitrust infringements. Similarly, Article 58 of the Turkish Commercial Code enables trade associations to take class actions against unfair competition behaviour, but this has no reasonable relevance to private suits under Articles 57 *et seq.* of the Competition Law.

8.3 What are the applicable limitation periods?

As noted above in question 3.4, the applicable periods of limitation in private suits are subject to the general provisions of the Turkish Code of Obligations, according to which the right to sue

violators on the basis of an antitrust-driven injury claim terminates upon the lapse of 10 years from the event giving rise to the damage of the plaintiff.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The Competition Law and judicial precedents do not specifically recognise "passing on" defences in civil damages claims. "Passing on" defences are yet to be tested in Turkish enforcement. However, this is still an area of controversy: a part of the doctrine suggests that passing on defences should be permitted, whereas some other scholarly writings argue that they should not be accepted. However, there is no roadblock under the general civil claims rules against a defendant to put forward a "passing on" defence in civil damages claims. Nevertheless, the issue requires a case-by-case analysis, as the admissibility of the defence depends on the position of the claimant and the nature of the claim.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Any person who is injured in his business or property by reason of cartel activity is entitled to sue the violators for three times their damages, plus litigation costs and attorney fees. Other than this, there are no specific cost rules for cartel cases. The general cost rules for civil law claims also apply in cartel cases.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

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. Civil damage claims have usually been settled among the parties involved prior to the court rendering its judgment.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

According to the annual activity report of the Authority, it received one leniency application in 2020 which centred on the auto-expert sector and resulted in the reduction of the administrative monetary fine in accordance with Article 5 of the Regulation on Leniency.

During the course of the year in review, there have not been any significant cartel decisions in which the Board has imposed significant administrative monetary fines. Overall, the Authority recorded increased cartel enforcement under horizontal agreements assessments. According to the annual report of the Authority for 2020, the Board decided 319 cases, 65 of which were related to competition law violations. Among the 65 cases, 36 were related to Article 4 of the Competition Law (anticompetitive agreements) only and seven cases were subject to both Article 4 and Article 6 (abuse of dominant position). The most-investigated sectors were (i) chemistry and mining (including petroleum, fuel, etc.), followed by (ii) machine industry (including household appliances, electronics, etc.). Finally, the Board issued monetary fines amounting to a total of TL 1,964,045,143 in 2020 due to violations of Articles 4 and 6 of the Competition Law, TL 1,656,837,739 of which was due to violations of Article 4 of the Competition Law.

In terms of cartel enforcement activity, the Board issued a short decision which concludes imposition of an administrative monetary fine against Novartis Sağlık Gıda ve Tarım Ürünleri San. ve Tic. A.Ş. and Roche Müstahzarları San. A.Ş. for their cartel arrangement (21 January 2021, 21-04/52-21).

As for concerted practices, the *Fertilizer* decision of the Board (26 November 2020, 20-51/718-317), which was rendered as a result of the investigation regarding price increases in the fertiliser industry, is a significant example of how and why a concerted practice should be analysed thoroughly and why the standard of proof should be high in cases where there exists an oligopolistic market. The Board conducted a detailed economic analysis to assess the market conditions as well as the price fluctuations. It made a shock analysis to evaluate the unilateral effects of certain events/shocks (e.g. instant impact on exchange rates) on the competitive conditions in the market and found that the market is characterised by an oligopolistic structure, significant dependence on imports for the supply of raw materials, international product prices, sensitivity to the changes in the exchange rates and seasonal fluctuation of consumption and the related stock risk.

In addition, the Board implemented a regression model to determine a price for relevant products, taking into account the factors that affect cost, demand, and supply. For the application of this model, considering all the sector-specific characteristics, the Board took into account the foreign exchange rates, producers' price index in energy, international Free On Board prices for urea and ammonia in USD, and seasonality as the explanatory variables for the reduced form price regression method with respect to the (i) base fertiliser, (ii) top fertiliser, and (iii) urea fertiliser prices. As a result, the Board found that (i) the regression model provides a meaningful result for base fertilisers and urea fertilisers but not for top fertilisers, and (ii) the regression analysis for base fertiliser and urea fertiliser does not reveal any structural fracture findings of the type that could indicate an explicit or implicit price-fixing agreement for these fertilisers, since the price fluctuations can be explained by the change in the explanatory variables. In addition, the Board also found that it was not known whether the price information included in the documents obtained during the on-site inspections is gathered directly or indirectly from competitors based on a mutual agreement on prices. Consequently, the Board decided that the undertakings did not violate Article 4 of the Competition Law.

Another recent decision of the Board concerns an association of undertakings (19 November 2020, 20-50/694-305). Based on documents showing that the association of the undertakings that are active in natural gas and mechanical installation in Van (a city in Turkey) determined the prices for installation, the Board decided that the association violated Article 4 of the Competition Law. The Board determined the ratio applied to the base fine as 2%, considering that: (i) the damage that has occurred or may occur as a result of the violation since almost all undertakings that are active in the city were members of the association; (ii) some undertakings including the members of the association applied prices below the price determined by the association; (iii) the determined prices were only applied in a limited place; (iv) there were recent entries into the market; and (v) the association made the necessary amendments to charter in order to comply with the Competition Law upon the preliminary investigation.

The *Gaziantep* auto-expert opinion decision is also one of the most significant decisions made by the Board in 2020 with regard to price-fixing arrangements (9 July 2020, 20-33/439-196). The decision concerns an investigation initiated against auto-expert opinion providers operating in the Gaziantep province of Turkey. The Board found concrete evidence of a price-fixing arrangement and therefore imposed a monetary fine on the relevant undertakings, except one, which received a reduction due to its application to benefit from the Active Cooperation Guideline.

In another decision, the Board concluded that gas stations located in the Burdur province violated Article 4 of the Competition Law by way of fixing prices (9 January 2020, 20-03/28-12). The Board found that the cartel arrangement was essentially formed via WhatsApp groups and messages created between certain employees of the relevant gas stations. Despite an explicit finding of a cartel violation, the Board took into consideration the lowest base fine rate stipulated under the Regulation on Fines applicable for violations other than cartel violations, since the profit margins of the investigated undertakings were significantly low and imposition of a high fine would restrict sustainability of their business.

Furthermore, the Board found that certain ready-mixed concrete producers operating in the Yozgat province infringed Article 4 by way of establishing two legal entities (namely, Güven Beton and Sorgun Emek Beton) in order to coordinate sales, collectively determine prices and allocate customers. Accordingly, the Board imposed an administrative fine of 1.2% of the annual gross income of the investigated parties (19 March 2020, 20-15/215-107). In this respect, the Board imposed an administrative monetary fine of 1.2% of the annual gross income of the investigated parties.

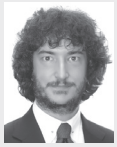
In an investigation concerning the traffic signalisation market, the Board concluded that nine of the 10 investigated parties violated Article 4 of the Competition Law by way of bid rigging (12 March 2020, 20-14/191-97). Among other practices, the Board essentially found that undertakings prepared offers and entered into bids based on a mutually reached consensus. As a result, all but one of the investigated undertakings were imposed with an administrative monetary fine of either 2% or 3% of their annual gross income. During the investigation process, one of the investigated undertakings – Mosaş Akıllı Ulaşım Sistemleri A.Ş. – was fined separately for hindering the on-site inspection conducted by the Authority (21 June 2018, 18-20/356-176) and refusing to grant access to the Authority for 17 days (5 July 2018, 18-22/378-185).

The investigations that have been initiated by the Authority so far clearly demonstrate that the Authority does not focus on any specific sectors when it comes to the investigation of cartel behaviour, but rather aims to tackle any conduct or practice which might point to a restriction of competition among competing undertakings. It is expected that this trend will continue in future cases.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

Similar to the rest of the world, technologies and digital platforms are on the Authority's radar. The Authority announced plans for the strategy development unit to focus on digital markets in May 2020 and launched a sector inquiry focused on e-marketplace platforms on 16 July 2020. The Authority published its Preliminary Report on its Sector Inquiry on E-Marketplace Platforms on 7 May 2021, and a workshop was carried out with the participation of all stakeholders, including lawyers and consumers, on 6 July 2021.

Furthermore, on 5 February 2021, the Authority published its Preliminary Report on its Sector Inquiry on the FMCG Sector.



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Matthew Readings


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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Section 2 of the Competition Act 1998 (the "Competition Act") sets out the civil offence for companies (also known as the "Chapter I prohibition") and Section 188 of the Enterprise Act 2002 (the "Enterprise Act") sets out the criminal offence for individuals.

Until the end of the transitional period under Brexit arrangements (i.e. 11pm on 31 December 2020) the Competition and Markets Authority ("CMA") had to apply Article 101 of the Treaty on the Functioning of the European Union ("TFEU") when applying the Chapter I prohibition to conduct which may affect trade between EU Member States. During this time, the European Commission ("EC") also had jurisdiction to investigate suspected infringements of Article 101 TFEU in the UK or which have effects on a UK market (see the CMA's January 2020 "*Guidance on the functions of the CMA under the Withdrawal Agreement*").

As the transitional period has ended, the CMA will no longer apply Article 101 TFEU and will no longer be subject to Regulation 1/2003. The legal basis for the CMA to issue cartel proceedings is now the Chapter I prohibition only, except in cases where the EC has formally initiated proceedings before the end of the transitional period, in which case the EC will retain jurisdiction. Any UK elements of any commitments given or remedies imposed in connection with any prior EC proceedings under Article 101 TFEU will continue to be overseen by the EC, unless responsibility for such oversight is transferred to the CMA by mutual agreement. The CMA may also obtain jurisdiction over elements of proceedings which have already been initiated by the EC, the precise scope of which may be the subject of future legislation.

1.2 What are the specific substantive provisions for the cartel prohibition?

Section 2(1) of the Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK, and may have as their object or effect the prevention, restriction or distortion of competition within the UK.

Under Section 188 of the Enterprise Act, an individual will commit an offence if they enter into a horizontal agreement, with one or more persons, that undertakings will engage in cartel activities (direct and indirect price fixing; limitation of supply or production; market sharing; or bid rigging). This applies irrespective of whether the agreement was implemented or whether the individuals had authority to act on behalf of the undertakings at the relevant time. An individual can also be prosecuted for attempting to commit an offence and conspiracy to do so. Dishonesty on the part of the individuals concerned must be demonstrated for arrangements performed from 20 June 2003 to 31 March 2014.

1.3 Who enforces the cartel prohibition?

The CMA, along with sectoral regulators (such as the Office of Communications, the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Civil Aviation Authority, the Payment Systems Regulator and the Financial Conduct Authority ("FCA")), enforce the civil prohibition. In February 2019, the FCA published its first decision finding that three asset management firms breached competition law by sharing information on initial public offerings before share prices had been set, issuing fines totalling over £400,000.

Only the CMA and Serious Fraud Office ("SFO") enforce the criminal offence in England, Wales and Northern Ireland, and the Crown Office Procurator Fiscal Service enforces such offence in Scotland.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The CMA or a sectoral regulator may conduct an investigation if there are reasonable grounds for suspecting that the Competition Act has been infringed, usually based on a complaint or leniency application, or its own intelligence. The CMA can then issue a Statement of Objections ("SO") to the relevant parties, setting out its allegations and giving them an opportunity to be heard. Depending on the outcome, an infringement decision may be issued. The CMA may also choose to convert a civil investigation into a criminal one, or conduct a parallel criminal investigation.

1.5 Are there any sector-specific offences or exemptions?

The Competition Act excludes certain agreements from the Chapter I prohibition, such as agreements: (i) relating to the production and trade of agricultural products; and (ii) subject to competition regulation under other legislation, including the

Financial Services and Markets Act 2000, the Broadcasting Act 1990 and the Communications Act 2003. The Secretary of State may order that the Chapter I prohibition not apply where there are exceptional and compelling public policy reasons.

No sector-specific exemptions apply to the criminal offence.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The civil offence applies to agreements actually (or intended to be) implemented in the UK, regardless of where they were entered into. The criminal offence only applies to agreements entered into outside the UK if they are in fact implemented in whole or part in the UK. This implementation test can be satisfied if there are affected sales in the UK.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

Under Sections 26, 26A, 27, 28 and 28A of the Competition Act, the CMA has the following investigatory powers:

Investigatory Power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	Yes*	Yes*
Carry out an unannounced search of residential premises	Yes*	Yes*
Right to "image" computer hard drives using forensic IT tools	Yes	Yes
Right to retain original documents	Yes	Yes
Right to require an explanation of documents or information supplied	Yes	Yes
Right to secure premises overnight (e.g. by seal)	Yes	Yes

Please note: * Searches of business and residential premises with a warrant require the authorisation of the High Court, the Competition Appeal Tribunal ("CAT") or another body independent of the CMA. In a civil investigation, the CMA can also visit business premises without a warrant if it has a reasonable suspicion that these are or have been occupied by a party to a suspected infringement, but will have limited powers (i.e. no ability to search, only to request and take copies of/extracts from documents).

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

In civil investigations, the CMA and sectoral regulators have the power to take original documents where necessary to preserve them or where it is not reasonably practicable to make copies. Original documents must be returned within three months.

For criminal investigations, the CMA/SFO will generally always take original documents.

2.3 Are there general surveillance powers (e.g. bugging)?

The CMA has powers of directed surveillance and can make use of covert human intelligence sources to investigate infringements of the Competition Act and the Enterprise Act.

In criminal investigations, the CMA/SFO has the power to use intrusive surveillance, including bugging.

2.4 Are there any other significant powers of investigation?

In criminal investigations only, the CMA/SFO has the power to access communications data (including telephone and message records) of the individuals under investigation.

The CMA runs a whistle-blower programme, allowing individuals who are aware of the existence of a cartel to receive up to £100,000 for providing significant "inside information" about such cartel. Individuals actively participating in the cartel would not be entitled to any financial remuneration when blowing the whistle, but will benefit from immunity from prosecution by submitting a leniency application. During the period between 1 April 2019 and 31 March 2020, 16 "qualifying disclosures" were made under this tool.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Searches of business and/or residential premises will be conducted by CMA officers and other assisting third parties named on the search warrant. The occupiers of the premises can request the presence of a legal adviser, for whom CMA officers will ordinarily wait a reasonable time to arrive. Where the CMA has not given prior notice about the search, but an in-house lawyer is on the premises, the CMA can conduct their search irrespective of whether such lawyer specialises in competition law.

While the legal advisers arrive, the CMA may take necessary precautions to prevent tampering with evidence or warning other businesses about the investigation (e.g. suspending external email or calls or sealing filing cabinets).

In November 2017, Concordia sought to discharge or vary parts of a CMA search warrant, which the CMA had argued was justified due to new information which it refused to share on public interest immunity grounds. The High Court confirmed that the CMA must produce all information, including that protected by public interest immunity, to the Court when applying for a warrant, and granted the warrant to the CMA on that basis. A subsequent appeal by Concordia was rejected in January 2019.

2.6 Is in-house legal advice protected by the rules of privilege?

Under English law, privileged communications are communications either between a professional legal adviser and client or those made in connection with, or in contemplation of, legal proceedings, including communication with both in-house

and private practice counsel. In February 2020, the Court of Appeal confirmed in *Civil Aviation Authority v R* that the dominant purpose of the communication must be to give or obtain legal advice in order to attract legal privilege. The English rules on privilege apply where the CMA conducts an inspection on its own initiative or, until the end of the transitional period, on behalf of the EC or a competition authority of another EU Member State.

When the CMA is only assisting the EC with an investigation in the UK, EU rules of privilege apply, meaning legal advice provided by in-house counsel and lawyers not qualified in an EU Member State are not privileged.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The CMA does not have the power to search a person and in civil investigations cannot force a business to provide answers that would result in an admission of a competition law infringement.

The CMA/SFO has the power to compel individuals to answer questions if they relate to a criminal cartel investigation; however, any statements made in response to mandatory interview questions may not be used against that person upon prosecution for the cartel offence.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

Civil and criminal sanctions apply to individuals and undertakings for non-compliance with or obstruction of the CMA's investigation powers. In March 2019, the CMA fined Fender Musical Instruments Europe Limited £25,000 for such obstruction due to a senior officer concealing notebooks during a dawn raid. The company handed the notebooks to the CMA three weeks later.

Persons who fail to comply with the CMA's investigations (intentionally or without reasonable excuse), such as failing to answer questions or produce documents, and failing to provide adequate or accurate information in response to a request, may be subject to a fixed penalty of up to £30,000 and/or a daily penalty of up to £15,000.

Sanctions of a criminal nature include fines or even imprisonment for a person:

1. intentionally obstructing an officer investigating with or without a warrant;
2. intentionally or recklessly destroying, disposing of, falsifying or concealing documents, or causing or permitting such things to happen; or
3. knowingly or recklessly supplying information which is false or misleading in a material respect either directly to the CMA, or to anyone else, knowing it is for the purpose of providing information to the CMA.

Penalties are usually financial; however, imprisonment for up to two years is also possible.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The CMA can impose fines on companies that have intentionally or negligently breached the Chapter I prohibition, up to a maximum of 10% of their worldwide turnover. Such agreements are void and unenforceable.

Generally, companies with a combined UK annual turnover below £20 million will benefit from immunity from fines; however, this will not apply to breaches of Article 101 TFEU or price-fixing agreements.

The CMA must provide a Draft Penalty Statement to the parties setting out how the fine has been calculated and giving the parties a reasonable period to make representations:

1. Starting point: the maximum starting point for the fine calculation is 30% of relevant turnover (the turnover of the undertaking in the product and geographic market affected by the infringement, in the undertaking's last financial year preceding the end date of the infringement). Such starting point will be determined based on the seriousness of the infringement – more serious offences are likely to have a starting point of 21–30%. This is then subject to five different stages of adjustment, set out below.
2. Duration: for infringements lasting more than one year, the fines cannot be multiplied by more than the number of years of the infringement.
3. Aggravating or mitigating factors: aggravating factors include: (i) role as a leader or instigator; (ii) involvement of directors and senior management; (iii) recidivism; and (iv) failure to comply with a warning/advisory letter. Mitigating factors include: (i) acting under severe duress; (ii) genuine uncertainty as to whether the agreement or conduct constituted an infringement; (iii) termination of the infringement as soon as the CMA intervenes; and (iv) cooperation with the CMA's investigation.
4. Deterrence and proportionality: the fine should have a deterrent effect on the undertaking on which it is imposed and on other undertakings in the same field, which is assessed based on an undertaking's financial size and position, over a period of three years.
5. The overall cap: the fine will be adjusted to ensure that it does not exceed 10% of worldwide turnover.
6. Leniency or settlement discounts: any such discounts will be applied at the final stage.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

For implementing or causing the implementation of cartel arrangements after 20 June 2003, individuals can face up to five years' imprisonment and/or an unlimited fine. Such prosecutions were first imposed in *Marine Hoses* in June 2008. Most recently, in September 2017, one individual was sentenced to two years' imprisonment suspended for two years, having pleaded guilty to dishonestly agreeing to divide supply and customers and fix prices in *Precast Concrete Drainage Products*.

Directors can also be disqualified for up to 15 years where they knew, or ought to have known, that their company was guilty of an infringement of UK competition law. The CMA can either apply to the court for such orders, or agree a disqualification undertaking with the relevant director. Since its first director disqualification in *Posters and Frames* in December 2016, the CMA has applied director disqualifications in four other cartel cases (*Estate Agent*, *Pre-cast Concrete Drainage Products*, *Non-residential Premises Refurbishment*, and most recently in March 2021, *Rolled Lead Roofing Materials*). In July 2020, the High Court upheld the CMA's seven-year disqualification of Michael Martin in the *Estate Agent* cartel following a four-day trial, despite Martin's absence from the infringing meetings – his knowledge of the agreement and failure to prevent or end the company's participation was deemed sufficient to justify his disqualification.

The CMA's January 2020 "*Guidance on the functions of the CMA under the Withdrawal Agreement*" suggests that the Competition

(Amendment etc.) (EU Exit) Regulations 2019 will be amended so that the CMA will be able to rely on conduct held to have infringed Article 101 TFEU during the transitional period for the purposes of making a director disqualification application.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Financial hardship can, in exceptional circumstances, be a reason for a reduction of a fine, provided the undertaking has sufficient information to demonstrate that it is unable to pay the fine due to its financial position, including in relation to all parent or subsidiary entities. However, there can be no expectation that a fine will be adjusted on this basis.

3.4 What are the applicable limitation periods?

There are no limitation periods for public enforcement action for the criminal cartel offence under the Enterprise Act or for the civil cartel offence under Chapter I of the Competition Act.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Subject to a company's articles of association, a company can indemnify the legal costs and/or financial penalties imposed on a former or current employee.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

Employees or directors cannot be held liable by their employer for legal costs or fines imposed on the employer as a result of competition law breaches. The Court of Appeal found in *Safeway Stores Ltd v Twigger* that a company could not recover the fines from the employees or directors, as the Competition Act does not impose liability of any kind on the directors or employees for which it could be vicariously responsible, also justified by policy reasons (e.g. encouraging individuals to report cartel activity and incentivising companies to adopt a compliance culture).

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

A parent company will be liable if it is (i) directly involved in the infringement, or (ii) jointly and severally liable with its directly involved subsidiary.

Liability for direct involvement will arise where the parent participated in the cartel, directed the subsidiary's involvement, or was aware of the subsidiary's infringing conduct and did not actively intervene to end it. This is largely a question of fact, assessing whether the parent knew of or was complicit in the subsidiary's behaviour. Direct involvement may also arise out of specific contractual arrangements between the parent and subsidiary (e.g. agency).

The CMA will also determine whether direct liability should be jointly and severally shared with a parent entity. Such liability will be found where, at the time of the infringement, the parent company had the ability to, and actually did, exercise decisive influence over the conduct of the subsidiary in question.

The Office of Fair Trading ("OFT") in the *Construction Recruitment Forum* case endorsed the EU Courts' approach in *Akzo Nobel*, noting that where a parent company directly or indirectly owns 100% or close to 100% of the subsidiary, there is a presumption of decisive influence, rebuttable by the parent adducing evidence (relating, for example, to the economic, organisational and legal links between the parent and subsidiary), demonstrating that the subsidiary independently determined its conduct. The EU Courts have continued to broaden their approach to parental liability, most notably in *Akzo Nobel* (2017) and *Goldman Sachs* (2021). Whether the CMA will endorse such a broad approach is uncertain, particularly after the end of the transitional period when EU Court judgments will not be binding on the CMA.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

Part 3 of the OFT's September 2012 "*Guidance as to appropriate amount of penalty for substantive infringements of competition law*" (which the CMA applies) outlines the corporate leniency policy applied in the UK. A more detailed explanation of the CMA's leniency policy is outlined in the OFT's July 2013 guidance on "Applications for leniency and no-action in cartel cases".

The three types of leniency include:

1. Type A: The applicant must be the first applicant and there must not be a pre-existing investigation by the CMA. The information provided must enable the CMA to take forward a credible investigation, and the company/individuals involved must provide all relevant information, accept participation in the cartel, cooperate with the CMA and cease participation in the cartel. Applicants that successfully meet this threshold will receive corporate immunity (no fine), blanket immunity from criminal prosecution for cooperating current or former individual employees/officers, and director disqualification protection. Type A immunity is unavailable to applicants that coerced other undertakings to participate in the cartel.
2. Type B: The applicant must be the first in a pre-existing investigation. Information provided must add significant value to the investigation, and the applicant must comply with the other conditions for Type A above. The applicant will benefit from discretionary corporate immunity from financial penalties, or percentage fine reductions. Cooperating current or former individual employees and directors could benefit from discretionary immunity from criminal prosecution ("blanket" immunity or otherwise). Directors could benefit from protection against disqualification provided corporate immunity or a leniency reduction is granted. Type B leniency/immunity is unavailable to applicants that coerced other undertakings to participate in the cartel.
3. Type C: Available for applicants who are coercers and/or not the first to apply, regardless of whether there is a pre-existing investigation. Information must add significant value to the investigation. Applicants will benefit from a discretionary reduction in fines of up to 50%, and discretionary immunity from criminal prosecution for specific individuals, to be agreed with the CMA. Director disqualification protection is available if a corporate leniency reduction is granted.

In November 2017, the CMA issued an information note clarifying the process behind handling leniency applications across regulated sectors. The note confirms that the CMA should

always be approached first in order for parties to secure their place in the leniency "queue" – this position will then determine corresponding positions with other regulators, without the need to submit concurrent leniency applications. The regulators will then cooperate closely throughout the application process, with the CMA having responsibility for all initial inquiries, and other regulators having responsibility for confirming any markers/leniency applications. The CMA remains solely responsible for assessing criminal immunity applications.

The CMA's January 2020 "*Guidance on the functions of the CMA under the Withdrawal Agreement*" confirms that the CMA's leniency regime will remain unchanged after the end of the transitional period. In September 2020, the CMA published a short addendum to its leniency guidance confirming that it would no longer expect to grant immunity or fine discounts of more than 50% to Type B applicants in resale price maintenance cases.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

In order to secure a Type A "marker", an applicant can approach the CMA on a hypothetical no-names basis to confirm that Type A immunity is available. The applicant should identify a "concrete basis for the suspicion" of a cartel and have a "genuine intention to confess". If the CMA confirms availability, the undertaking must make an immediate application and provide its identity. A discussion of perfecting the marker then follows. A similar approach may be taken to secure a Type B marker, but without a requirement to make an immediate application once the CMA confirms availability.

In order to "perfect" a marker for Type A immunity, the applicant must provide the CMA with all available information, giving a sufficient basis to take forward a credible investigation. For Type B immunity/leniency or Type C leniency, applicants must provide all information to add significant value to, and genuinely advance, the CMA investigation.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Yes. However, certain parts of the process must be in writing, e.g.: (i) all pre-existing evidence of the cartel; (ii) witness signatures confirming the accuracy and authenticity of their statements; and (iii) leniency agreements.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

In cases where the CMA launches a civil investigation, the name of the party who applied for leniency and the information it has submitted on which the CMA intends to rely will be set out in the SO issued to the other parties to the proceedings, as well as during the course of access to file. The leniency applicants and the nature of certain leniency evidence submitted will be included in the public version of any infringement decision. Leniency statements are protected from disclosure in national proceedings in line with Article 6 of Directive 2014/104/EU ("Damages Directive"), a provision incorporated into UK law (see below at question 8.1).

Although the UK courts have a history of enforcing wide pre-trial disclosure (e.g. in follow-on claims related to the EC's *Trucks* case), in recent follow-on claims related to the EC's *Forex* decision, the High Court rejected the claimants' request for a disclosure of documents related to a time period not covered by the decision.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

The cooperation requirement, which requires parties to adopt a "constructive approach" and genuinely assist the CMA, is expected to continue until the conclusion of any action brought by the CMA, extending to the conclusion of any appeals. The CMA may withdraw leniency in the event of non-compliance with such obligations.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

The CMA operates a "leniency plus" policy. If a firm is already cooperating with one cartel investigation, and comes forward with information and obtains immunity in relation to a second cartel, it may receive an additional reduction in the penalty for the first cartel. Reductions are unlikely to be high and will depend on factors such as the amount of effort by the applicant to uncover the second cartel and whether the CMA would have been likely to discover it in any event.

The CMA does not operate a "penalty plus" policy.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Yes, see above at question 2.4. A "no-action" letter may also be granted, where an individual whose employer has taken part in cartel activity is the first to report cartel conduct directly to the CMA in return for immunity from prosecution and/or director disqualification. In such instances, the relevant company may lose the chance to apply for Type A or B immunity.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Once the CMA considers that the evidential standard for issuing an SO is met, it has the discretion to discuss the possibility of a settlement with the defendants. To be eligible for a settlement, the defendant must:

1. make a "clear and unequivocal" admission of the infringement;
2. terminate its involvement in the infringement;
3. confirm that it will pay a penalty set at a maximum amount, including a discount for settlement; and
4. agree to procedural cooperation with the CMA.

Additional case-specific conditions may also be imposed. Settlement discount is capped at 20% if settlement occurs before the CMA has issued an SO, and at 10% thereafter. The settlement procedure is streamlined, with no oral hearings or written responses to the SO, and only limited access to file. Where a settling party appeals the infringement decision, it ceases to benefit from the settlement discount.

In October 2019, the CMA fined three construction companies £36 million for their participation in a seven-year cartel in a hybrid settlement case, where two of these companies settled with the CMA. Two firms also settled with the CMA and received reduced fines of £1.5 million and £8 million respectively in the *Roofing Lead* cartel.

The CMA also operates a commitment procedure where parties can provide binding commitments to cease and desist conduct or behave in a certain manner, instead of receiving an infringement decision and fine. Revised guidance on this procedure was published in January 2019.

7 Appeal Process

7.1 What is the appeal process?

Decisions can be appealed to the CAT in the first instance, a specialist competition tribunal that determines appeals from decisions applying the competition provisions "on the merits" (both law and fact; and both liability and quantum). The CAT may remit the decision to the CMA for reconsideration or reach its own decision which supersedes that of the CMA.

Further appeals on points of law or quantum of a penalty are available at the Court of Appeal in relation to CAT proceedings in England and Wales with the permission of the CAT or the appellate court. CMA decisions may also be challenged under judicial review procedures before the High Court.

7.2 Does an appeal suspend a company's requirement to pay the fine?

Yes, until the appeal is determined.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Yes; however, any cross-examination can be limited by the CAT as it deems appropriate.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Both follow-on and stand-alone claims can be brought before the CAT or the High Court.

Follow-on actions rely on a decision taken by either the CMA or the EC establishing a breach of competition law, meaning the claimant is only required to prove that it suffered damage as a result. Stand-alone claims will only succeed if the claimant establishes that the defendant breached competition law, and that it suffered loss as a result. The CAT may grant injunctions as regards both stand-alone and follow-on actions, and such actions may be brought in the civil courts by way of a breach of statutory duty claim.

In March 2017, the UK incorporated the Damages Directive into national law by way of the Competition Act and Other Enactments (Amendment) Regulations 2017. Changes include: the introduction of a rebuttable presumption that cartels cause harm; and the possibility of exclusion from joint-and-several liability between infringing companies for small and medium-sized entities ("SMEs") and immunity recipients. Substantive provisions will only apply to claims where both the infringement and harm occurred post-9 March 2017, whilst procedural provisions will apply to all proceedings brought post-9 March 2017. This may lead to some uncertainty in UK courts.

Parties subject to an investigation or infringement finding may enter into a voluntary redress scheme under the Consumer Rights Act 2015, to voluntarily compensate parties suffering loss as a result. A fast-track procedure for bringing claims is also available to SMEs, where a hearing takes place within six months and the CAT can impose caps on the parties' costs.

8.2 Do your procedural rules allow for class-action or representative claims?

Collective proceedings can be brought when approved by the CAT. The claimants must have "the same, similar or related issues of fact or law", the matter in dispute must be "suitable to be brought in collective proceedings", and the "representative" bringing such proceedings must be regarded as "just and reasonable". The CAT's collective proceedings order ("CPO") will stipulate whether the class will be defined using the "opt-in" (the representative brings a claim on behalf of all parties who have expressly decided to participate) or "opt-out" (the representative brings a claim on behalf of all parties who fit a particular description, unless some parties expressly choose to be excluded) models.

A key judgment on this issue relates to the collective claim brought by Walter Merricks on behalf of consumers suffering overcharges as a result of MasterCard's multilateral interchange fees ("MIFs"). The CAT's refusal to approve this class action in 2017 was rejected by the Court of Appeal in April 2019, which found that the CAT imposed too high a standard in relation to the evidence required at the certification stage and only needed to be satisfied that the claimant's data method was "capable of, or offer[ed] a realistic prospect of, establishing loss to the class". MasterCard appealed this judgment to the Supreme Court, arguing in a May 2020 hearing that Merricks had failed to provide supporting data for the calculation of the class-wide loss and how such loss would be distributed. The Supreme Court in its judgment largely agreed with the Court of Appeal, concluding that the CAT made several errors of law and reinforcing a relatively low bar for successful collective actions by noting that, for example, a collective proceeding should not be prevented from going to trial due to difficulties in quantifying damages. This case is informative for any future collective claims – indeed, the CAT's approval of two collective follow-on claims brought in July 2018 in respect of the EC's *Trucks* decision was put on hold pending this judgment.

Approval requests for two opt-out claims against multiple banks involved in the EC's *Forex* cartel will also be jointly heard by the CAT in July 2021, where the CAT will decide whether a CPO should be made and, if so, to which of the two class representatives.

8.3 What are the applicable limitation periods?

The limitation period is six years for stand-alone or follow-on claims before the High Court or CAT which relate to loss or damage suffered, or arise as a result of an actual or alleged competition law infringement occurring, on or after 9 March 2017. Such limitation period runs from the later of: (i) the day on which the infringement of competition law that is the subject of the claim ceases; and (ii) the claimant's day of knowledge (i.e. the day on which the claimant first knows or could reasonably

be expected to know: (a) of the infringer's behaviour; (b) that the behaviour constitutes a competition law infringement; (c) that the claimant has suffered loss or damage arising from the infringement; and (d) the identity of the infringer). Such limitation period will be suspended while the competition authority's investigation is ongoing, and for at least one year after the conclusion of such investigation.

The same six-year limitation period also applies to: (a) stand-alone or follow-on claims before the High Court relating to loss or damage suffered/resulting from an infringement occurring *before* 9 March 2017; and (b) stand-alone or follow-on claims before the CAT related to a cause of action accruing between 1 October 2015 and 9 March 2017. This period runs from the date of the accrual of the cause of action in accordance with Section 2 of the Limitation Act 1980.

The limitation period is only two years before the CAT in respect of stand-alone or follow-on claims related to a cause of action accruing before 1 October 2015. This period runs from the later of the date on which the infringement decision is final, or on which the cause of action accrued.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

The Competition Act recognises passing-on damages for overcharges and underpayments. MasterCard's attempt to employ the defence in 2016, alleging that Sainsbury's passed on the overcharge to customers, was rejected by the CAT on the basis that MasterCard did not demonstrate: (i) an identifiable (and causally connected) increase in retail prices for consumers; and (ii) that there was another class of claimant to whom the overcharge had been passed on. This finding was dismissed by the Supreme Court in June 2020 (see question 8.6 below).

The burden of proving that an overcharge has been passed on rests with the entity from whom damages are being sought. In July 2019, the EC published "*Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser*" which provide practical guidance to assist national courts in estimating the share of the overcharge passed on.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

In civil courts, costs usually follow the event, meaning that the losing party will ordinarily have to pay a proportion of the costs of the winning party. This ultimately remains at the court's discretion. The CAT does not have specific rules on costs, but may make any order it thinks fit on costs at any point in the proceedings.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

The first successful stand-alone claim was brought by Sainsbury's against MasterCard, relating to MasterCard's imposition of UK MIFs. MasterCard was ordered to pay £68.5 million in damages by the CAT on appeal. This judgment (amongst other High Court findings relating to Visa and Mastercard's MIFs) was subsequently appealed to the Court of Appeal, which in July 2018 confirmed that the MIFs did breach Article 101(1) TFEU and remitted the cases back to the CAT to assess a potential application of the Article 101(3) TFEU exemption, as well as the quantum of damages.

Following an appeal by Visa and MasterCard, in June 2020 the Supreme Court upheld the majority of the Court of Appeal's findings, concluding that: (a) the Court of Appeal was bound by the Court of Justice of the EU's judgment which annulled MasterCard's appeal against the original EC decision, and was therefore correct in finding that the MIFs amounted to a restriction of competition contrary to Article 101(1) TFEU; (b) parties seeking to rely on the Article 101(3) TFEU exemption are required to substantiate and evaluate the efficiencies they claim arise out of their conduct, and verify the link between such efficiencies and the anti-competitive conduct itself (including by providing detailed, empirical evidence and analysis); and (c) the "fair share" requirement of the Article 101(3) TFEU exemption was not met as the retailers were not fully compensated for the harm inflicted (due in particular to the two-sided nature of the market). However, the Supreme Court ruled that the Court of Appeal was wrong to require a greater degree of precision from MasterCard and Visa as defendants in their quantification of the level of pass-on than would be required of a claimant. The cases have been remitted back to the CAT for the specific determination of damages, together with a rehearing on the Article 101(3) TFEU issue as regards Sainsbury's claim.

In May 2020, Arcelik, an electrical-appliance manufacturer, announced it received out-of-court settlements of £20.15 million and €22.8 million from members of the *Cathode Ray Tube* cartel. Arcelik had filed a claim before the High Court in December 2018.

Many other follow-on damages claims, including against participants in the EC's *Trucks*, *Cathode Ray Tubes*, *Air Cargo*, *Maritime Car Carriers* and *Forex* cases, are ongoing before the UK courts.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

In August 2020, the CMA commenced a public consultation on proposed revisions to its guidance on procedures for running investigations under the Competition Act. Following this consultation, the CMA updated its guidance in November 2020, making minor amendments to the wording of current procedures to ensure increased transparency at case opening, the possibility for Draft Penalty Statements to be sent with statements of objections, and other clarifications.

Please see questions 1.1, 3.1, 4.1 and 9.2 for guidance issued by the CMA in relation to the UK's withdrawal from the EU.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

Brexit: 2021 is the CMA's first year as a stand-alone regulator outside of the EU. The CMA's 2021–22 Annual Plan highlights that it has "taken on new responsibilities at the end of the EU Exit transition period", including clamping down on cartels. Indeed, as explained in response to question 1.1 above, as the transitional period has ended, the CMA will no longer apply Article 101 TFEU and is able to commence its own cartel investigations on the basis of UK law alone. In the CMA's view, this will increase its engagement with other competition regulators worldwide and enhance its presence on the global competition enforcement stage.

Digital units: The CMA launched a pro-competition Digital Markets Unit ("DMU") in April 2021. Its aim is to oversee plans to give consumers more choice and control over their data, promote online competition and crack down on unfair practices. It will look at how codes of conduct could work in practice to govern the relationship between digital platforms such as Google and Facebook, and groups such as small businesses which rely on them to advertise or use their services to reach their customers. The UK government intends to consult on the form and function of the DMU later in 2021 and legislate when parliamentary time permits, which is not expected to be before 2022.

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

Corporations and individuals may face both civil and criminal penalties under U.S. federal antitrust laws, which prohibit economic agreements that unreasonably restrain free trade. Section 1 of the Sherman Act prohibits "[e]very 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". Section 4 of the Clayton Act enables private parties (including state and local governments) to bring civil actions for damages because of Sherman Act violations.

1.2 What are the specific substantive provisions for the cartel prohibition?

To convict a defendant for a criminal violation under Section 1 of the Sherman Act, the government must prove four elements beyond a reasonable doubt: (1) an agreement or concerted action; (2) between two or more potential competitors; (3) in an unreasonable restraint of trade; and (4) in or affecting interstate commerce or commerce with foreign nations.

Agreement or Concerted Action. An agreement, defined as an understanding or meeting of the minds between competitors, is the "essence" of a Sherman Act violation. The agreement does not need to be express or involve overt actions; tacit understandings are sufficient (although still subject to the reasonable doubt standard identified above). Evidence used to prove this element of the offence may include direct evidence, such as testimony from participants or other witnesses and communications with competitors, or circumstantial evidence, such as identical bidding behaviour.

Between Competitors. The parties must carry out business in the same product and geographic market to qualify as competitors. Products do not have to be identical to be considered part of the same market; a product market consists of all goods or services that buyers view as close substitutes. To qualify as a competitor, companies do not have to actively participate in the market, but they must be capable of participating.

Unreasonable Restraint of Trade. Under the rule of reason, which is the default doctrine for determining if a restraint is "unreasonable", conduct is unreasonable when its restraint on trade is greater than its procompetitive effects. Courts have found certain types of agreements to be illegal *per se* because of the harmful effect these arrangements have on competition. These agreements include, but are not limited to, price fixing, bid rigging and market division. In recent years, the government has shown a willingness to criminalise conduct that was previously pursued civilly. For example, the government has stated that it intends to pursue "no-poach" agreements criminally, although it is unclear if the government's public statements adequately put companies and their employees on notice of the change. If an agreement is *per se* illegal, the defendant is foreclosed from arguing either against the agreement's alleged adverse effects on competition or for the agreement's procompetitive justifications. With very few exceptions, *per se* violations are the subject of criminal investigations and prosecutions. Other agreements, such as joint ventures or participation in standard-setting organisations, that are not *per se* illegal, are subject to the rule of reason. Because of difficulty in proving beyond a reasonable doubt that conduct is unreasonable compared to its procompetitive effects, the Department of Justice ("DOJ") typically only prosecutes *per se* violations criminally.

Effect on Interstate and/or Foreign Commerce. Only agreements that take place in or affect interstate or foreign commerce are subject to federal antitrust laws. The interstate commerce test is met if products or services related to the agreement move across the borders of any state within the United States. The foreign commerce requirement is described in question 1.6.

As stated, the government must prove all four of the above elements in a criminal prosecution beyond a reasonable doubt. The government also must prove that either the agreement itself or an act in furtherance of the agreement occurred within the federal district where the criminal indictment is returned for trial. In a civil case, each element must be proven by a preponderance of the evidence.

1.3 Who enforces the cartel prohibition?

The Antitrust Division of the DOJ ("Division") is the sole enforcer of the antitrust laws with respect to criminal violations of the cartel prohibition. The Federal Trade Commission ("FTC") can challenge certain coordinating conduct pursuant to Section 1, but if it uncovers evidence of a criminal cartel violation in its investigations, it ordinarily will refer the matter to the Division. In addition, state attorneys general and private plaintiffs (as well as the Division) can bring a civil action for injuries resulting from a cartel violation. These other parties (including the FTC) can seek treble damages for injuries suffered, but only the Division can seek criminal fines for the cartel violation under federal antitrust laws. In addition to federal antitrust laws, some state antitrust laws give state attorneys general the ability to prosecute antitrust violations criminally as well.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

When the Division learns of a potential antitrust violation, its first step is usually to convene a grand jury, an independent investigatory body described in question 2.2. The Division can use the grand jury to gather relevant documentary and testimonial evidence. Throughout the investigative process, the Division may also rely on the Federal Bureau of Investigation ("FBI") to execute search warrants, conduct surveillance and interview witnesses.

Once the Division has gathered sufficient evidence of the potential antitrust violation, it may present this evidence to the grand jury. If the grand jury determines that a probable cause exists to support criminal charges, they will issue an indictment charging the defendant and initiating formal criminal proceedings. Following the indictment, and assuming jurisdiction, the defendant must appear before a federal court to enter a plea of guilty or not guilty on the charges. If the defendant decides to plead not guilty, the case will proceed to trial where the defendant has the right to be tried by a jury. If, after trial, the defendant is found guilty, the judge will issue a sentence according to the United States Federal Sentencing Guidelines ("Guidelines").

In many cases, defendants enter into negotiated pleas with the Division that waive their right to the grand jury. In those cases, the Division does not have to seek an indictment from the grand jury and instead files an information charging the defendant. Plea bargaining is explained in question 6.1.

1.5 Are there any sector-specific offences or exemptions?

Federal antitrust laws do not identify sector-specific offences, although exemptions do apply to certain types of activities. Most of the exemptions are created by statutes. For example, the Merchant Marine Act exempts ocean shipping carrier companies from antitrust prosecution, while the McCarran-Ferguson Act largely exempts insurance companies. In addition to the statutory exemptions, court-created doctrines may protect specific entities and activities. For example, states and certain state-supervised entities are exempt under the Parker Immunity doctrine, while joint lobbying or litigation efforts between competitors are protected under the Noerr-Pennington doctrine. Major League Baseball was granted an exemption to antitrust laws in a 1922 Supreme Court case. Congress limited the exemption slightly in 1998 with the Curt Flood Act, which repealed the exemption with respect to labour issues.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The Foreign Trade Antitrust Improvements Act ("FTAIA") limits the reach of antitrust laws with regard to foreign commerce. Under the FTAIA, only foreign conduct that has a "direct, substantial and reasonably foreseeable" effect on U.S. commerce with foreign nations may be prosecuted. However, U.S. courts have not settled the meaning of "direct, substantial, and reasonably foreseeable". Some courts require the domestic effects to be an immediate consequence of the defendant's activity, while others only require a reasonably proximate causal nexus between the alleged conduct and the domestic effects. There also remains some question as to whether the FTAIA applies with the same force to civil actions as to criminal actions.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

When investigating a cartel allegation criminally, the DOJ (through the grand jury's subpoena power, discussed further in question 2.2) can order the production of specific documents or information as well as carry out compulsory interviews with individuals. Additionally, the DOJ can carry out unannounced searches of business and residential premises during which time they can seize information and documents (retaining and/or copying the same) as well as secure and seal off the premises for the duration of their search.

When investigating a cartel allegation civilly, the DOJ or FTC can issue a civil investigative demand ("CID"), a statutorily authorised device that allows the agencies to compel the production of information and documents. The agencies can serve a CID on any natural or juridical person whom the agencies have "reason to believe" might have material or information "relevant to a civil antitrust investigation". Using a CID, the agencies can compel the production of specific documents or information as well as demand written or oral testimony (in the form of interrogatories or depositions). However, CIDs cannot be used to authorise searches of business or residential premises and the accompanying seizure, securing, and/or copying of materials on those premises.

As noted above, a number of entities aside from the DOJ and FTC can pursue civil actions for injuries resulting from cartel conduct. While these actions are not in themselves "investigations", the civil process allows for extensive discovery that includes, among other things, requesting that an opposing party produce documents, answer interrogatories and make witnesses available for deposition, essentially allowing these other entities similar access to the information which the DOJ or FTC would receive through a CID.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

In a criminal investigation, the Division must convene a grand jury, an independent body vested with the power to issue subpoenas. Through this subpoena power, the Division has broad ability to investigate alleged conduct. The DOJ has significant discretion which it can (and routinely does) implement in carrying out an investigation. As a result, individuals (even those on the fringe of an investigation) may face substantial burdens in connection with sitting before a grand jury.

Documentary Evidence and Compulsory Interviews. Grand juries can issue subpoenas to compel the production of documentary (*subpoena duces tecum*) or testimonial (*subpoena ad testificandum*) evidence. If a witness refuses to cooperate with or testify before the grand jury, he or she can be held in contempt and subjected to fines or imprisonment.

Searches of Premises. The Division must obtain a search warrant from a judge before conducting a search of company or residential premises or seizing documentary evidence. To obtain a search warrant, the Division must submit an affidavit stating facts that show probable cause that a crime has been committed, that evidence of the crime exists, and that the relevant evidence is on the premises to be searched. However, the government may take possession of documentary evidence even without a search warrant if the party being searched voluntarily hands over the evidence. The Division can also conduct, without a

search warrant, surprise visits to individuals that are not represented by counsel. These individuals are not required to cooperate with the Division and do not have to permit the Division to search their property.

Informal Witness Interviews. The Division can interview an individual informally at any time if the individual is not represented by counsel. If the individual is represented by counsel, the Division must coordinate with counsel before conducting an interview. Usually, these interviews will occur either at the company's premises (such as in the course of executing a search warrant) or at the employee's home. The locus of the interview could impact who questions the witness. While both Division attorneys and agents from the FBI may conduct an interview at an employee's home, it is Division policy that attorneys may not be present on company premises while agents execute a search warrant.

Companies might consider developing procedures to protect employees from negative consequences of a government search. In a search and seizure, the company may want to contact legal counsel immediately. It is helpful for employees to remain calm and vigilant, taking note of any items collected during the search. Additionally, individuals have the right to remain silent during informal interviews and may refuse to answer any questions without an attorney present. These conversations have as much weight as formal interviews and any false statement made during an informal interview is subject to prosecution.

2.3 Are there general surveillance powers (e.g. bugging)?

While the Division mainly relies on the grand jury process to collect evidence, it can work in conjunction with the FBI to utilise electronic surveillance, such as wiretaps, if it receives court authorisation. The Division's electronic surveillance can include monitoring and/or accessing electronic data, including text messages, instant message communications and social media accounts. Companies should be cognisant of the content of these communications, as the Division may use them as evidence in antitrust investigations. Given the increasing prevalence of messaging platforms – as well as the occasionally blurred line between personal and professional accounts – companies should consider implementing policies governing employee use of electronic communications, especially regarding interactions with competitors.

2.4 Are there any other significant powers of investigation?

Cooperating parties seeking plea agreements or immunity not only provide documents and testimony in excess of what the Division can obtain through the grand jury, but also may consent to wiretaps and other electronic surveillance that may be used to incriminate co-conspirators. Cooperating parties can be particularly devastating tools for building an antitrust case against an alleged violator because they often obtain persuasive evidence of criminal conduct. However, a defendant can refute this evidence. For example, a defendant can impeach a government's witness if the witness's testimony does not comport with other evidence in the case, including the witness's own prior statements.

Given that the Division places an emphasis on obtaining cooperation from companies accused of criminal violations, it is possible that the prevalence of cooperating witnesses seeking to gather evidence that implicates fellow conspirators will increase. However, the parallel focus on prosecuting individuals stemming from the Yates Memo (which is discussed further in question 6.1) could chill cooperation as well, resulting in fewer cooperating witnesses overall.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

When the Division obtains a search warrant, FBI agents will execute searches of residential and company property, usually at the same time as or just prior to service of a grand jury subpoena. This timing minimises the opportunity for the defendant to destroy evidence while also incentivising targeted companies to seek leniency. The agents do not have to wait for counsel to arrive, but may wait if specifically requested. Also, the agents are limited in their search by the warrant itself, which must describe the exact location to be searched as well as identify with particularity the evidence to be seized.

2.6 Is in-house legal advice protected by the rules of privilege?

The attorney-client privilege protects communications between in-house counsel and company employees made for the purpose of seeking or providing legal advice. Companies should be aware that not all communications involving in-house legal counsel are privileged – only those with the purpose of seeking legal advice are covered. Communications strictly about business are not protected. Therefore, an email is not considered privileged simply because an attorney is copied; the communication must contain or seek legal advice. Companies should also be aware that an attorney's business advice ordinarily is not protected. For example, an employee requesting a lawyer's opinion about the legal issues posed by a merger likely would be covered by attorney-client privilege, while a conversation about the financial soundness of the merger would likely be considered unprotected business advice. Because of this, it may be helpful to keep discussions that seek legal advice separate from business discussions to strengthen any claim of privilege made during an investigation. Notwithstanding the foregoing, privilege rules in foreign jurisdictions can impact privilege claims in the United States. For example, internal company communications with an in-house lawyer in the European Union generally are not considered privileged under that jurisdiction's laws.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

Challenging a Subpoena. As noted above, the Division has broad grand jury powers, and it can be difficult to quash a subpoena if its subject has any connection to the alleged conduct. Even so, the Division can avoid imposing burdens upon potential witnesses by planning its investigation accordingly. For instance, with respect to scheduling, the Division may accommodate alternative dates for a witness who is not available on the date the subpoena identifies, particularly if the witness is not essential to the investigation. Furthermore, because the Division can compel the attendance of grand jury members under threat of imprisonment, it can avoid imposing an unnecessary burden on a witness (e.g., by cancelling a grand jury session if failing to meet quorum) by planning in advance.

Privileged Documents. If either party believes that privileged documents (e.g., documents containing legal advice) have been seized during a search, the Division must put procedures in place to ensure that attorneys and agents working on the case do not access those documents.

Privilege Against Self-Incrimination. An individual called to testify before the grand jury has the right to invoke the Fifth

Amendment's privilege against self-incrimination and confer with counsel outside the jury room. However, grand jury proceedings themselves are conducted in secret and witnesses have no right to counsel inside the jury room. Generally, the government will not seek the testimony of an individual who states an intention to invoke the privilege before the grand jury because, to compel the testimony, the government would be required to provide that individual with immunity. The privilege against self-incrimination generally does not apply to documentary evidence, although courts have recognised a narrow, derivative "act of production" privilege that can protect an individual from being required to produce documents when the act of production itself would be incriminating.

Jurisdictional Limitations. Because of jurisdictional limitations in the federal rules governing the service of subpoenas, the Division generally cannot serve subpoenas on individuals or companies located outside of the United States. However, if an individual or company does receive a subpoena and fails to respond, it is possible that the Division will cooperate with the relevant foreign government to enforce the subpoena or otherwise secure the requested materials.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

In criminal investigations, the government will bring obstruction of justice charges against individuals who attempt to impede enforcement efforts by destroying evidence or providing false information to the government. The Division has pursued a number of obstruction cases in recent years, suggesting increased enforcement on this issue. Individuals should also note that, while the Division has had limited success extraditing foreign nationals for antitrust violations, obstruction of justice is prosecutable in nearly every jurisdiction, and thus could serve as a basis for extradition.

In civil cases, obstruction may result in fines, jury instructions to make an adverse inference against the defendant, or other sanctions the court deems appropriate.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Under the Sherman Act, corporations that commit antitrust violations are subject to fines of up to $100 million. Alternatively, the corporation may be subject to penalties based on the unlawful gains or losses occasioned by anticompetitive activity. Federal law provides for fines of up to twice the gross amount that the antitrust co-conspirators gained through the violation or twice the gross amount that the victims lost through the violation, whichever is greater. These alternative fines can – and in many instances have – exceed the $100 million ceiling the Sherman Act establishes, although the government is required to prove the amount of gain or loss in these cases beyond a reasonable doubt.

When imposing criminal penalties for antitrust violations, the courts assess antitrust-violation fines based on the formula and guidance set forth in the Federal Sentencing Guidelines. The court begins the analysis by calculating 20% of the total volume of commerce affected by the antitrust violation, which is then taken as the base fine. Note, the Guidelines do not define "volume of affected commerce", nor do they specify how to calculate the figure. Consequently, the court has significant flexibility in determining the appropriate base fine.

The court next assigns the corporate defendant a "culpability score" reflecting the circumstances involved in the particular case. The Guidelines outline various factors that may bear on the culpability determination, including the company's criminal history, the role that high-level personnel played in the conspiracy, the company's efforts to develop an effective compliance programme, and the extent of the company's cooperation with the government's investigation. The culpability score correlates to minimum and maximum multipliers, which are then applied to the base fine to calculate a fine range. This range is merely advisory, however, and the court may upwardly or downwardly depart from the suggested range in setting the final fine.

The DOJ, for its part, typically seeks a sanction that falls within the range the Guidelines suggest. In special circumstances, the DOJ may recommend a downward departure from the range suggested by the Guidelines in recognition of a defendant's cooperation or assistance. The DOJ also can, and usually does, seek discounted fines against defendants who cooperate immediately following the leniency applicant (e.g., a company that was second to report its antitrust violation). Like the Guidelines ranges themselves, however, the DOJ's role in the sentencing process is only advisory, and the courts retain broad discretion in making the final determination as to the size of the penalty.

In recent years, the Division also has emphasised probationary periods for companies convicted of antitrust violations. If the Division believes that a company has an ineffective compliance programme or is continuing to employ culpable individuals, then it could argue that court-supervised probation is necessary to prevent recidivism. This probation could include a court-appointed monitor. With respect to compliance programmes, discussed further in question 4.1, the government has both prioritised their promotion and rethought how compliance programmes should affect both charging and sentencing outcomes, noting that even the best compliance cannot foreclose every potential violation.

In addition to these criminal fines, corporate defendants may be ordered to pay restitution to the victims of the conspiracy. Defendants with federal contracts may be subject to prosecution under companion criminal statutes, such as those prohibiting mail fraud or wire fraud, and any company may be disbarred from future participation in government contract work.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The Sherman Act provides for criminal penalties of up to $1 million and 10 years' imprisonment for individuals who commit an antitrust violation. Individuals also are subject to the alternative fine regime by which the DOJ may seek to impose monetary penalties of up to twice the losses or wrongful gains resulting from the conspiracy. Like corporate defendant penalties, fines against individuals are based in part on the volume of commerce affected by the unlawful activity, with typical individual fines falling between 1% and 5% of this figure. Individual sanctions are not multiplied by a culpability score, but the Guidelines provide that these fines should in all cases exceed $20,000.

The volume of affected commerce also guides the court's determination regarding sentences of imprisonment. Antitrust violations increasingly are punished on an individual level using jail time: between 2010 and 2019, an average of 47 individuals per year were charged with antitrust violations. Of those

convicted, average prison sentences for the same period were 18 months. The DOJ may recommend that the court impose terms of imprisonment below the suggested Guidelines ranges for defendants who provide substantial assistance to the government's investigative efforts. The DOJ may also make such recommendations pursuant to plea agreements.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

Criminal fines in corporate antitrust cases can be reduced to the extent necessary "to avoid substantially jeopardizing the continued viability of the organization". The Guidelines clarify that a defendant will be eligible for a reduction only if the court finds that the company would be unable to pay the minimum recommended fine, even if allowed the benefit of an instalment schedule. Additionally, the court may reduce the size of a criminal fine to ensure that the defendant company can pay restitution to the victims of the conspiracy.

The Guidelines require the courts to impose fines on individuals in antitrust cases unless the defendant can establish "that he is unable to pay and is not likely to become able to pay any fine". When determining the amount of the defendant's fine, the court may consider evidence of "the defendant's ability to pay the fine ... in light of his earning capacity and financial resources". The Guidelines provide that the courts may impose a lesser fine or waive the fine if the court finds that (1) the defendant is unable to pay and is not likely to ever become able to pay, or (2) imposing the fine would "unduly burden the defendant's dependents".

If a defendant wishes to pursue an "inability to pay" argument, a government-selected forensic expert will thoroughly review the defendant's books and records and may also request to interview company personnel. The process can be onerous and, even if the forensic expert finds in the defendant's favour, the court still can reject the forensic expert's findings at sentencing.

3.4 What are the applicable limitation periods?

Criminal antitrust actions are subject to a five-year statute of limitations. In cases involving prolonged conspiratorial activity, the statutory period begins to run after the termination of the conspiracy; that is, the point at which the purpose of the antitrust conspiracy has been achieved or abandoned. As stated in question 8.3, civil antitrust actions are subject to a four-year statute of limitations.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

Companies may pay for the legal costs which current and former employees incur during antitrust investigations. Generally, companies are prohibited from paying the financial penalties imposed on their employees, however, pursuant to state laws forbidding indemnification in cases involving wilful violations of the criminal law.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

In theory, an employer could hold a rogue employee liable for the costs associated with an antitrust violation; however, this scenario is unlikely under U.S. law. Vicarious liability allows plaintiffs to sue employers who benefit from their employees' misconduct, even if the misconduct in question was not at the employer's request. For this reason, a company seeking to hold its employee liable for antitrust sanctions or legal fees would be unlikely to succeed unless it could prove that the company was not involved in the violation, that it derived no benefit from the violation, and that the employee was not acting within the scope of his employment.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

In the United States, a parent company only becomes liable for the conduct of its subsidiary if the government (or civil plaintiffs) can pierce the corporate veil under an alter ego or agency theory. Specifically, the government must indict the parent along with its subsidiary and prove at trial that the subsidiary is an "alter ego" of the parent company or that an "agency" relationship exists.

As a general matter, in order to impose liability on a parent company based on the alter ego theory, the DOJ must show the following: (1) that there is such unity of interest and ownership that separate personalities of entities no longer exist; and (2) that failure to disregard their separate identities would result in fraud or injustice.

Under the agency theory, the DOJ must prove that the subsidiary was acting as an agent of the parent company. To prevail, the DOJ must show the following: (1) the parent company intended for the subsidiary (the alleged agent) to act on its behalf; (2) the subsidiary agreed to act as the parent company's agent; and (3) the parent company exercised total control over the subsidiary.

U.S. courts rarely pierce the corporate veil because there is a strong presumption that a parent company and its subsidiary are separate legal entities. Courts have zealously guarded the principle that a parent corporation is not liable for the acts of its subsidiaries and generally will not pierce the corporate veil except in the case of sham legal structures.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

The Division operates a Leniency Programme for both individuals and companies. The Leniency Programme underlies many of the Division's cartel investigations, with DOJ officials stating, "self-reporting under our leniency programme remains at high levels … increasingly, non-U.S. companies are reporting anticompetitive behaviour".

The Corporate Leniency Policy establishes two types of leniency, Type A and Type B, which incentivise companies to report antitrust violations through reduced sanctions. Critically, the Division will grant only one corporate leniency application per cartel conspiracy; thus, the programme may result in situations in which co-conspirators race to turn themselves into the government.

Type A and Type B leniency require that applicants confess fully to their participation in the conspiracy, take steps to terminate such participation, and agree to cooperate fully with the DOJ's investigative and enforcement efforts going forward. Successful applicants are awarded prosecutorial benefits, which vary depending on the form of leniency.

Type A leniency may be available under the following six conditions. The company must have: (1) voluntarily come forward before the DOJ became aware of any illegal conduct; (2) taken steps to terminate its participation in the illegal activity immediately upon its discovery of the conspiracy; (3) confessed fully and committed to providing complete, ongoing assistance to the DOJ's investigative efforts; (4) come forward as an entity, rather than through isolated confessions of executives; (5) made restitution to victims of the conspiracy where possible; and (6) not originated, led, or coerced others to participate in the illegal activity. A grant of Type A leniency confers automatic amnesty upon the company and its cooperating employees.

Type B leniency allows companies to apply for amnesty after the DOJ has become aware of illegal activity. The DOJ will grant this type of application only if it lacks the evidence to obtain a successful conviction against the applicant and it determines that leniency would not be unfair given the timing of the confession, the applicant's role in the conspiracy, and the nature of the illegal conduct. Additionally, companies must satisfy requirements (2) through to (5) of the above paragraph to qualify for the programme. If the DOJ grants the application, the company's employees will be considered for immunity from prosecution.

It is important to note, however, that in July 2019 the DOJ instituted a new policy for companies with strong corporate antitrust compliance programmes that do not qualify for leniency as the first to report. Under the new policy, corporate antitrust compliance programmes will now factor into prosecutors' charging and sentencing decisions and may allow companies to receive greater prosecutorial leniency from the Division. Prosecutors will consider the following factors in evaluating the effectiveness of compliance programmes: the design and comprehensiveness of the compliance programme; the company's culture with respect to compliance; the operational authority of those responsible for compliance; risk assessment, auditing and reporting protocols; the training of and communications with employees; and the discovery and remediation of violations, including the disciplining of employees.

While the effects of this new policy have yet to be seen in practice, it is possible the policy could result in the expanded use of deferred prosecution agreements ("DPAs") (discussed further in question 6.1). A company that is not eligible for Type A or Type B leniency, but is considering this option, should weigh the costs and benefits carefully, as DPAs could impose heavy burdens on the regulated party through strict control of business operations. Among other requirements, DPAs can mandate that a company terminate key employees, restructure business segments, and acquiesce to government oversight and monitoring.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

Yes, a company that confesses to an antitrust violation before its co-conspirators come forward can reserve its place as first in line for leniency by securing a marker for its application. To do so, the company must contact the DOJ with information about the antitrust violation and its potential role therein; the marker then will allow the company a finite period of time – for example, 30 days, to be extended on a rolling basis – to conduct a preliminary internal investigation into the nature of its role in the conspiracy. Because the leniency programme is only available on a "first in" basis, the marker system can play a critical role in determining which amnesty applications will be granted.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Companies may apply orally for leniency, and the DOJ does not specify that applications take any particular form. However, the DOJ may require applicants to turn over any documents relevant to their illegal activity.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

The Division protects the confidentiality of all information provided through leniency applications and will disclose the contents of an application only with the applicant's consent. These protections apply even against foreign antitrust agencies seeking information on applicants to the DOJ. The information in leniency applications may, however, be subject to discovery in criminal litigation. Additionally, civil plaintiffs routinely request (with success) documents used as part of a leniency application. To note, the government typically will seek to stay some or all discovery in a parallel civil case while its investigation is ongoing.

Leniency applicants also can make the strategic decision to disclose incriminating documents to private litigants pursuant to incentives established by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"). ACPERA provides that successful leniency applicants may limit their civil liability by cooperating with plaintiffs in private suits related to the government's enforcement actions. To satisfy the statutory requirements, a company seeking relief generally must begin to cooperate early in the government's investigation and must also produce to the private plaintiffs a substantially larger body of documents than would be required under typical discovery rules. Companies that provide satisfactory cooperation are subject only to actual damages suffered by the plaintiff. In the absence of ACPERA's civil liability limitation, the defendant, in civil actions, would be subject to statutorily authorised treble damages and joint-and-several liability with other co-conspirators.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

A company that seeks leniency is obligated to cooperate with the government's enforcement efforts until the DOJ's investigation has concluded. These obligations are set forth in a conditional leniency agreement which the DOJ can revoke at any time during the investigation. Upon the conclusion of the investigation, the DOJ will provide the company with a final letter indicating that the leniency application has been granted.

Whether a company has satisfied its leniency obligations will depend in part on the number of individuals the company makes available and the information they provide. The DOJ has attempted to revoke a conditional leniency agreement only once based on a company's alleged failure to promptly terminate its involvement in the illegal activity, but this attempt failed before the courts. As a result, the DOJ amended the terms of its standard conditional leniency agreements to provide that if the DOJ does revoke a company's conditional leniency agreement, the company cannot appeal the decision prior to the conclusion of the investigation.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Yes, the DOJ has policies that provide for both additional rewards for certain cooperating companies, "leniency plus", and harsher sanctions for companies that fail to comply fully with the DOJ in its investigations, "penalty plus". Under the former programme, a company that cooperates with the DOJ in one investigation may be eligible for special benefits if it also reports information about an additional antitrust violation occurring in a separate industry. A company that obtains amnesty plus status will not be fined in connection with the second conspiracy, nor will the DOJ prosecute any cooperating employees, officers, or directors for the offence. The Division also may seek reduced sanctions for the first offence.

Conversely, a company that cooperates with an investigation may be subject to the "penalty plus" policy if the DOJ discovers that the company has failed to disclose information about separate antitrust activity. The DOJ treats such nondisclosure as an aggravating factor and, therefore, may seek greater sanctions against the company at sentencing.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

The DOJ has programmes that allow individuals to contact the government in their individual capacities to report antitrust violations to the Division. Under current DOJ policy, an employee whistle-blower may be eligible for leniency or immunity if he reports antitrust activity of which the government was unaware and provides full cooperation with the DOJ. The employee cannot have originated or led the conspiracy in question, and he will not be granted immunity if he coerced others into participating in the illegal activity. Additionally, federal law prohibits companies from retaliating against employees who report corporate wrongdoing to the authorities.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

The Division frequently engages in plea bargaining rather than pursuing a matter to a contested trial. In a typical plea-bargaining agreement, the defendant pleads guilty to the antitrust violation and agrees to cooperate fully in the investigation. In return, the Division generally recommends a punishment less severe than the minimum of the range given by the Guidelines. The district court does not have to follow either the Division's recommendation or the Guidelines, but usually selects a sentence below the minimum of the Guidelines range for each offence.

Following a memo which the DOJ issued in September 2015 (often referred to as the "Yates Memo" in reference to its author, former Deputy Attorney General Sally Yates), the Division has placed a greater emphasis on accountability for individual defendants. Among other things, the original memo instructed Division attorneys to include a provision in plea agreements that requires a company to provide information about "all culpable individuals". Recognising that prosecutorial resources are limited, however, the previous administration narrowed that portion of the memo to apply to all individuals "substantially involved in or responsible for the criminal conduct" in an effort to make investigations more efficient. Whether the current administration continues this practice or further changes the policy has yet to be seen.

Regardless, each iteration of the memo so far has been consistent with the Division's position that, because it is seldom able to stop a crime before it starts, it must rely on deterrence, which entails seeking large criminal fines for corporations and significant jail time for executives.

Additionally, the past few years have seen an increase in the Division's use of DPAs, particularly with respect to companies involved in federal programmes, such as healthcare providers and generic drug manufacturers. While the Division traditionally has opted not to use DPAs to resolve criminal investigations, it has entered into several since 2019. Specifically, the Division justified this increased use by identifying its interest in resolving the charges without debarring the companies from participating in federal programmes, which the Division believes would be detrimental to the market overall.

Combined with the Division's new Procurement Collusion Strike Force, which focuses on routing out bid rigging in government contracts, it is likely that the Division's use of DPAs with companies that participate in federal programmes will continue, if not increase, in the future.

7 Appeal Process

7.1 What is the appeal process?

To initiate a criminal prosecution, the government must convince a grand jury to issue an indictment against the defendant. After receiving the indictment, the government must proceed to trial promptly and prove each element of the antitrust violation beyond a reasonable doubt to a jury of the defendant's peers. During this trial, the defendant has the right to confront its accusers and cross-examine them. While an individual defendant cannot be compelled to testify at trial, he or she can waive this right and take the stand in his or her own defence.

If the defendant is acquitted at trial, the government is precluded from trying the defendant again or appealing the acquittal. On the other hand, if the defendant is found guilty, he or she does have the right to appeal. While the government may not appeal a criminal verdict, it may appeal any sentence, generally within 30 days (although courts can amend or supplement this timeframe, and the others referenced below, through their local rules).

The appeal process in antitrust cases is the same as in any federal proceeding. The defendant must file a notice of appeal with the district clerk within 14 days of either the entry of judgment or the filing of the government's notice of appeal.

However, a defendant subject to a plea agreement typically will have waived the right to appeal for any reason other than ineffective assistance of counsel or prosecutorial misconduct.

To initiate a civil case, a plaintiff must file a complaint and prove in court by a preponderance of the evidence all the elements of the alleged violation. While the parties have a right to a jury trial in a civil case, the parties can also elect to have a bench trial.

In a civil proceeding filed in federal court, either party may appeal a district court's judgment within 30 days, except that when the United States is a party it has 60 days to appeal.

A losing party at the appellate level may ask the Supreme Court to review the case by filing a petition for a writ of *certiorari*.

The Supreme Court rarely grants writs of *certiorari* and only does so when at least four justices agree to hear the case.

If the civil case is filed in state court, the appeals process will follow that state's appellate procedure.

7.2 Does an appeal suspend a company's requirement to pay the fine?

The district court exercises discretion in deciding whether to stay a judgment. An appeal does not stay a judgment automatically. If the district court does stay the judgment, it may take measures to ensure that the company can pay the fine after an unsuccessful appeal, such as requiring the company to post a bond. As a practical matter, a district court is unlikely to stay a fine.

7.3 Does the appeal process allow for the cross-examination of witnesses?

The appeal process does not allow for the cross-examination of witnesses, which occurs during the trial period described in question 7.1. Instead, appellate courts review the district court record, which generally consists of the parties' papers and exhibits, any transcripts of proceedings, and the district clerk's official docket entries. Appellate courts review the district court's factual findings for clear error and legal conclusions *de novo*.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Section 4 of the Clayton Act allows a private party to bring a civil suit for any injury that results from an antitrust violation. The party generally receives three times the amount of the damages sustained as well as costs and attorney fees, except against the following defendants: (1) a leniency applicant or co-operator in a preceding DOJ investigation; (2) a joint venture engaged in research, development and production, or a standards development organisation that has given prior notification to the DOJ and the FTC; and (3) an export trading company that has received a certificate of review from the Department of Commerce. Section 16 of the Clayton Act also allows a private party to sue for injunctive relief against any threatened loss or damage that an antitrust violation would cause. In contrast to Section 4, a party bringing suit under Section 16 does not have to show actual injury to receive an injunction but only that a threat of injury exists.

Defendants in civil cases not only are jointly and severally liable but also have no right of contribution. Therefore, private parties can pursue a single defendant for the totality of damages from a cartel violation, and the defendant will have no recourse against the other members of the cartel.

In addition to private parties, the United States may bring a civil suit for antitrust injuries and receive an injunction or three times its damages along with costs if it prevails. A state attorney general also may bring an action for Sherman Act violations as *parens patriae* on behalf of natural persons within the state and receive an injunction or triple damages and costs, including attorneys' fees.

Given that a judgment in a criminal antitrust proceeding constitutes *prima facie* evidence of a violation in the subsequent civil proceeding, plaintiffs in "follow-on" civil actions may be litigating from a more advantageous position than plaintiffs bringing suit in a "stand-alone" action.

8.2 Do your procedural rules allow for class-action or representative claims?

As in other areas of law, private parties may bring class actions in antitrust if they satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. A putative class must meet the numerosity, commonality, typicality, and adequacy of representation requirements under Rule 23(a). Moreover, a court must find that the conditions set forth in Rule 23(b) are satisfied as well. These conditions include that a class action is a fair and efficient way of resolving the antitrust dispute and the questions of law or fact common to the class members predominate over any questions unique to individual members. Because of the predominance requirement, antitrust class actions generally are based on price-fixing violations and courts rarely certify classes of plaintiffs asserting claims of price discrimination.

8.3 What are the applicable limitation periods?

A civil action must be commenced within four years of the time when the action accrued. An action accrues whenever a plaintiff is injured by a violation of the antitrust laws. Thus, when anticompetitive conduct consists of multiple acts over time, each act has its own four-year statute of limitations. For a conspiracy, each independent act that injures the plaintiff restarts the statute of limitations.

This limitation is subject to tolling under certain equitable doctrines, such as fraudulent concealment, duress and estoppel. In addition, the civil statutory period may be tolled pursuant to government enforcement actions or class action proceedings.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

A "passing on" defence generally is not available to an antitrust defendant in a civil case. Succeeding in such a defence requires showing that the plaintiff (1) raised its price fully to compensate for the overcharge, (2) experienced no reduction in sales or profit margin, and (3) would not have raised his price absent the overcharge and/or maintained the higher price after the overcharge was discontinued. Such a showing usually requires a pre-existing cost-plus contract under which an indirect purchaser would suffer the entirety of the harm.

Indirect purchasers also are unable to use a "passing on" theory under the Illinois Brick doctrine. However, many states have rejected the Illinois Brick doctrine and allow suits by indirect purchasers under state law.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

Under the Clayton Act, private plaintiffs, the United States, and state attorneys general acting as *parens patriae* can all recover reasonable costs. The relevant provisions for private plaintiffs and state attorneys general specify that costs include reasonable attorneys' fees. They also allow for pre- and post-judgment interest, although no private plaintiff has pleaded facts sufficient to obtain pre-judgment interest. Prevailing defendants, on the other hand, must bear their own attorneys' fees and are unable to obtain reimbursement from losing plaintiffs except under very special circumstances.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

The DOJ is very active in pursuing cartel cases, with the Division reporting approximately 100 open grand jury investigations as of April 2020. Although the most high-profile investigations in recent years have focused on the electronics and automotive industries, the DOJ lately has been focusing on companies in the food supply chain (e.g., poultry, seafood, and beef suppliers) as well as companies in the healthcare industry (generic pharmaceuticals, home healthcare services, and cancer treatment centres). Because indictments and investigations regularly become public, civil actions typically follow.

Most cases are settled, and some are settled for substantial amounts. Among the few that go to trial, jury verdicts in favour of plaintiffs are common, although they are overturned sometimes on legal grounds.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

As stated in response to question 1.3, the DOJ is the sole enforcer of the antitrust laws with respect to criminal violations of the cartel prohibition. However, some state antitrust laws give state attorneys general the ability to prosecute antitrust violations criminally as well. While such state-level prosecutions have been rare historically, there are trends at the state level that indicate states could take on a more significant role in criminal antitrust enforcement in the future, either directly or indirectly. For example, state attorneys general offices have been expanding their antitrust enforcement bureaus generally and joining (if not leading) numerous high-profile civil antitrust investigations and litigations involving numerous major U.S. corporations. While many state antitrust laws are modelled after or are co-terminous with federal antitrust law, there is no legal barrier to states enforcing those statutes more aggressively or even seeking to expand their enforcement powers. As state attorneys general offices expand, they might find themselves not only with the resources but also the political support to pursue criminal antitrust investigations that once were thought to be the purview of the DOJ alone.

In September 2021, for example, New York enforcers arrested and indicted 10 individuals and corporations suspected of running a two-decades-long bid-rigging scheme for moving services. Specifically, the defendants are alleged to have submitted false and inflated bids to New York state and city offices responsible for securing relocation services for public benefits recipients, domestic violence survivors, and other crime victims, collecting more than $15 million from the jobs in the course of the conspiracy. Additionally, in a Texas-led civil antitrust lawsuit involving 15 attorneys general, an inadvertent disclosure in the defendant's answer to an amended complaint has prompted several Democrat lawmakers to request the DOJ to open a criminal antitrust investigation into that defendant (the DOJ has not yet commented). Assuming the DOJ declines to investigate, it is possible that certain state attorneys general will step in, as they have done in the civil antitrust context, to supplement and otherwise bolster federal enforcement.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

While it is of particular importance for a company or individual to understand its disclosure obligations to the DOJ in the course of a criminal investigation, it is equally important to understand the DOJ's disclosure obligations to the company or individual. In short, the grand jury process does not provide an opportunity for discovery on behalf of the investigated company or individual outside of voluntary disclosures by the DOJ (sometimes referred to as reverse proffers). In fact, the grand jury process is subject to broad and stringent safeguards under Rule 6(e) of the Federal Rules of Criminal Procedure meant to secure grand jury secrecy. Indeed, even though grand jury witnesses are permitted to disclose their testimony outside of the grand jury, those witnesses are not entitled (nor are their counsel or employers) to copies of their grand jury transcript.

As noted in response to question 4.4, however, once a grand jury issues an indictment and the status of the action changes from an investigation to a prosecution, the DOJ is obligated to disclose certain materials upon the request of the defendant. These materials are specifically outlined in various federal rules of criminal procedure and evidence, local court rules, and legal precedents. Chief among these sources are Rule 16 of the Federal Rules of Criminal Procedure (which identifies information subject to disclosure from both the government and the defendant), *Brady* materials (so called for *Brady v. Maryland* and typically consisting of exculpatory materials) and *Jencks* materials (so called for the Jencks Act and typically consisting of documents relied upon by government witnesses who will testify at trial). These sources will cover materials from any leniency applicant as well as testimony provided by grand jury witnesses.

The disclosure of these materials will be the defendant's first opportunity not only to review the evidence underlying the government's case but also to challenge that evidence. As a result, it is imperative for companies and individuals to recognise the information imbalance that can develop in the investigation phase of a criminal matter and the importance of prompt and diligent discovery at the start of the pre-trial phase.

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