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Contributing Editor:
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Paul, Weiss, Rifkind, Wharton & Garrison LLP

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Q&A Chapters

From the Publisher

Dear Reader,

Welcome to the 17th edition of *ICLG – Cartels & Leniency*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to cartels & leniency laws and regulations around the world, and is also available at www.iclg.com.

The question and answer chapters, which in this edition cover 18 jurisdictions, provide detailed answers to common questions raised by professionals dealing with cartels & leniency laws and regulations.

As always, this publication has been written by leading cartels & leniency lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editor Joseph J. Bial of Paul, Weiss, Rifkind, Wharton & Garrison LLP for his leadership, support and expertise in bringing this project to fruition.

Ben Lawless
Publisher
Global Legal Group

International Comparative Legal Guides

Argentina

Julián Peña

Federico Rossi

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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?

Cartels are regulated by Chapter I of Law No. 27,442 (the "Antitrust Law"), notably, by sections 1 and 2.

Section 1 of the Antitrust Law sets forth the guiding principle to analyse any anticompetitive conduct, which provides that:

> "*Agreements between competitors, economic concentrations, acts or conducts, in any form manifested, related to the production and exchange of goods or services, which have the object or effect of limiting, restricting, falsifying, or distorting competition or access to any market or that constitute an abuse of a dominant position in a market, in a manner that may be harmful to the general economic interest, are prohibited.*"

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

Section 2 sets forth a list of types of anticompetitive agreements between competitors that are considered practices absolutely restrictive of competition and are presumed to affect the general economic interest, including:

a) To directly or indirectly determine, arrange or manipulate the sales price or the purchase price of goods or services offered or demanded in the market.
b) To establish obligations to produce, process, distribute, purchase or commercialise only a restricted or limited quantity of goods, or to render a restricted or limited number, volume or frequency of services.
c) To horizontally divide, distribute, allocate or impose territories, markets, customers, and supply sources.
d) To arrange or coordinate positions in tenders or bids.

Section 29 of the Antitrust Law provides that the Defense of Competition Tribunal (*Tribunal de Defensa de la Competencia*), in accordance with what is established in the regulation, may issue permits to enter into contracts, agreements, or arrangements that relate to conducts included in the Antitrust Law that according to the reasonable discretion of the Tribunal are not harmful to the general economic interest. In turn, the regulation (i.e., section 29 of Decree 480/2018 – the "Regulatory Decree") established that the Defense of Competition Tribunal shall verify the fulfilment of the following conditions to grant a permit to an agreement that relates to section 2 conduct:

a) contribute to improve the production or allocation of goods and/or services;
b) promote technical or economic progress;
c) generate specific benefits for consumers;
d) not impose on the companies in question any restriction that is not indispensable to the fulfilment of the purposes set forth in the preceding paragraphs (a), (b) and;
e) not afford such companies the possibility to eliminate competition in a significant portion of the affected market.

To date, the Antitrust Authority has not issued any permit (either of individual or general scope) under section 29 of the Antitrust Law.

1.3 Who enforces the cartel prohibition?

The Antitrust Law's enforcement is at present vested in the Secretariat of Trade of the Ministry of Economy (the "Trade Secretariat"), which is appointed and removed by the President of Argentina. The Trade Secretariat, which has decision-making powers, is assisted by the National Antitrust Commission (*Comisión Nacional de Defensa de la Competencia)* (the "CNDC"), which is a technical agency with investigatory and advisory powers. The Trade Secretariat adopts the final decision generally following the recommendations issued by the CNDC (together with the Trade Secretariat shall be hereafter referred to as the "Antitrust Authority") and very rarely adopts a different position.

The CNDC is composed of five members. The President of the CNDC is appointed by the President of Argentina who can remove him or her without cause. The remaining four commissioners are also designated by the President of Argentina but their term in office is four years, which can be renewed indefinitely.

However, the Antitrust Law envisions the removal of all decision-making powers from the Trade Secretariat and provides for the creation of a new, more independent antitrust authority, the National Competition Authority (*Autoridad Nacional de la Competencia*), which will be composed of three bodies:

1. The Defense of Competition Tribunal: composed of five members which decide all matters relating to the Antitrust Law.
2. The Anticompetitive Conduct Secretariat: investigates and prosecutes all matters related to anticompetitive conduct before the Defense of Competition Tribunal.
3. The Economic Concentrations Secretariat: responsible for the preliminary assessment of economic concentrations within the framework of the merger control regime and for issuing legal opinions for the Defense of Competition Tribunal to rule on these cases.

Although all three bodies will make up the National Competition Authority, each will possess technical autonomy.

Pursuant to a temporal clause embedded in section 80 of the Antitrust Law, pending establishment of a National Competition Authority, the Trade Secretariat and CNDC will continue in their antitrust enforcement roles.

As at today, there are no official plans to establish the National Competition Authority despite that more than five years have elapsed since the Antitrust Law has been passed.

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

A cartel investigation may be initiated by the filing of a claim by any individual or company, *ex officio* by the Antitrust Authority or through a leniency application. Once a claim is filed, it is at the Antitrust Authority's sole discretion whether to conduct an investigation or not since there are no legal instruments to force the Antitrust Authority to do so.

Once an investigation is initiated, the Antitrust Law grants the investigated parties a 15-day business period to submit their explanations regarding the alleged anticompetitive conduct. If the Antitrust Authority, after reviewing the explanations and evidence filed by the investigated parties, concludes that there are grounds to file formal charges, it issues a resolution opening a formal investigation and grants the accused parties a 20-day business period to file their defences and offer evidence.

On the contrary, should the explanations filed by the investigated parties rule out the existence of an anticompetitive conduct, the Antitrust Authority issues a resolution closing the investigation.

The evidence-production period shall last a maximum period of 90 business days (which may be extended to a further 90 business days). After the evidence-production period is finalised, and the parties file their closing arguments on the evidence, the Antitrust Authority has 60 business days to issue its final decision. In practice, cartel investigations that finished with an infringement decision and the imposition of a fine by the Antitrust Authority took approximately between four and eight years.

Once the final decision is issued by the Trade Secretariat, it can be appealed within 15 business days with the Federal Civil and Commercial Court of Appeals (or the competent Federal Court of Appeals in the provinces of Argentina).

1.5 Are there any sector-specific offences or exemptions?

The Antitrust Law does not contain any provision regarding anticompetitive practices taking place in specific industries or sectors of the economy.

In fact, all individuals and legal entities, either private or public that carry out an economic activity, are subject to the provisions of the Antitrust Law. Put differently, individuals and companies carrying out an economic activity in Argentina or with effects in Argentina are equally subject to the Antitrust Law, regardless of the sector or market of the economy in which they carry out their economic activity.

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

An anticompetitive conduct that took place outside the territory of Argentina is covered by the Antitrust Law as long as it had effects in the domestic market. Section 4 of the Antitrust Law adopts the so-called Effects Doctrine and introduces the principle of extraterritorial application of the Antitrust Law. However, there has not been any known case relating to the extraterritorial application of the Antitrust Law that derived in the sanction of cartels adopted abroad.

2 Investigative Powers

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

The Antitrust Law provides the enforcement authorities with broad investigative powers. According to section 30 of the Antitrust Law, the Antitrust Authorities may:

a) Hold hearings with the presumably responsible individuals and companies, claimant, damaged parties, witnesses or experts, take their declarations and order confrontations, for which purpose the help of public force could be requested.
b) Review books, documents and other elements of the investigation, control stock, confirm origins and cost of raw material or other goods.
c) Access places subject to inspection, with the consent of the inhabitants or by means of a court order requested from the competent judge, who shall grant or deny the search within 24 hours.

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.

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

The Antitrust Authority does not have general surveillance powers. This is an exclusive power of the criminal courts.

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 search of business and/or residential premises can solely be performed by those authorised by a criminal court. Generally, the criminal judge issuing a search order allows representatives of the Antitrust Authority to participate.

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

In-house legal advice is 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.

The limitations of the Antitrust Authority's investigatory powers to safeguard the rights of defence of companies and/or individuals are the ones established by the Argentine Constitution,

such as: the due process of law; property rights; *non bis in idem* or double jeopardy principle; the presumption of innocence; and right against self-incrimination, among others.

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?

Pursuant to section 59 of the Antitrust Law, anyone who impedes or obstructs an investigation or who does not meet the requirements of the court and/or the Antitrust Authorities, in the required terms and forms, whether they are third parties not involved in the investigation or those to whom the investigated conducts are attributed to, can be fined in an amount of up to 500 Administrative Units per day (as at September 2023, ARS 81,275, approximately US$222 per day).

These powers have been rarely employed by the Antitrust Authority.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Pursuant to section 55 of the Antitrust Law, the sanctions that may be imposed on the individual or companies found to be involved in a cartel are the following:

a) The cessation of the acts or conducts prohibited by the Antitrust Law and, if relevant, the removal of their effects.

b) Fines of (i) up to 30% of the turnover of the product to which the infringement relates during the last fiscal year multiplied by the number of years of infringement. This amount cannot exceed 30% of the consolidated turnover archived by the offender's economic group in Argentina during the last fiscal year, or (ii) up to double the economic benefit derived from the infringement. In the event that fines cannot be calculated using either method (i) or (ii), fines for each offender cannot exceed 200 million Administrative Units (as at September 2023, ARS 32,510 million, approximately US$88.9 million). If the fine can be calculated according to the two criteria established in points (i) and (ii), the higher fine will be applied. In case of recidivism, the amount of the fine shall be doubled for those companies that have been sanctioned in the previous 10 years for anticompetitive infringements.

c) In case of breach of injunctions issued pursuant to section 44 of the Antitrust Law or compromises reached with the Antitrust Authority, a daily fine of up to 0.1% of the Argentinean turnover of the infringing economic group during the previous year. If a fine cannot be determined using this methodology, the amount of the daily fine cannot exceed 750,000 Administrative Units (as at September 2023, ARS 121.9 million, approximately US$333,500).

d) Order measures aiming at eliminating the distorting effects over competition or the request to a competent judge to order that the offending companies be dissolved, liquidated, spun off or divided.

e) Suspension from the National Registry of State Suppliers for up to five years. The exclusion may be for up to eight years in case of the bid-rigging conducts established in section 2, paragraph (d) of the Antitrust Law.

Section 57 of the Antitrust Law makes companies liable for the conduct of individuals who acted on their behalf, with the help or for the benefit of the company, even if the individual's representation is rendered ineffective.

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

Section 58 of the Antitrust Law provides the joint and several liability of directors, managers, administrators, trustees, or members of the Statutory Auditors Office, agents or legal representatives of the infringing legal entity who by means of their action or omission of their duties of control or supervision, had contributed, encouraged, or allowed an infringement to the Antitrust Law.

The Antitrust Law does not establish criminal sanctions (notably, prison) for individuals.

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 provided in the Antitrust Law, nor has this criteria been used by the Antitrust Authorities in any known case.

3.4 What are the applicable limitation periods?

Pursuant to section 72 of the Antitrust Law, the applicable limitation period for the imposition of sanctions for a cartel conduct is five years. In cases of continuous conduct, the term will begin as of the date in which the cartel conduct ceased.

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

There are no legal obstacles for companies to pay the legal costs and/or financial penalties imposed on a former or current employee involved in a cartel case.

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?

An employee may be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer if the company proves that the employee was solely responsible for the anticompetitive conduct.

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?

Section 58 of the Antitrust Law establishes that controlling companies may be joint and severally liable for the illegal conduct of their subsidiaries. Put differently, the Antitrust Authority has the power to and may seek to collect the full amount of the fine from the controlling legal entities as a consequence of the illegal activities of their subsidiaries, in particular, if the subsidiary has an inability to pay, totally or partially, the fine.

4 Leniency for Companies

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

The current Antitrust Law created Argentina's first antitrust leniency programme. Its main features are set forth in sections 60 and 61 of the Antitrust Law:

- Leniency will be available only in relation to agreements between competitors that are deemed as practices "absolutely restrictive of competition" pursuant to section 2 of the Antitrust Law. Therefore, it does not cover vertical agreements and/or unilateral behaviour.
- Leniency will be available to both companies and individuals involved in a cartel.
- The first applicant to provide evidence that allows the Antitrust Authority to determine the existence of the conduct will obtain civil and criminal immunity.
- Provided that additional evidence of the cartel is furnished, subsequent applicants will obtain criminal immunity as well as reductions in the fines that would have otherwise been applicable, ranging between 20% and 50%, depending on the chronological order in which applications were lodged.

The common requirements to benefit from leniency, regardless of being the first applicant or not, are: (i) to immediately cease participation in the cartel, unless otherwise ordered by the Antitrust Authority to avoid tip-offs; (ii) to cooperate fully, continuously, and diligently with the Antitrust Authority throughout the whole proceedings; (iii) not to destroy or conceal evidence related to the cartel; and (iv) not to have made public the decision to apply for leniency (except for other antitrust authorities).

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

Section 60 of the Regulatory Decree 480/2018 created a National Registry of Markers in order to record all the requests for markers made, indicating the order of priority of each request according to the date and order of filing.

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

The Antitrust Law does not specifically foresee the possibility for applications to 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 identity of all leniency applicants will be kept confidential by the Antitrust Authority. The competent judges in the private follow-on proceedings that may be initiated, in no case may order the exhibition of the statements, acknowledgments, information and/or other evidence that may have been submitted by the leniency applicants to the Antitrust Authority.

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

Pursuant to section 60 of the Antitrust Law, the applicant must cooperate continuously from the time of submission of the application until the end of the administrative proceedings before the Antitrust Authority.

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

Section 60, paragraph c) provides a "leniency plus" benefit for those applicants that fail to qualify for immunity for the first cartel being reported, but which may nonetheless report a second and discrete cartel for which they will be granted immunity plus an additional one-third fine reduction in relation to the first 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.

Section 60 of the Antitrust Law establishes that the leniency programme is available for both companies and individuals involved in cartel conducts.

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 Antitrust Law provides the possibility for the investigated parties to propose a voluntary suspension of a conduct subject to approval of the Antitrust Authority. This can be carried out only prior to the issuance of the final resolution and is subject to the Antitrust Authorities' approval. However, this approval seems highly unlikely. Despite the fact that compromises would not appear to be available in cartel cases, the Antitrust Authority has recently accepted a compromise in the *Prisma* case, even when the theory of harm put forward by the CNDC in its investigation included collusive conduct.

7 Appeal Process

7.1 What is the appeal process?

Once a cartel infringement decision is issued by the Trade Secretariat, it can be appealed by the infringing companies and individuals to the Civil and Commercial Federal Court of Appeals (or the competent Federal Court of Appeals in the provinces of Argentina). The Federal Court of Appeals' decision may be appealed, as a last resort, before the National Supreme Court of Justice. In fact, the most important cartel cases decided by the Antitrust Authority have been appealed before the National Supreme Court of Justice.

Pursuant to section 66 of the Antitrust Law, the following Antitrust Authorities' resolutions can be appealed:

a) Imposition of fines.
b) Cease-and-desist orders.
c) Dismissal of a claim filed before the Antitrust authorities.
d) Rejection of a leniency application.
e) Injunctions adopted pursuant to section 44 of the Antitrust Law.

However, any other decision adopted by the Antitrust Authority that causes sufficient and irreparable harm can be appealed by the addresses of such decision.

Pursuant to section 67 of the Antitrust Law, an appeal does not suspend the effects of the decision issued by the Antitrust Authority (except for fines imposed under item (a) above in which case the parties may not pay the fine amount provided they submit a surety bond).

Appeals should be filed within 15 business days as of the notification of the Antitrust Authority's decision. Thereafter, the Antitrust Authority has 10 business days to send the administrative file to the Federal Civil and Commercial Court of Appeals (or the competent Federal Court of Appeals in the provinces of Argentina).

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

An appeal suspends a company's requirement to pay the fine provided it submits a surety bond.

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

The appeal process does not allow for 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?

Pursuant to section 62 of the Antitrust Law, any person damaged by an anticompetitive practice may seek damages under civil and commercial law before a competent judge.

The Antitrust Law states that follow-on damages actions will be subject to an expedited procedure set forth in the Code of Civil and Commercial Procedure. Both direct and indirect purchasers have standing to sue for damages.

There is no need to have a previous resolution issued by the Antitrust Authority. Given the lack of case law, it is not possible to assess whether the position is different for "follow on" actions as opposed to "stand alone" actions.

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

The procedural rules allow for class action or representative claims in Argentina pursuant to the 2009 Supreme Court Halabi ruling.

8.3 What are the applicable limitation periods?

Pursuant to section 72 of the Antitrust Law, the applicable limitation periods are:

a) three years counting from the date when (i) the infringement was committed or ceased, or (ii) the injured party became aware or reasonably became aware of the act or conduct constituting an infringement, which has caused him/her damage; or

b) two years from the date on which the sanctioning decision of the Antitrust Authority became final.

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

The Antitrust Law does not specifically recognise a "passing on" defence in civil damages claims.

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

In order to access the courts, a judicial fee of 3% of the claimed amount shall be paid in advance.

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 known cases of successful civil damage claims for cartel conduct in the past in Argentina, nor of any substantial out of court settlement. However, in 2009, a judge ordered YPF (Argentina's largest producer and distributor of Liquefied Petroleum Gas (LPG)) to pay Autogas (an LPG distributor) compensation of roughly ARS 13 million, plus interest, for the damages caused by YPF's abuse of its dominant position, previously decided by the Antitrust Authority.

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 recent years, the Antitrust Authority has significantly increased the battle against cartels, having imposed fines, most notably, on the automobile and wheat flour industries.

In 2014, the Antitrust Authority imposed fines totalling ARS 1,060 million to several car manufacturers alleging the existence of a price-fixing cartel. The Antitrust Authority's decision considered that the automobile companies had engaged in an illegal price-fixing scheme by means of selling automobiles in the Province of Tierra del Fuego at the same price (or even higher price) than those charged for the same automobiles in the continental territory of Argentina. As products and services sold in the Province of Tierra del Fuego are exempted from certain national taxes, the fact that cars were sold at a price that was similar to the price charged by car manufacturers in the rest of Argentina led the Antitrust Authority to understand that the companies were fixing the prices. In 2015, the Federal Court of Appeals of Comodoro Rivadavia annulled and thus reversed the Antitrust Authority's infringement decision. Thereafter, the Supreme Court of Justice confirmed the decision. This was the first important cartel decision adopted by the Antitrust Authority that was not confirmed by the courts.

In April 2022, the Antitrust Authority sanctioned Molino Cañuelas and three trade associations (i.e., FAIM, CIM and APYMIMRA) for setting up a price-fixing cartel in the wheat milling market. The total fines amounted to ARS 445 million. As part of the investigation, the CNDC unearthed the existence of an agreement entered into by the three trade associations so-called "General Agreement for the Defense of Free Competition in the Milling Industry" (the "Agreement"), which had the aim of fixing a minimum price for wheat as well as to exchange commercially sensitive information. Pursuant to the Agreement, the three trade associations had powers to monitor its compliance by the wheat milling companies, as well as to impose fines in case of breach of the Agreement. This case is currently under appeal.

Lastly, in November 2022, the Trade Secretariat sanctioned certain nightclubs of the city of Bariloche (Province of Rio Negro, Argentina) with fines totalling ARS 240 million. As a

result of a complaint filed in 2018 by Powerlink S.R.L. (a night-club involved in the student parties' market in the city of Bariloche), the CNDC initiated an investigation against Alliance S.A. and Grisú S.R.L. for the potential abuse of a dominant position and cartelisation. Within the framework of the investigation, the CNDC verified the existence of a price-fixing and market allocation agreement between the Powerlink, Alliance and Grisú to establish a single price for the tickets offered to student tourism agencies. The Trade Secretariat issued a cease-and-desist order and imposed a fine against the offenders.

It is important to mention that one of the companies (i.e., Powerlink) was exempted from a fine, even though the company was part of the cartel agreement and did not file an application under the leniency programme provided for in the Antitrust Law. The CNDC acknowledged that Powerlink filed the complaint that triggered the investigation and "based on the cooperation provided during the proceedings and the evidence provided" to the authorities, added to "the coercion exercised by the dominant companies" that led Powerlink to sign the agreement, there was sufficient merit to exempt that company from a fine. This is a brand-new enforcement development, and it remains to be seen whether companies collaborating in the investigation with the Antitrust Authority could qualify for an exemption to a potential fine despite being part of a cartel. This case is currently under appeal.

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

Firstly, and more generally, it is important to mention that competition law enforcement in Argentina (and cartel enforcement has not been an exemption), has been regularly used for political ends (such as fighting inflation).

Secondly, as at September 2023, the National Competition Authority has not been established (in spite of the Antitrust Law which mandated its creation more than five years ago). Consequently, the Antitrust Law remains to be enforced by the Trade Secretariat with the technical assistance of the CNDC.

Julián Peña joined Allende & Brea in 2004 and became the partner in charge of the Antitrust and Competition Law department in 2007. His practice focuses on antitrust and competition law issues, including merger control proceedings, anticompetitive practices investigations and compliance work having been involved in many of the most relevant cases in Argentina. He has also been very active representing clients in antidumping and countervailing duties investigations both in Argentina and abroad.

Prior to joining Allende & Brea, Julián was an advisor to the Ministry of Economy, having advised different Ministers, Secretaries of Industry and Trade and of Coordination. He has worked in the National Commission for the Defense of Competition and was a stagiaire of the European Commission in Brussels.

He is a professor at Universidad Torcuato Di Tella's Masters on Law and Economics, was a visiting professor at the University of Florida in 2009, and a professor at the Graduate Programme of Universidad de Buenos Aires (2004/2018), among others. Julián has published three books and has published many articles and given numerous conferences around the world on competition law.

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Federico Rossi joined Allende & Brea in 2005 and became a partner in 2021. His practice focuses on all aspects of antitrust and competition law, including merger control proceedings, cartel, and abuse of dominance investigations, as well as sector and market investigations. Federico is also actively involved in the representation of national and international clients in antidumping investigations.

He graduated as a lawyer from Universidad Austral in 2009. In 2007, as part of his law studies, he completed a semester exchange programme at the University of California (Hastings College of the Law, San Francisco, USA), where he focused his studies on Competition Law, Law & Economics and Transnational Law.

In 2017, he obtained an LL.M. in Competition Law from King's College London (London, United Kingdom).

During 2017, he worked as a foreign lawyer in the Competition, Trade and Regulatory practice at Herbert Smith Freehills (London, UK) where he was mainly engaged in advising clients on merger control matters before the competition authorities of various jurisdictions.

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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 2021. 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 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 the 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 proceed and 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 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 discovering 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.

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 (Cartel Court 7.7.2022, 24 Kt 4/22a). 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. If a foreign authority conducts a search or other activity upon the request of the FCA, such search or activity does not need to be based on a decision by the Cartel Court and is regulated by the laws in the country where it occurs, which, however, shall not fall below the requirements of Austrian law. Any remedies in that respect must be sought in the country where the activity occurred (VWGH 18.3.2022, Ro 2018/04/0001-5).

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 one per cent of the yearly turnover (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 0.5 per cent of the yearly turnover. If a formal decision is passed, it can be enforced (please see question 8.1 and the fines may amount to one per cent of the yearly turnover). 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 45 million (27 Kt 12/21y) and EUR 62 Million (26 Kt 5/21m) for a single company against two construction companies in settlement procedures. With an earlier decision (16 Ok 2/15b), 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 procedure for gaining leniency is now regulated in an ordinance issued by the Ministry for Digitalisation and Economics. The FCA has issued guidelines. 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.

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. The Supreme Court ruled (25.5.2023, 16 Ok 8/22w) that the FCA may move for reopening a decided and closed fine case if the FCA gains only afterwards knowledge and evidence of cartel infringements which defendants have not disclosed despite the general obligation to cooperate under the leniency programme.

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

Yes, the Leniency Ordinance 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.

The FCA sets a deadline 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 by this deadline, 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 in writing. However, according to the Leniency Ordinance, the information required 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.

Upon reasoned motion by a party, the Court can, during proceedings – after having balanced the mutual interests – order the opposing party or even a third party to disclose specific pieces of evidence. The evidence plaintiffs seek will likely concern the effects of a competition law infringement, whereas defendants will likely request the disclosure of documents proving the passing on of overcharges. The ECJ has ruled (10.11.2022; C-163/21) that under the Damage Directive the relevant evidence to be disclosed, in the control of the defendant or a third party, also covers those documents which the party to whom the request to disclose evidence is addressed and must be created *ex novo* by compiling or classifying information, knowledge, or data in its possession. The national court is required to restrict the disclosure of evidence to that which is relevant, proportionate, and necessary, taking into account the legitimate interests and fundamental rights of that party.

In case of confidential information, the Court must order effective measures for the protection of such confidential information. For confidential information, the defendant of the application can demand that the evidence is only disclosed *vis-à-vis* the Court, which then decides on the disclosure to the other party or takes the information into account when rendering its decision.

Also, the disclosure of evidence contained in the files of competition authorities can be requested by parties. Upon such motion, the Court must also consider the effectiveness of the public enforcement when judging the proportionality of the request. Documents that were prepared specifically for the proceedings conducted by the competition authority, and which the competition authority created and sent to the parties during its proceedings and settlement submissions, which have been withdrawn, are sometimes called "**grey list documents**". The disclosure of such grey list documents must not be ordered prior to the proceedings before the competition authority being closed.

Even stricter restrictions apply to leniency and (non-withdrawn) settlement submissions in cartel cases (i.e., proceedings concerning cartel behaviour between competitors, not including vertical agreements). The disclosure of these so-called "**black-list documents**" must not be ordered at any time unless such documents or information are available independently from the competition procedure.

Further, under general procedural rules, the parties to a trial may ask each other questions in Court with a view to establish the facts of a case and the relevant documents.

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

According to the Competition Act and the Leniency Ordinance, 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.

The FCA installed an internet whistle-blower system for anonymous information on competition law infringements. In early 2023, an Act to protect whistle-blowers, implementing EC Directive 2919/1937/EU was enacted, containing detailed provisions on the procedures to be followed and on the protection awarded to whistle-blowers with a strong emphasis on the public sector.

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 marked to expire on December 31, 2028.

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, 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. 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.
- Still, it must be considered that the individual claims remain separated. Consequently, the jurisdiction of Courts may be determined on that basis or, if the individual claims are below certain thresholds, the appeal to the Supreme Court may be barred in that respect.

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 that 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. These rules apply to older claims that were not time barred by December 26, 2016, unless old rules effective on that date are more beneficial to the harmed party. It was discussed whether this provides for a retroactive effect and whether such effect is permissible under the EU, while the latter was confirmed (ECJ June 22 2022, C267/20). Furthermore, limitation as to interest may pose issues, as under Austrian law this is separately regulated from limitation for the main claim (Sec. 1480 ABGB) providing for a three-year limitation period.

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. See in relation to costs also ECJ February 16, 2023, C-312/21.

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 damage 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 and have been decided at different levels of the Court system. However, so far, no final damage award has emerged. 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). The declared reason for the publication is to facilitate private enforcement of damage claims. When a decision by the Cartel Court is partly confirmed, partly amended by the Supreme Court, only the decision by the Supreme Court, and not the one by the Cartel Court, shall be published (November 8, 2021, 16 Ok 2/21m). The Supreme Court ruled (May 25, 2023, 16 Ok 8/22w) that the FCA may move for reopening a decided and closed fine case if the FCA gains only afterwards knowledge and evidence of cartel infringements which defendants have not disclosed despite the general obligation to cooperate under the leniency programme.

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

The FCA has during the past years actively conducted raids and fined several companies following settlement procedures, mostly concentrating on vertical infringements. Important sectors affected included waste-management, construction, submetering and carpenters. Several big cartel damage cases are still under trial. 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 developed a tendency for competition monitoring. Recently, gasoline, e-car loading infrastructure and other industries have triggered special interest.

The quite influential position of the General Director for Competition is still vacant and the procedures for a new appointment are underway, triggering some interest and discussion by the public and the stakeholders in the competition law scene.

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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 conduct is challenged in Brazil by four different statutes, and can be considered both a civil/administrative and a criminal infringement:

- Law No 12,529/2011 (Brazilian Competition Law) – cartel as a violation against the economic order.
- Law No 8,137/1990 (Economic Crimes Law) – cartel as a crime (only for individuals).
- Law No 12,846/2013 (Anticorruption Law) – provides other penalties for bid-rigging.
- Law No 14,133/2021 (Public Contracting Law – this law superseded Law No 8,666/1993, which established bid-rigging as a criminal offence and was revoked as of April 1st, 2023) – this sets the crime of frustration of the competitive nature of bid proceedings.

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

The Brazilian Competition Law sets forth in its article 36 some circumstances that can constitute a cartel misconduct, including any agreement with competitors directed at price-fixing, product and output restrictions, as well as customer and market allocation and bid-rigging.

The cartel misconduct definition has been further developed in the Administrative Council for Economic Defence's (CADE) case law and it is worth noting that CADE defines a cartel as an intrinsically illegal conduct, regardless of its actual effects. There is a rebuttable presumption of illegality.

The other specific substantive provisions are:

- Economic Crimes Law – article 4.
- Anticorruption Law – article 5, section VI, items a and c.
- Public Contracting Law – article 178 (added article 337-F to the Criminal Code).

1.3 Who enforces the cartel prohibition?

CADE is the federal agency in charge of anti-cartel enforcement and has jurisdiction over all Brazilian territory. CADE's lower unit, the General Superintendence (GS) is the investigatory unit responsible for launching and conducting administrative proceedings, whereas CADE's Administrative Tribunal (Tribunal) is the decision-making body. Cartel liability under criminal and civil laws must be enforced before courts (either federal or state).

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

The main procedural steps from the opening of an investigation by GS, until the imposition of a sanction by the Tribunal, are as follows:

General Superintendence

- GS Technical Note launching the proceeding.
- Notification of the defendants and presentation of defence.
- GS Technical Note analysing the procedural arguments raised by the parties and opening the evidentiary stage.
- Evidentiary stage: production of documental evidence and written statements and hearing of witnesses.
- Final Arguments presented by the defendants.
- GS Final Technical Note (non-binding) with its opinion recommending the dismissal of the case or the conviction of the defendants.

Tribunal

- The case is assigned to a Reporting Commissioner, who will lead the judgment.
- The Reporting Commissioner may request additional evidentiary measures.
- The Federal Prosecutor and the CADE Attorney General will issue opinions.
- The Reporting Commissioner may open a deadline for the parties to present a new round of Final Arguments (if new evidentiary measures are taken).
- The case will be ruled by the Tribunal (formed by six Commissioners, plus a President), who may either impose fines or dismiss the case.
- The defendants may file a motion before the Tribunal for clarifications on its final decision.

1.5 Are there any sector-specific offences or exemptions?

There are no sector or industries exemptions from Brazilian Competition Law when it comes to cartel practices.

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

To assess its jurisdiction, CADE considers whether Brazil was affected by the (direct or indirect) effects of the misconduct, even if only potentially and even if Brazil was not the country where the misconduct took place.

2 Investigative Powers

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

An investigation of cartel infringements by CADE can start in three different ways:

- Because of a Leniency Agreement executed by CADE or previous investigations by criminal or administrative authorities.
- *Ex officio* by CADE; e.g., CADE can become aware of the illicit conduct through:
  (a) an anonymous report;
  (b) news from media; or
  (c) 'the Brain Project', a screening and data mining tool to detect cartels.
- Because of a complaint from any interested party.

Once started, an investigation can be divided into three stages: (i) preparatory proceedings; (ii) administrative inquiry; and (iii) administrative sanctioning proceeding. In summary, preparatory proceedings and administrative inquiry are optional stages and may be kept confidential by GS. These two types of proceedings may be established when it is unclear whether the misconduct under review is within CADE's jurisdiction or when the current body of evidence is not sufficient to start an administrative sanctioning proceeding. At the end of these stages, if GS concludes that there is no evidence of an infringement, in theory the case must be dismissed (the Tribunal may, however, challenge this decision and request the case files for its review); otherwise, an administrative sanctioning proceeding must be launched.

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

In order to supplement the fact-finding effort of an ongoing investigation/proceeding, CADE can request court orders to conduct dawn raids to seize papers of any kind, as well as business books, computers and mobile phones of a company or an individual suspected of involvement in an anticompetitive misconduct, without prior notice. Dawn raids are an exceptional investigative measure, as it must be authorised by a judge, based on a well-reasoned request made by CADE's Attorney General Office, which must specify the facilities that will be searched and relevant material to be collected at the target's premises.

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

There is no such specific power granted by the Brazilian Competition Law; however, Brazilian courts have consistently permitted CADE to borrow evidence gathered in other proceedings, especially criminal, provided that the diligence was authorised by a judge and the adversary right is observed in the proceeding in which the evidence will be used, even if the original proceeding has different defendants. In this context, some general surveillance power exercised in the criminal proceeding may be further used in administrative proceedings.

2.4 Are there any other significant powers of investigation?

The Brazilian Competition Law also gives CADE powers to make unannounced visits, in practical terms, however, this is not commonly used.

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's task force led by a judicial officer, the police and CADE's staff allocated to the task will carry out the search at business/residential premises. The dawn raids must be strictly conducted within the limits set forth by the judicial warrant granted for this purpose. The procedure must be monitored by witnesses and outside counsel can participate to ensure the protection of the targeted parties' individual rights. The role of counsel is important to make sure that the scope of the warrant is observed and not exceeded during a dawn raid – thus, the dawn raids should only start upon his/her arrival (unless waived by the party).

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

Attorney-client privilege (in essence, confidentiality and inviolability) is secured by Law No 8,906/1994 (Brazilian Bar Association Law) and is only for lawyers enrolled before the Brazilian Bar Association. The application of the privilege principle for communication to or from in-house counsel may be subject to discussions and limitations.

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

Based on the Federal Constitution and the Brazilian Competition Law, cartel defendants have the right to: (i) remain silent, encompassing the privilege against self-incrimination; (ii) a due process of law; (iii) a full and effective defence, with the assistance of counsel; and (iv) privacy/intimacy.

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 the Brazilian Competition Law, the refusal, failure or unwarranted delay to provide information or documents requested by CADE subjects the non-compliant party to daily fines of BRL 5,000, which can be increased by up to 20 times, if necessary, to ensure its effectiveness, based on the economic condition of the party.

Furthermore, the Brazilian Competition Law also provides that the unjustified absence of the defendant or third parties, when subpoenaed, to provide clarification during the investigation shall subject the non-compliant party to a fine ranging from BRL 500 to BRL 15,000 for each absence, which is also based on the economic condition of the party.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Companies can receive fines ranging from 0.1% to 20% of the company's gross turnover accrued in Brazil in the fiscal year preceding the launching of the administrative proceeding, in the field of economic activity in which the violation took place. In specific cases, CADE may take into consideration the turnover of the whole group or conglomerate.

Non-pecuniary sanctions may also be imposed separately or cumulatively with said fines, such as:

- The obligation to publish the Tribunal decision in a well-circulated newspaper.
- Debar from contracting with financial institutions and participating in public biddings.
- A split-up of the company or a divestiture of certain assets.
- Recommendation to public bodies to the effect that:
  (a) a compulsory licence over intellectual property rights held by the offender be granted; and
  (b) the offender be denied instalment payment plans for outstanding federal taxes or that tax incentives or public subsidies be cancelled in full or in part.
- A prohibition on engaging in commerce for up to five years.
- Any other act or measure deemed necessary to mitigate the harmful effects to the economic order.

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

Statutory directors and managers, directly or indirectly responsible for the violation committed by their company, are subject to a fine in an amount ranging from 1% to 20% of the corporate fine. Other individuals without decision-making power, as well as associations or other entities that do not perform business activities and thus do not register turnover, shall be levied with a fine ranging from BRL 50,000 to BRL 2 billion.

One should note that a cartel is also a criminal offence in Brazil and, accordingly, individuals may also be criminally sanctioned for a cartel offence, with an imprisonment penalty from two to five years, which may be increased by one-third to one-half if the crime: (i) causes serious damage to consumers; (ii) is committed by a public servant; or (iii) relates to a market essential to life or health. On the other hand, in Brazil companies are not subject to criminal liability with respect to cartel offences (corporate liability applies only for the purposes of environmental violation).

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

Yes. In a few situations, the Tribunal has already taken into consideration the financial situation of companies when setting the fines, mainly when they are going through a judicial reorganisation or have filed for a voluntary bankruptcy. In these cases, a lower percentage of the company turnover will be used as the basis for the calculation of the fine.

3.4 What are the applicable limitation periods?

As mentioned, a cartel is both an administrative and a criminal offence.

Under criminal law, the statute of limitation period for a cartel is 12 years. Nonetheless, this is a contentious subject in the administrative sphere. This is because, according to the general rule set forth by the Brazilian Competition Law, antitrust violations are subject to a five-year statute of limitations term, except for those practices that are also considered a crime (for which the limitation period for the administrative enforcement shall follow the statute of limitation set forth by the Criminal Code).

However, the application of the criminal statute of limitation to the administrative enforcement is quite controversial and there is heated debate on whether the 12-year limitation period should be extended to legal entities (since only individuals are criminally liable for cartel violations), and whether a criminal proceeding must have been initiated (or concluded) if the criminal statute of limitation is to be applied, among other topics.

This matter has been frequently discussed and the current stand of the Tribunal, by a majority of votes, is that the limitation period of the cartel violation should be the same as the criminal limitation. In addition, a recent decision from Brazilian Superior Court acknowledged that the replacement of the administrative statute of limitations (five-year term) for the criminal (12-year term) does not depend on a criminal action being filed against the investigated parties in relation to the facts under investigation in the administrative proceeding.

Furthermore, with respect to bid-rigging cartels specifically, CADE has been taking as a reference the criminal penalty of a prison term of up to four years, plus a fine based on the Public Contracting Law. As a consequence, in practice, CADE has been applying a limitation period of eight years for bid-rigging cartels.

The statute of limitation is counted from the date that the misconduct was perpetrated, or, in the case of a permanent or continuing violation, as for cartel conduct, according to CADE's prevailing understanding, the day such practice has ceased (for instance, the more recent document with evidence of the collusion or in bid-rigging cases, when the object of the contract is delivered or when the last payment is made). The limitation period is interrupted by any administrative or judicial act with the purpose of investigating the practice.

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

Yes, the company is permitted to pay the fine imposed to (former) employees; however, the payment slip issued for the payment of the fine will be issued on the (former) employee's name and taxpayer number, and the individual – not the company – will be personally held responsible for collection.

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 employer may request the reimbursement of cost and/or financial penalties from the civil or labour courts; however, this is not a usual procedure and no decision in this regard is known as at this time.

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, companies from the same economic group can be held liable for the anticompetitive violation carried out by one of them.

4 Leniency for Companies

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

The party interested in signing a Leniency Agreement with CADE (Leniency Applicant) must: be the 'first-in' to report a violation previously unknown to CADE; cease and confess its participation; and fully co-operate with CADE's investigation by providing documents, information and any clarification needed until the Tribunal rules.

Leniency Applicants may receive full administrative immunity (total leniency or 'amnesty') or the reduction of one-third to two-thirds of the applicable fine (a 'partial leniency') if CADE already had previous knowledge of the reported misconduct but lacked evidence to support a conviction. In terms of criminal offence, both Leniency Agreements (total or partial) prevent criminal prosecution of the Leniency Applicant.

CADE's first Leniency Agreement was signed in 2003. Since then, CADE has entered into 109 Leniency Agreements with companies and individuals that had engaged in cartel practices.

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

CADE has a 'marker' system, and the applicant (individual or company) must identify itself before the antitrust authority and provide general information about the misconduct, such as the market/biddings affected by it (both product and geographical scope), the participants and the period of the conduct. Latecomers may secure their place in line and can be entitled to negotiate a Leniency Agreement if CADE's negotiations with the 'first-in' fail or may be invited to enter into Settlement Agreement (TCC) negotiations if the Leniency Agreement is no longer available.

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

Yes, a marker application can be made orally through a phone call to the GS Chief of Staff or personally at CADE's headquarters. In 2021, CADE launched an electronic system to register the applications for marker, named as 'Clique Leniência', which is available via CADE's website.

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 application is treated confidentially during the entire administrative proceeding, and only the defendants will be aware of the identity of the Leniency Applicant, which will be disclosed only in the final ruling of the case.

The access to leniency and settlement confidential documents is highly debated in private litigations. As for the use of evidence from administrative proceedings in civil cases, CADE has indicated that its final decision (including the Commissioner's votes) should be sufficient to initiate a claim; however, CADE's decisions do not bind judges' rulings.

In September 2018, CADE issued Resolution No 21/2018 to rule on the sharing of information and evidence from investigations with third parties. According to this resolution, access to the History of Conduct (a corporate statement made by GS in the context of a leniency or a Settlement/Cease-and-Desist Agreement, based on self-accusatory documents and information) shall not be granted to third parties, even after the Tribunal's final decision, except in case of legal determination or judicial decision. Access can also be authorised by the leniency/settlement signatories or granted through international co-operation (provided a waiver is granted by the signatories), both with CADE's consent.

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

Continuous co-operation of the Leniency Applicants is expected until the final ruling of the case. There is an ongoing debate as to whether co-operation would be applicable to spin-off proceedings related to the original investigation if they are related to the same misconduct.

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

Brazil adopts a 'leniency-plus' programme, which provides incentives for a defendant under investigation regarding an anticompetitive conduct in a certain market ('original case') to report its involvement in a violation in another market ('disclosed case'), thereby securing full immunity in the disclosed case and a fine discount on the original case (fines can even be further reduced if the defendant settles the original case; i.e., the TCC discount will be subsequently applied to the 'plus reward').

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 may report cartel misconduct using the same procedure available for companies as explained above, by applying for a marker, in which case they will be the Leniency Applicant. Alternatively, individuals may also report an anticompetitive conduct anonymously to CADE through a hotline made available via the antitrust authority website, 'Clique Denúncia'.

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?

Yes. If a company or individual facing an investigation wants to settle with CADE, they can execute a TCC (Cease and Desist Agreement) with the authority. Under a TCC, the antitrust authority agrees to close investigations against the interested party upon the fulfilment of certain terms and commitments.

Among these commitments, and under a cartel investigation, it is mandatory for the interested party to acknowledge its participation in the conduct, collect a settlement fine ('pecuniary contribution'), cease conduct, fully co-operate with CADE throughout the investigation by providing additional evidence of the misconduct, as well as complying with eventual ancillary obligations that may be negotiated with CADE.

To start the settlement negotiations, the interested party must make a request for a marker, which grants a position in the line to negotiate a TCC. This is relevant since the first TCC applicant in the case is granted a discount of 30–50% on the fine expected to be imposed by the Tribunal, the second applicant is granted a discount of 25–40%, and the third and onwards a discount of no more than 25%. However, after the case is sent to Tribunal, the expected fine discount must not surpass 15%.

If the TCC applicant is also applying for a Leniency Plus Agreement in another case, the following parameters will be applied to the TCC discount:

- first TCC applicant (+ leniency-plus): 53.33–66.67% of the expected fine;
- second TCC applicant (+ leniency-plus): 50–60% of the expected fine; and
- all other TCC applicants (+ leniency-plus): up to 50% of the expected fine.

A TCC can be proposed at any moment up until the case is included in the dockets for trial.

The TCC pecuniary contribution is calculated based on the expected fine to be imposed by the Tribunal, in which the mentioned discount is applied as a result of the negotiation.

Different from the Leniency Agreement, the TCC does not provide criminal immunity to the individuals who admit participation in the conduct. However, CADE may help the settling party to also reach an agreement with the Public Prosecutor's Office to settle the criminal liability.

7 Appeal Process

7.1 What is the appeal process?

CADE's decisions are final and non-appealable at the administrative level. Defendants may challenge CADE's decisions in a federal court either during an investigation (to discuss the illegality of an investigatory measure, such as a dawn raid), or after the trial (to annul or revert the Tribunal's decision). To suspend CADE's ruling effects, defendants should provide appropriate guarantees to the court, when applicable (i.e., create an escrow account with the fine imposed by CADE or offer a Letter of Guarantee).

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

An appeal may suspend a company's requirement to pay the fine if the Appealing Party requests a preliminary injunction to stay CADE's decision. To obtain a preliminary injunction, the Appealing Party must prove (i) the probability of the alleged right, and (ii) the likely damages if CADE's decision is not suspended until ruling of the appeal. Moreover, to suspend CADE's ruling effects, defendants should provide appropriate guarantees to the court, when applicable (i.e., depositing the amount of the fine imposed by CADE or offering a Letter of Guarantee).

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

In the analysis of a Request for Annulment of CADE's decision, the court is permitted to carry out a full review of the terms of the final decision issued, which includes the analysis of the evidence used to ground the decision, which was presented during the cartel investigation (and may include the cross-examination of witnesses if the parties wish to do so). However, note that the judge ruling the case has discretionary power to decide on the evidence to be produced in the Request for Annulment.

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?

Private entities and individuals seeking damages compensation for illegal acts have the right to file a civil lawsuit before courts. Provided that it has standing to sue, the plaintiff must prove: (i) the illegal act; (ii) the damage; and (iii) the causal link between the illegal act and the damage to obtain relief.

Both direct and indirect purchasers (not distinguished by the Brazilian Competition Law) harmed by the cartel have the right to seek damages from any of the cartel members (including the Leniency/Settlement Applicants).

On November 16th, 2022, the Brazilian President sanctioned Federal Law No 14.470/2022, which immediately entered into effect, adding some provisions to the Brazilian Competition Law aiming to foster private enforcement. According to such law, Leniency/Settlement Applicants are no longer jointly liable for cartel-related damages and should be charged only for 'single damages', while the other participants can be charged for 'double damages'.

Furthermore, it raised CADE's decision to the status of '*prima facie* evidence' allowing it to ground request for injunctions before Courts strengthening the follow-on actions.

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

Civil collective actions for cartel damages compensation (class actions) are permitted in Brazil. Associations and public interest groups, specifically those destined to defend interests and rights protected by Law No 8,078/1990 (Consumer Protection Code), are listed among the entities that have standing to file collective actions. Also, based on Law No 8,625/1993 (National Law of Public Prosecutor's Office), the Public Prosecutor's Office can propose collective actions in the face of violations against collective rights.

8.3 What are the applicable limitation periods?

According to recently approved Federal Law No 14.470/2022, civil antitrust claims from cartel victims are subject to a five-year limitation period, counted as of the publication of the Tribunal's decision in the Federal Official Gazette. Furthermore, such limitation period is suspended while an administrative inquiry or proceeding, being carried out by CADE, is ongoing.

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

Private antitrust enforcement is still incipient in Brazil and there is no consolidated case law yet regarding indirect purchases or passing-on defences. Any purchaser (either direct or indirect) can claim damages resulting from cartel overprice at the courts, following the ordinary judicial proceeding rules. In addition to that, newly approved Federal Law No 14.470/2022, established that the burden of proof of the 'passing-on' defence lays on the defendant arguing it.

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

To file a follow-on damage claim, the plaintiff must bear the court fees related to the initial presentation of the claim, notification process, interlocutory appeals and motions (if applicable), and usually expert fees in the evidentiary stage.

The losing party is also obliged to pay an amount set by the judge – which will range from 10% to 20% of the claim value or the condemnation value – to the attorneys engaged by the winning party, as well as the reimbursement of its court fees.

The losing party has none of these obligations in collective claims, pursuant to both the Brazilian Consumer Protection Code and Law No 7,347/1985 (Public Civil Suit Act).

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?

Generally, litigation in Brazil is quite a lengthy process and it may take several years to resolve a claim. Private antitrust enforcement is still incipient in Brazil. It is worth pointing out that the lengthy process and the burden of proving actual damages may contribute to discouraging private antitrust enforcement in Brazil, justifying in part its incipience. Private actions can also be costly for the parties, which could add another layer of discouragement for the proliferation of such actions.

In this context, there are a few civil damages claims ongoing before the courts; however, their results are not yet final, and in some instances, due to confidentiality issues, information on their status or even whether an Agreement was reached is not available. As previously mentioned and detailed in section 9, a recent Federal Law entered into effect in the end of 2022, setting several measures aiming to foster Damage Actions Claim.

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 mentioned, Federal Law No 14.470/2022 has been recently approved by the Brazilian President and entered into force at the end of 2022. Such regulation complemented the Brazilian Competition Law with provisions aiming to foster Damage Action Claims. The main changes brought to the Brazilian Competition Law are listed below:

- Double damage for the cartel participants, except for Leniency and Settlement Applicants who are not jointly responsible for the cartel damage.
- Passing-on defence is not presumptive and should be proved by the defendant that argued it.
- Set a five-year limitation period counting as from the publication of CADE's final decision on the cartel (and stops the limitation period while the proceeding is ongoing before CADE).
- CADE's decision may be used to ground a request for injunction in Damage Action Claims.

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

The following guidelines relating to cartel conduct are publicly available via CADE's website:

- CADE's antitrust leniency programme.
- TCC for cartel cases.
- Competition compliance programmes.

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Caminati Bueno Advogados is widely recognised as a leading Brazilian competition and antitrust law firm. The firm is an antitrust powerhouse headquartered in São Paulo with more than 20 seasoned professionals wholly dedicated to antitrust matters. Leading Partners Eduardo Caminati Anders and Marcio C. S. Bueno have more than two decades of substantive experience working in many of the most challenging and complex antitrust cases in Brazil. The firm is solidly structured, relying on the expertise of five other Partners able to assist clients and to co-operate with international law firms in getting approval for global mergers, dealing with antitrust high-profile investigations, and assisting in all sorts of antitrust compliance works. Recent cases include: getting full clearance of a global merger involving Albaugh and Rotam; assisting Citigroup in Brazil under investigations comprising Forex 1 and Forex 2; executing several Leniency Agreements and settlements on behalf of Andrade Gutierrez under the 'Car Wash Operation'; successfully representing a hotel association in Brazil against the largest OTAs (Booking, Expedia and Decolar) due to imposition of parity clauses (MFN); and dismissing an investigation on resale price maintenance against a big watch producer and representing a multinational company in the Human Resources cartel investigation carried out by the Brazilian Competition Authority.

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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 Canada, competition law is governed by the *Competition Act*, R.S.C., 1985, c. C-34 (the "Act"). The Act does not expressly define or refer to cartels or cartel conduct. Cartel conduct is generally understood as an agreement or arrangement for collaboration between competitors contrary to the Act that harms competition.

Criminal cartel-related conduct is a *per se* offence prohibited under Part VI of the Act (the "Criminal Provisions"). For the purposes of the Criminal Provisions, an agreement or arrangement need not be formal nor carried out. It can be proved on the basis of circumstantial evidence.

Agreements or arrangements between competitors that do not amount to naked restraints on competition but nonetheless prevent or lessen competition substantially are prohibited under section 90.1 of the Act (the "Civil Provision").

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

The Criminal Provisions of the Act are:

- Section 45(1) applies to agreements between or among competitors or potential competitors in respect of a product or service to fix prices, allocate markets or restrict output for that product. This section does not require proof of anti-competitive effects; such agreements are, *per se*, illegal.
- Section 45(1.1) criminalises agreements or arrangements between unaffiliated employers (i) to fix, maintain, decrease or control salaries, wages or terms and conditions of employment ("wage-fixing" agreements) or (ii) to not solicit or hire each other's employees ("no-poach" or "no-hire" agreements).
- Section 46 prohibits corporations from implementing a "directive, instruction, intimation of policy or other communication" from a person outside of Canada that would give effect to a conspiracy, agreement or arrangement that would offend section 45 had it occurred within Canada.
- Section 47 criminalises bid rigging, a defined term in the Act.
- Section 48 prohibits certain agreements related to professional sport.
- Section 49 prohibits federal financial institutions from entering into certain agreements related to interest rates, loans and other services.

There are several defences available under section 45, such as the ancillary restraints defence which requires an arrangement or agreement to be ancillary to a broader agreement or arrangement, necessary for giving effect to the broader arrangement, and to not contravene the Act.

Agreements between competitors that are not captured by section 45, but may nonetheless prevent or lessen competition substantially, can be challenged under the Civil Provision.

1.3 Who enforces the cartel prohibition?

The Competition Bureau (the "Bureau"), led by the Commissioner of Competition (the "Commissioner"), is an independent federal law enforcement agency, primarily responsible for the administration and enforcement of the Act. The Bureau receives complaints relating to alleged prohibited practices from the public and conducts corresponding reviews and investigations.

In the case of criminal matters, the Bureau refers matters to the Public Prosecution Service of Canada (the "PPSC"). The PPSC, led by the Director of Public Prosecutions, has the discretion to decide whether to prosecute under the Criminal Provisions. Criminal prosecutions can be brought before a provincial superior court or before the Federal Court.

In the case of civil matters, the Bureau decides whether to file an application with the Competition Tribunal (the "Tribunal") to adjudicate such matters. A Tribunal hearing is typically presided over by a panel of three members, at least one of whom is a Federal Court judge. The remaining two members are usually lay members appointed to the Tribunal due to their expertise in economics, business and the law. An appeal of any decision of the Tribunal may be filed with the Federal Court of Appeal.

Cartel conduct and anti-competitive agreements are reviewable under multiple provisions of the Act; however, there is a prohibition against duplicate proceedings under both the Civil Provision and the Criminal Provisions. Accordingly, if the

Commissioner has sought an order under the Civil Provision, it will not refer the matter for prosecution under the Criminal Provisions.

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

Where the Commissioner believes that a person has violated the Act or is engaging in conduct that could be the subject of an order under the Act, they can commence a formal investigation.

Criminal Matters

Upon completing an investigation, the Commissioner can refer criminal matters to the PPSC for prosecution in Canadian courts. The PPSC has discretion to decide whether to prosecute.

Following the laying of charges, the accused or a prosecutor can request a preliminary inquiry before a provincial court judge to determine whether the matter should proceed to a full trial. If a trial is scheduled, a matter proceeds before a judge or jury in a provincial superior court or before a judge of the Federal Court. At trial, the prosecutor must prove the charges beyond a reasonable doubt. A separate sentencing hearing is held if an accused is found guilty.

Civil Matters

Following the completion of an investigation under the Civil Provision, the Commissioner can commence an application before the Tribunal. In these cases, the Commissioner must prove their case on a balance of probabilities.

1.5 Are there any sector-specific offences or exemptions?

Section 48 prohibits agreements related to professional sport that unreasonably limit the opportunities for a person to participate as a player, including the imposition of unreasonable terms or conditions, or the opportunities to negotiate with or play for a team or club.

Section 49 prohibits agreements between federal financial institutions related to fixing interest rates on deposits or loans, charges to customers, the amount or kind of service to be provided to a customer, loans offered to customers, or to whom loans or other services will be provided or withheld.

The Act does not apply to collective bargaining between trade unions and employers, the underwriting of securities, or agreements relating to amateur sport.

The Criminal Provisions do not apply to agreements between companies that are affiliated (under common control).

Section 90.1 does not apply to agreements amongst affiliates, federal financial institutions, or those certified by the Minister of Transport. Section 90.1 also does not apply to agreements under the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act that have been approved by the Minister of Finance.

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

Section 46 prohibits corporations from implementing a foreign directive from outside of Canada that would give effect to a conspiracy, agreement or arrangement that would offend section 45 had it occurred within Canada.

2 Investigative Powers

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

The Commissioner and the Bureau have access to investigative powers, including search and seizure powers, orders for the production of data, and wiretaps.

Section 11 of the Act allows the Commissioner to apply to a court for (i) production of documents (including documents in the possession of affiliates), (ii) written responses to requests for information, and (iii) the examination of a witness under oath. Section 11 orders can be obtained if the Bureau has commenced a formal investigation and the target of the order is likely to have the relevant information sought. These orders can be sought against anyone with relevant information, including people and corporations outside of Canada.

Bureau officers use search warrants to enter and search a premise and seize relevant records (including electronic records). To obtain a search warrant, the Bureau must show that there are reasonable grounds to believe (i) an offence under the Act has been committed, and (ii) the premises to be searched contain the records.

Under the *Criminal Code*, the Bureau can obtain additional warrants including for wiretaps.

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

In Canada, the Bureau's investigative powers generally require prior judicial authorisation. A warrantless search is only permitted where there are exigent circumstances that make it impracticable to obtain a warrant. Representatives of the Bureau are also permitted to seize documents in plain sight even where they are not described in the search warrant but they contain evidence of other crimes. The "plain sight" doctrine also applies to computer system searches.

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

Subsections 184.2, 184.3 and 188 of the *Criminal Code* allow the Bureau to obtain a warrant from the court for wiretaps.

2.4 Are there any other significant powers of investigation?

Bilateral Mutual Legal Assistance Treaties, including with the US and UK, and the *Inter-American Convention on Mutual Assistance in Criminal Matters*, allow Canada to seek investigative assistance from over 50 countries.

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

Searches are generally carried out by officers from the Bureau, although in some circumstances police may assist. Upon arrival, the search team may take immediate steps to secure the premises and prevent the concealment or destruction of records. They are not required to wait until legal counsel arrives to commence a search; however, they will generally wait for a reasonable period of time for the target's legal counsel to arrive, upon request.

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

In Canada, communications containing advice from in-house legal counsel, or made for the purpose of obtaining legal advice, are generally subject to solicitor-client privilege. Courts will focus their privilege analysis on the purpose of the communication.

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 the Act, the following limitations exist to safeguard the rights of defence of companies and/or individuals under investigation:

- The Bureau is required to conduct investigations in private and to keep the information it receives in the course of an investigation confidential. However, the Bureau may disclose the information for the purpose of enforcing the Act.
- There are procedures in the Act for dealing with privilege claims over records. Generally, counsel and the Bureau will reach an agreement on privilege in the context of an investigation, or a judge may make a determination.
- Under the Canadian Charter of Rights and Freedoms and the Canada Evidence Act, individuals are protected from forced self-incrimination. A witness cannot refuse to answer where the answer is self-incriminatory, but the answer given cannot be used against them in a criminal proceeding.
- If a party's documents are seized, they are entitled to inspect them.
- To obtain a search warrant, a section 11 order, or another type of warrant, the Bureau requires judicial authorisation.
- Targets of an investigation are entitled to receive updates on the progress of an 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?

It is a criminal offence under the Act to obstruct investigations, punishable by up to 10 years in jail, a fine in the discretion of the court, or both. It is also an offence to fail to comply with a section 11 order.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The penalty imposed for contravention of the Criminal Provisions is fines in the discretion of the court.

If a company is convicted of a conspiracy offence under the Act, they are prevented from carrying out business with the federal government under federal government procurement policies.

Under section 36 of the Act, private actions can also be brought by third parties for the recovery of damages suffered as a result of the cartel conduct.

The Tribunal can impose prescriptive or prohibition orders under the Civil Provision. A prohibition order can apply to any person, whether or not the person is a party to the agreement or arrangement. Prescriptive orders can require any person, whether or not the person is a party to the agreement or arrangement, to take any action.

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

The penalties for conspiracy or bid-rigging convictions can include imprisonment for up to 14 years, fines in the discretion of the court, or both. Fines are imposed on a per count basis, and individuals can face multiple counts. Debarment sanctions may also apply 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?

A court considers factors such as financial hardship or the inability to pay in determining the amount of a fine. A court can only impose a fine on an individual if it is satisfied the individual is able to pay it. For corporations, a court is required to consider the impact a fine would have on the economic viability of an organisation and the continued employment of its employees.

3.4 What are the applicable limitation periods?

There is no limitation period applicable to the Criminal Provisions.

The application of the Civil Provision is limited to existing or proposed agreements between competitors.

A two-year limitation period applies to actions to recover damages under section 36 of the Act. This limitation period begins to run from the time that the claim is discovered or is discoverable by the plaintiff.

There are also provincial statutory limitation periods that apply to private actions to recover damages, which are typically two or three years from the time the claim is discovered or is discoverable by the plaintiff.

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

A corporation is not restricted from indemnifying employees for legal costs or financial penalties, and in some circumstances an employee may be entitled to such indemnification. However, Canadian corporate statutes generally only allow a company to indemnify a director or officer convicted of an offence if that individual was acting honestly and in good faith, with a view to the best interest of the corporation, and had reasonable grounds to believe their conduct was lawful.

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 Canada, the *ex turpi causa* defence may prevent a company convicted of a conspiracy offence from making a claim against the employees responsible for the wrongdoing.

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?

Any parent-subsidiary relationship between corporations is not sufficient, in and of itself, to hold a corporation liable for the actions of a subsidiary. Section 22.2 of the *Criminal Code* sets out the test for determining when a corporation is a party to an

offence. The test generally requires the involvement of a senior officer (a term defined in the *Criminal Code* and caselaw) of the parent corporation in the offence. However, section 46 of the Act prohibits corporations from implementing a foreign directive that would give effect to a conspiracy that would offend section 45 had it occurred within Canada.

4 Leniency for Companies

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

A company or individual can approach the Bureau and request immunity from prosecution under the Act in exchange for cooperation with the Bureau's investigation. To qualify for immunity, an individual or company must admit its involvement in criminal activity, and agree to cooperate with the Bureau's investigation and related prosecutions. An immunity applicant is required to cease its participation in the illegal activity and must not have coerced other parties to participate in the activity. All cooperation with the Bureau is provided at the applicant's own expense.

In general, immunity is available where the Bureau is not aware of the offence or has insufficient evidence to prosecute without the immunity applicant's cooperation. Once an applicant has obtained a marker and made a proffer (as described below) and the Bureau determines that sufficient information has been received, it will recommend that the PPSC grant immunity. Typically an interim grant of immunity will be made while the applicant completes a full disclosure process of non-privileged information. Once the Bureau is satisfied with the information disclosed, it will recommend to the PPSC that the final grant of immunity be made. If an applicant fails to meet its disclosure and cooperation obligations, it can lose its immunity status.

Companies or individuals that are not eligible for immunity might qualify for leniency in sentencing for cooperating with the Bureau. The leniency programme also requires full disclosure from the applicant. The fines payable can be reduced by up to 50% under the leniency programme. The Bureau is responsible for making recommendations to the PPSC on the fine for a leniency participant based on (i) a base fine (generally 20% of the indirectly and directly affected commerce), (ii) adjustments accounting for mitigating or aggravating factors, and (iii) a reduction for leniency. If the Bureau's recommendation is accepted, the PPSC and the applicant make non-binding joint submissions to a court after the applicant has pled guilty. Courts will typically not depart from a joint submission unless it would bring the administration of justice into disrepute. If a court departs from the joint submission, an applicant is generally permitted to withdraw its guilty plea.

Section 34 of the Act allows the court to grant prohibition orders to prevent conduct contrary to the Act. The PPSC has previously negotiated such orders involving a monetary payment to the Crown to settle cases absent an admission of liability. There are no clear criteria delineating when the PPSC will consider a prohibition order *in lieu* of pursuing prosecution.

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

In Canada, an immunity marker can be obtained from the Bureau by the first party to request and qualify for immunity. Although only one immunity marker is granted, there is no limit to the number of leniency markers that may be granted subsequently. Markers are typically obtained by counsel who must identify the nature of the offence and the relevant product and geographic markets to the Bureau. Counsel are not required to disclose the name of the applicant. Markers are obtainable on a per offence basis. Upon obtaining a marker, the applicant is required to provide the Bureau with a detailed description of the criminal activity, called a "proffer", typically within 30 days. The Bureau permits a proffer to be made orally and on a without prejudice basis.

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, and typically are, 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?

Section 29 of the Act applies to information provided in the context of immunity and leniency applications. Such information will be treated as confidential by the Bureau except where disclosure is required by law, is necessary to obtain or maintain a judicial authorisation related to investigative powers, is for the purpose of securing the assistance of a Canadian law enforcement agency, a party has agreed to disclosure, or there has been public disclosure by the party.

However, as part of Crown disclosure obligations, an applicant's information may be disclosed once charges are laid. This can include the notes made by the Bureau during the proffer.

A private litigant may attempt to obtain information from the Bureau by way of a court order, however, the Bureau's position is to oppose such requests if compliance would potentially interfere with an ongoing examination, inquiry or enforcement proceeding or otherwise adversely affect the administration or enforcement of the Act (see the Bureau's *Information Bulletin on the Communication of Confidential Information Under the Act*).

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

The requirement to continuously cooperate comes to an end when the Bureau's investigation is concluded and any related criminal prosecutions and all appeals therefrom are complete.

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

If a leniency applicant discloses information constituting a further criminal offence, they may be eligible for Immunity Plus status. Provided the applicant meets the leniency programme eligibility criteria with respect to that offence, the Bureau can recommend to the PPSC that the applicant receive immunity in respect of the newly-disclosed offence. If the applicant is not eligible for immunity in respect of the new offence, the Bureau can recommend that they be granted additional leniency of typically an additional 5–10% reduction of any fine levied.

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 apply for immunity or leniency if they meet the

eligibility criteria. Section 66.1 of the Act requires the Bureau to keep the identity of a whistle-blower confidential, and section 66.2 prevents reprisals against these 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?

The PPSC has the authority to negotiate and approve plea bargains, however, discussions typically involve the Bureau. If a settlement is negotiated, a guilty plea is made in court alongside a joint submission on sentencing. In such cases, a court is not bound by the joint submission but it can only depart from the proposed sentence if it would bring the administration of justice into disrepute or if it is otherwise not in the public interest.

7 Appeal Process

7.1 What is the appeal process?

Both an offender and the PPSC can appeal the verdict of a provincial superior court on a criminal matter to the court of appeal in that province. If a civil trial was held before the Federal Court, an appeal is made to the Federal Court of Appeal. An accused can appeal a conviction as of right on questions of law and mixed fact and law, however, they require leave to appeal questions of fact or to appeal a sentence. The PPSC's rights of appeal are more limited.

Any decision of a court of appeal can be appealed to the Supreme Court of Canada. If the court of appeal's decision included a dissent, an appeal is as of right. Elsewise leave is required and the Supreme Court only grants leave in matters raising issues of national public importance.

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

The requirement to pay a fine is not automatically suspended; however, an appeal court can suspend the obligation to pay a fine or restitution pending the determination of the appeal.

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

In general, an appeal does not allow for the cross-examination of witnesses. Fresh evidence can be tendered on appeal in exceptional circumstances where the evidence was not previously available, and in such cases cross-examination of witnesses may be permitted by an appeal 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?

Under section 36 of the Act, private actions can also be brought by third parties for the recovery of damages suffered as a result of criminal conduct that contravenes the Act, as well as the investigation costs and legal costs related to the proceedings. These actions are generally brought as class proceedings and include ancillary common law and equitable causes of action. Criminal convictions under the Act can be used as proof of the offence in a private action, however, many class proceedings have been commenced in Canada where there was no prior conviction.

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

Each province and territory in Canada, as well as the Federal Court, provides for class proceedings; however, each jurisdiction has its own rules governing those proceedings.

8.3 What are the applicable limitation periods?

A two-year limitation period applies to actions to recover damages under section 36 of the Act. This limitation period begins to run from the time that the claim is discovered (or discoverable) by the plaintiff.

Other ancillary causes of action are subject to provincial statutes of limitations which typically provide for a two or three year limitation period from the time the claim is discovered or is discoverable by the plaintiff.

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

The passing-on defence has been rejected by the Supreme Court of Canada. However, indirect purchaser and umbrella purchaser claims are permitted under Canadian law.

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

In Canada, the successful party is typically able to recover a portion of its legal costs from the unsuccessful party. The Act provides for the recovery of the costs of investigation in addition to the legal costs in section 36 actions. This supersedes any limitations on costs recovery in provincial class proceedings statutes. Plaintiffs can also recover pre- and post-judgment interest.

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 Canada, there has not been a complete trial of a class proceeding related to cartel-conduct. Most proceedings settle before trial, and in one case during trial. A few individual claims for damages pursuant to the Act have proceeded to trial.

The settlement of price-fixing class actions can be substantial, with the largest settlement being CAD 517 million paid by Microsoft in 2020. Other examples include CAD 78 million paid by auto-parts makers in 2023.

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 June 2022, the Act was amended to include the section 45(1.1) prohibition against wage-fixing and no-poach agreements

between unaffiliated employers which is a criminal offence as of June 23, 2023. At the same time, the Act was amended to remove the CAD 25 million cap on fines for criminal cartel conduct, and fines are now in the discretion of the court. Section 11 was also amended to allow for orders against corporations and individuals outside of Canada.

The Canadian government launched a public consultation process for the review of the Act in November 2022, including publishing a discussion paper on proposed amendments to the Act. To date, no draft legislation for further amendments has been tabled.

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

There are no further issues of note.

Eric C. Lefebvre's litigation practice involves a broad range of commercial litigation matters, including competition law, class actions, banking, consumer law, corporate disputes and commercial contracts. He has particular experience in urgent remedies such as seizures and injunctions of various kinds. He has been retained both by petitioners and respondents in many high-stakes shareholder oppression cases and has defended parties facing cartel and bid-rigging accusations before criminal courts.
Mr. Lefebvre represents clients before the Québec and Federal Courts as well as before regulatory bodies such as the Tribunal. He has been involved in a great many searches and seizures conducted by the Bureau as well as ensuing internal investigations and litigation. In addition, he acts in commercial arbitration proceedings.
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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?

Decree Law No. 211 ("**DL 211**"), specifically in its article 3, prohibits billboards, establishing the following penalties:

1) Antitrust sanctions: the Competition Court ("**TDLC**" – *Tribunal de Defensa de la Libre Competencia*) or the Supreme Court may impose fines and other sanctions to the offender. In this sense, the monetary penalties imposed by the TDLC are for fiscal benefit. In addition to the monetary fines, in cases of collusion the TDLC may prohibit contracting, under any title, with state bodies or companies, and on being awarded any concession granted by the state, for a maximum of five years from the date of the final ruling.
2) Damages: any entity or person who has been damaged by an anti-competitive conduct may submit damage claims in order to be compensated.
3) Criminal sanctions: criminal sanctions may be imposed on both companies and individuals that: executed, ordered or performed an anti-competitive agreement to fix sale or purchase prices for goods or services in one or more markets; restricted output or supply; divided, assigned or distributed market zones; or affected the result of tender processes conducted by public or private companies that are rendered by public services or by public bodies.

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

Article 3 of DL 211 in general sanctions any deed, act or agreement that impedes, restricts or thwarts competition, or tends to produce such effects. This article enumerates certain events, acts or agreements that are deemed to hamper, restrict or hinder competition, among which cartels are specifically prohibited in the following terms: "*a) agreements and concerted practices among competitors, and which consist of fixing sale or purchase prices, limiting output, assignment of market zones or quotas, affecting the outcome of tender processes, as well as agreements and concerted practices that, conferring market power to the competitors, consist of the determination of marketing terms and conditions, or the exclusion of current or potential competitors*".

The criminal prohibition of collusion is established in article 62 of DL 211.

1.3 Who enforces the cartel prohibition?

The TDLC, the Supreme Court and the National Economic Prosecutor ("**FNE**" – *Fiscalía Nacional Económica*) are responsible for enforcing the cartel prohibition within their own scope of authorities.

The FNE is an administrative agency whose general duty is to defend and promote free competition and – among other specific duties related with mergers, unilateral anti-competitive conducts and advocacy – is in charge of investigating cartel conducts, managing applications for leniency and representing the public interest before the TDLC when filing a cartel claim before the TDLC. The FNE is also in charge of seeking enforcement of the decisions passed by the TDLC, as well as filing a criminal complaint for collusion before the competent criminal court only after the TDLC has declared that a cartel existed.

The TDLC is a special and independent court, whose function is to prevent, correct and sanction competitive infringements, and is subject to the supervision of the Supreme Court. One of its functions is decide upon cartel cases the FNE or private parties may submit to its consideration.

Additionally, a competent criminal public prosecutor and criminal courts are responsible for the criminal enforcement of collusion.

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

Antitrust perspective (articles 39–41 of DL 211):

1. An investigation by the FNE can be triggered by a leniency application, an *ex officio* initiation – because of its own market intelligence – or as a result of a complaint filed by a third party.

2. Upon receiving a complaint from a third party, the FNE may request, within the 60 days, background information, as well as call any person to testify who may have knowledge of the alleged act.
3. The FNE will have four months from the date of receipt of the complaint to carry out an admissibility examination of the complaint from a third party.
4. If the complaint is declared admissible, the FNE must give instructions to initiate an investigation that is reported to any affected parties.
5. Once initiated – either *ex officio*, by a third-party complaint, or by a leniency application – the FNE will investigate the case, and may carry out raids, subpoenas, requests for information from the affected parties or any other entity, among others.
6. As a result of the investigation, it will either be dismissed or lead to the filing of a lawsuit or claim before the TDLC. The ruling of the TDLC is subject to a special appeal (*recurso de reclamación*) before the Supreme Court.

Criminal perspective (in general, between section 166 to section 258 of the Chilean Procedure Code):

1. The National Economic Prosecutor shall have the exclusive initiative to: (i) file a denunciation before the Criminal Prosecutor's Office for the crime of collusion; or (ii) file a criminal complaint directly before the criminal court (*juez de garantía*) to the extent that there is an enforceable judgment by the TDLC and the facts in question seriously compromise free competition in the markets.
2. In case of choosing alternative (i) mentioned above, the Criminal Prosecutor's Office will initiate an investigation. If alternative (ii) is chosen, the criminal court shall inform the Criminal Prosecutor's Office of the case in order to initiate an investigation.
3. Once the investigation has concluded, the Criminal Prosecutor will bring charges against the defendant by the Criminal Prosecutor's Office before the Criminal Court.
4. Conclusion of the investigation by alternative outlets, such as a compensation agreement between the victim and the defendant, or the conditional adjournment of the investigation.
5. Indictment.
6. Trial.
7. Sentence.

1.5 Are there any sector-specific offences or exemptions?

As a general rule, anti-competitive infringements other than cartels are not *per se* unlawful and can be justified under the rule of reason. However, as a general rule, there are no exemptions to the sanctioning of cartels, being commonly *per se* unlawful.

According to the provision under article 5 of Law Decree 3,059, Chilean shipping companies can participate in shipping freight conferences, pooling agreements and consortia that regulate and rationalise services, and will not be subject to the DL 211 rules for these purposes.

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

Chilean jurisdiction would apply only if a cartel has effects in the Chilean territory.

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	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)	No	Yes*

Please note that * 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.

In cartel investigations the FNE may request, through a grounded petition and with prior approval from the TDLC and of a Minister of the Santiago court of appeals, that the police (*Carabineros de Chile*) or investigative police (*Policía de Investigaciones*) may, under the direction of the employee of the FNE, proceed to:

1) enter public or private premises and, if necessary, raid and break and enter;
2) register and seize all types of objects and documents that may prove the cartel;
3) authorise wiretapping of all types of communications; and
4) order any communications services to provide copies and records of transmitted or received communications made thereby.

To grant the authorisation, a Minister of the Santiago court of appeals must verify the existence of such qualified grounds regarding the existence of collusive acts and its must precisely specify the measures, the duration for which they will be enforced, and the persons who will be affected.

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

DL 211 does not grant the FNE with general surveillance powers. The FNE may obtain authorisation from the referred court of appeals for intercepting communications only in

serious and qualified cases of cartel investigations, according to the terms explained above.

2.4 Are there any other significant powers of investigation?

Yes, according to article 39 of DL 211, the FNE may additionally:

1) Either *ex officio* or at the request of an interested party, request that certain parts of the file should be kept reserved or confidential.
2) Instruct that there will be no notice of the initiation of an investigation to the affected party, with the authorisation of the TDLC.
3) Require the TDLC to exercise any of its authorities and adopt preventive measures on the investigations that the FNE is developing.

Additionally, investigative authorities of the competent criminal prosecutor's office when conducting a criminal investigation of collusion have the following powers:

1) Exclusively lead the investigation.
2) Instruct investigative actions to the police.
3) Bring charges and indictments against the defendants.
4) Request the Criminal Court for authorisation to lift bank secrecy, and, in general, other investigative actions, that can deprive, restrict, or disturb the defendant or third parties of the exercise of rights that the Constitution ensures.
5) Protect witnesses and victims and request protection measures.
6) Request precautionary measures against the defendant in order to, for example, ensure its attendance before the Criminal Court.

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

While it depends on the particularities of the case under investigation, the FNE is under no legal obligation to wait for legal advisors.

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

Pursuant to article 39 n.4) of DL 211 and article 220 of the Criminal Procedure Code, the FNE may not seize or wiretap the following information:

1) Communications between the people investigated and individuals that are not compelled to declare as witnesses, such as those persons who, given their condition, profession or legal function, such as an attorney, doctor or confessor, and must keep the secret confided to them.
2) Notes taken by the people previously mentioned in relation to said communications.
3) Other objects or documents to which the non-declaration faculty naturally extends.

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?

Within the powers of the National Economic Prosecutor, article 39 letter h) of DL 211 establishes that, in the context of the requests for information that it may make to individuals:

1) Any party, who, with the purpose of hindering, diverting, or eluding the authority of the FNE, conceals information or submits false information will be penalised with minor imprisonment, in its minimum to medium degree.
2) Any party who is bound to respond to the information requests of the FNE, who unjustifiably fails to respond or only partially responds to such requests, will be penalised with a fine up to two *unidades tributarias anuales* (approximately USD 1,660) for each day of delay.

In addition, the recently enacted Economic Crimes Law (No. 21,595) establishes that concealing information or providing false information to the FNE, described above, will be considered first category economic crimes, which means that under any circumstance, they will have special rules for determining the penalty, a special regime of alternative penalties and prohibitions. Furthermore, it generates criminal liability of the legal entity if there is no crime prevention model implemented.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The TDLC may impose:

a) the modification or termination of agreements, contracts or arrangements against competition that violate the provisions of DL 211;
b) the modification or dissolution of the company, corporation or other legal entity involved in the cartel;
c) fines of up to 30 per cent of the offender's sales of the respective product or service line of business during the period in which the cartel was executed, or up to twice the economic benefit received as a result of the collusion. If is not possible to determine either the sales or the economic benefit, the TDLC may impose fines up to a maximum amount equivalent to 60,000 tax units (approximately CLP 45.5 billion or USD 56.8 million); and
d) the prohibition of contracting, under any title, with state bodies or companies, and on being awarded any concession granted by the state, for a maximum of five years from the date of the final ruling.

From a criminal perspective, according to Law No. 20,393 regarding Criminal liability of Legal Entities, companies may also have criminal liability. On the other hand, Law No. 21,595 established that collusion is a crime that may be committed and for which a company may be liable. However, article 65 of the same Act established that, as long as a law does not coordinate the concurrence of different penalties, sanctions and remedies that may be applied to a company for collusion, corporations will not be criminally liable for this conduct. In other words, as long as the law that coordinates these sanctions is not issued, companies will not be criminally liable for cartels.

Finally, and as explained in section 8 below, companies and individuals that have entered into a collusive agreement will be exposed to damage claims from consumers or any other affected third party.

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

The TDLC may apply the fines mentioned in letters a) through c) in the answer to question 3.1 above to the directors, administrators and all individuals that intervened in the cartel.

From a criminal perspective, an individual may be punished with imprisonment of up to three years and one day up to 10 years (in the event alternative punishment may apply, it can only be requested after the convict has been imprisoned for one year). Also, he or she may be subject to absolute temporal disqualification to act as a director or manager in an open stock corporation or in a corporation subject to special regulations, a state-owned company or one in which the state has an interest in, or in any trade or professional union.

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

According to the FNE's Internal Guidelines for the Application of Fines, the FNE may reduce the base amount of the fine taking into account the real, effective and certain possibility of the offender of paying the fine to be imposed by the TDLC, having regard to its size, in terms of operating revenues and ability to pay. This circumstance will be especially applied if the infringer is an individual. The economic capacity of the offender may also be considered when the FNE has received objective background information that the fine threatens to jeopardise irreparably the economic viability of the offender.

3.4 What are the applicable limitation periods?

For the application of sanctions by the TDLC, the statute of limitation is five years as from the time the cartel's effects on the market have ceased.

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

No, they cannot.

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?

An employee is jointly responsible for paying the fines imposed on legal persons, its directors, administrators and those individuals that benefitted from the respective cartel, as long as they participated in it.

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. Moreover, according to the FNE's Internal Guidelines for the Application of Fines, the FNE understands that the "offender" in terms of article 26 includes all those entities that are part of the same economic agent, to the extent that responsibility for the acts carried out by it may be predicted with regard to the same decision-making centre.

4 Leniency for Companies

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

According to article 39 bis of DL 211, participants of a cartel may request a reduction or an exemption of fines if they supply the FNE with relevant information that helps to prove such conduct and determines the persons involved. The following benefits may be granted:

1) Exemption benefit: the first applicant may be exempted from: (i) the sanction of compulsory dissolution of a legal entity established in article 26, letter b); (ii) the antitrust fine; and (iii) criminal liability for the crime of collusion ("Exemption Benefit").
2) Reduction benefit: the second applicant may obtain the following benefits: (i) a reduction of up to 50% of the fine that would have been otherwise requested to the TDLC by the FNE; (ii) a reduction by one degree of the penalty for the crime of collusion; and (iii) the applicant will not be required to comply with the minimum of one year of effective imprisonment established in subsection four of article 62 if the FNE's complaint involves more than two competitors, and provided that the beneficiary fulfils the requirements established in Law No. 18,216 to substitute the enforcement of penalties involving the deprivation of liberty ("Reduction Benefit").

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

Yes. The applicant initiates the leniency process by requesting a "marker" ("Marker Request"). The following information is required:

1) Full name, telephone number and contact email address.
2) Identification of the natural person or the legal entity being represented.
3) A domicile in Chile.
4) A general description of the conduct and the affected market.

Once the Marker Request has been filed, the FNE will inform and guarantee to the applicant its place by issuing a "marker". Along with issuing the marker, the FNE will set a deadline within which the formal application must be filed, accompanied by the supporting information ("Benefit Request"). If the Benefit Request fulfils the legal requirements, the FNE will grant the requested benefit provisionally by issuing an official letter establishing the requirements that the applicant must fulfil to obtain the definitive benefit. When the applicant fulfils such requirements, the provisional benefit becomes definitive upon the FNE's filing of the complaint before the TDLC.

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

According to the FNE's Leniency Guidelines, a Marker Request may be made by: (i) logging in through the link available at the FNE's website; or (ii) contacting the FNE's leniency officer by phone or by email.

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 FNE shall keep confidential the existence of the Benefit Request, which includes its supporting information and any other information obtained during the leniency process. Such confidentiality will cease when a complaint is filed with the TDLC. However, the identity of those who have made statements or provided information during the leniency process with the FNE will be protected as well as any other information that may affect its competitive development.

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

The FNE's Leniency Guidelines set the duty to cooperate truthfully, opportunely and continuously with the FNE during the course of the investigation.

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

Yes, in accordance with FNE's Leniency Guidelines, parties that could not apply for the Exemption Benefit (because they were not the first applicants) may still confess a second act of collusion to the FNE, different from the first. In this case, if the applicant fulfils the requirements to obtain the Reduction Benefit with respect to the first conduct, and the requirements to obtain the Exemption Benefit with respect to the second conduct, the FNE will grant the maximum permitted reduction with respect to the first collusive conduct and the Exemption Benefit with respect to the second conduct.

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.

No, it is the same procedure.

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 FNE is entitled to enter into agreements with the parties involved in an investigation (article 39(ñ) of DL 211). Once the FNE files a claim before the TDLC, it may enter into an agreement with the parties during the proceedings, subject to the approval of the TDLC, a decision that is subject to appeal before the Supreme Court.

7 Appeal Process

7.1 What is the appeal process?

The TDLC's final ruling is only subject to an appeal before the Supreme Court which may be filed by the FNE and/or any of the parties within 10 days.

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

The filing of the appeal does not suspend the enforcement of the judgment issued by the TDLC, except with respect to the payment of fines. However, at the request of a party and by a grounded decision, the Supreme Court may suspend the proceedings effects of the judgment, in whole or in part (article 27 of DL 211).

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

By a subsidiary application of article 159 of the Civil Procedure Code, the Supreme Court could request *ex officio* the cross-examination of witnesses (article 29 of the DL 211).

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 damages claim may be filed after a TDLC's final decision before the same court pursuant to an abbreviate procedure (article 30 of DL 211). Likewise, if the collective or diffuse interests of consumers were affected as a result of a cartel conduct sanctioned by the TDLC, civil damages can be pursued through the class action procedure set forth in the Consumer Protection Act, by way of filing a collective damages claim before the TDLC (article 51 of the Consumer Protection Act).

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

Yes. Please refer to the answer above.

8.3 What are the applicable limitation periods?

The applicable limitation period is four years, once the final antitrust ruling is pronounced.

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

There are no precedents on "passing on" defences yet.

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

There are no special cost rules for civil damages. However, pursuant to the general procedural rules applicable, the party that is totally defeated in a trial will be condemned to pay the cost of proceedings, unless the court considers that the claimant has had plausible reasons to litigate (article 144 of the Civil Procedural Code for subsidiary application according to article 29 of DL 211).

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 main civil damages claims for cartel conduct have been consumer class action cases. Currently, the only "successfully" concluded claims have been settled. In this regard, the claim regarding the Pharmacies cartel was terminated by a settlement with two of the defendants and therefore the trial will continue with respect to the third defendant who did not agree to the settlement, while at the TDLC, the trial initiated by the Poultry meat cartel was concluded by a court settlement reached by the parties. Finally, the TDLC is currently preparing the ruling in the damage claim based on the Tissue cartel.

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 most important development introduced by the Amendments to DL 211 is the criminalisation of collusion and the introduction of a *per se* standard to punish hard core cartels, where the existence of an agreement may be sufficient to condemn, disregarding the market power of the parties requisite and/or the anti-competitive effects of the cartel.

Also, the Amendment to DL 211 introduced a criminal liability exemption for the crime of collusion to individuals who have first provided background information to the FNE in the context of a leniency application. Those who provide information at a later time will be awarded a reduced punishment and will be able to access an alternative punishment without having to effectively comply with the one-year imprisonment penalty (article 63 of DL 211).

Finally, as noted above, the recently enacted Economic Crimes Law (No. 21,595) establishes that cartels, concealing information or providing false information to the FNE and claiming the existence of a cartel, based on false or fraudulent background information, will be considered first category economic crimes, which means, in practice, that under any circumstance, they will have special rules for determining the penalty, a special regime of alternative penalties and prohibitions. Furthermore, this will generate criminal liability of the legal entity, if there is no crime prevention model implemented.

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

There are no further issues.

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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 the People's Republic of China* ("**AML**") provides the main legal basis for cartel prohibition. Under the framework of the AML, cartels include horizontal, vertical and hub-and-spoke monopoly agreements (hybrid monopoly agreements with characteristics of both horizontal and vertical monopoly agreements). It is worth noting that the 2022 amended version of the AML ("**2022 AML**") came into effect on August 1, 2022.

The *Provisions on Prohibition of Monopoly Agreements* ("**PPMA**") issued by the State Administration for Market Regulation ("**SAMR**") on 10 March 2023 provides further regulation of the cartel. The PPMA comes into effect on 15 April 2023.

In addition, there exist several Anti-monopoly guidelines issued by the Anti-Monopoly Commission of the State Council ("**AMC**") or the SAMR concerning or involving cartels. Although these guidelines are not legally enforceable, they are important references for AML enforcement authorities and business operators, which can, on the one hand, provide guidance to AML enforcement authorities in their enforcement activities and, on the other hand, help business operators in their compliance reviews.

The AML, prior to the amendment of 2022, did not impose criminal liability for monopolistic conducts, including entering into monopoly agreements; however, in the 2022 AML, criminal liability for monopolistic conducts was added in article 67, which also means that the AML formally establishes a trinity of administrative, civil and criminal legal liability systems. However, according to the principle of a legally prescribed punishment for a specified crime, the criminalisation criteria and specific penalties for monopolistic conducts still need to be further clarified.

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

1.2.1 Provisions concerning the definition of monopoly agreements

Article 16 of the AML provides that "monopoly agreements" refer to agreements, decisions or other concerted actions that eliminate or restrict competition.

Article 5 of the PPMA further provides that agreements or decisions can be in written or verbal form. Other concerted actions refer to those substantially carried out by business operators in the absence of any clear agreement or decision made by and between them.

Article 6 of the PPMA further lists some factors that shall be considered to identify other concerted actions. There may be special criteria for identifying other concerted actions in some special areas, such as special criteria in the field of platform economy listed in the *Anti-monopoly Guidelines on Platform Economy Sectors* issued by the AMC on February 7, 2021.

1.2.2 Provisions concerning the specific types of monopoly agreements

As mentioned above, the monopoly agreements prohibited under the AML are currently divided into horizontal, vertical and hub-and-spoke agreements, which are stipulated in articles 17, 18 and 19 of the AML and articles 8 to 14 of the PPMA, respectively.

Article 17 of the AML and article 8 to 13 of the PPMA prohibit monopoly agreements between business operators who are in competition (i.e., horizontal monopoly agreements).

Article 18 of the AML and article 14 of the PPMA prohibit monopoly agreements between a business operator and a transaction counterparty (i.e., vertical monopoly agreements).

Article 19 of the AML provides that a business operator shall not organise other business operators to reach a monopoly agreement or provide substantive assistance for other business operators to reach a monopoly agreement (i.e., hub-and-spoke monopoly agreements).

1.3 Who enforces the cartel prohibition?

Article 4 of the AML provides that the leadership of the Communist Party of China shall be adhered to in anti-monopoly work. This is a new provision added in the 2022 AML, which is a declaratory expression and a confirmation of this fundamental principle in the AML.

The State Anti-Monopoly Bureau ("**SAMB**") was officially established on November 18, 2021, and the Anti-Monopoly Bureau under the SAMR was adjusted to three departments, which are the Anti-Monopoly Enforcement Department I, the Anti-Monopoly Enforcement Department II and the Department of Competition Policy Coordination. Among them, the Anti-Monopoly Enforcement Department I is responsible for anti-monopoly enforcement of monopoly agreements.

The SAMR may authorise provincial Administrations for Market Regulations ("**provincial AMRs**") to take charge of the anti-monopoly enforcement work within their own administrative region in the name of their own authority.

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

1.4.1 Initiation of investigation
According to article 46 of the AML, AML enforcement authorities may initiate investigation procedures *ex officio* or based on reports. If the report is made in writing and provides relevant facts and evidence, the AML enforcement authorities shall conduct the necessary investigation.

1.4.2 The regulatory talk
The 2022 AML now includes a regulatory talk system. Where any business operator, administrative agency, or organisation authorised by laws or regulations to perform the function of administrating public affairs is suspected to be in violation of this Law, the AMR may conduct a regulatory talk with their legal representative or head person and require them to put forward corrective measures. However, the regulatory talk is not a mandatory procedure in AML enforcement.

1.4.3 File the case
According to article 24 of the PPMA, AML enforcement authorities conduct necessary investigations of a suspected monopoly agreement, and file the case for official investigation if it meets the following criteria:
(1) there is preliminary evidence proving that the business operators involved have entered into a monopoly agreement;
(2) the case falls within the jurisdiction of the agency; and
(3) the case is within the limitation period for administrative punishment.

The provincial AMRs shall file the case with the SAMR within seven working days as from the date of filing the case.

1.4.4 Investigation procedures
According to article 48 of the AML, when the AML enforcement authority investigates a suspected monopolistic conduct, there shall be no fewer than two law enforcement officers, who shall present their law enforcement credentials. Meanwhile, officers shall keep written records, which are to be signed by those being questioned or investigated. Any business operators being investigated, stakeholders or other entities or individuals involved shall cooperate with AML enforcement authorities as they perform their duties and shall not refuse or obstruct the investigation conducted by AML enforcement authorities.

1.4.5 The right to state the opinion
Any business operators under investigation and the interested parties have the right to state their opinions. AML enforcement authorities shall verify the facts, reasons and evidence provided by the business operators and the interested parties under investigation.

1.4.6 Prior notice of the administrative penalty
According to article 24 of the PPMA, when the AML enforcement authority is to impose administrative punishment regarding a monopoly agreement, it shall, before making the administrative punishment decision, notify any party to the case in writing of the content of the administrative punishment to be imposed, the facts, reasons, and basis for it, as well as their legally-entitled right of statement, right of defence, and right to a hearing.

According to article 24 of the PPMA, after the AML enforcement authority has notified any party to a case of the administrative punishment decision to be made, it shall fully hear their opinions and review the facts, reasons, and evidence submitted by them.

1.4.7 Issue the administrative penalty decision
Finally, the AML enforcement authority shall, after investigation and verification of the suspected monopolistic conducts, issue the administrative penalty decision to the investigated party. The decision may be announced to the public.

1.5 Are there any sector-specific offences or exemptions?

1.5.1 General exemptions
The AML provides some general exemptions for monopoly agreements in article 20, with sector-specific exemptions provided in articles 68 and 69.

1.5.2 Intellectual property rights
The complex relationship between the exclusivity of intellectual property rights and competition in market determines the special status of intellectual property rights in the field of anti-monopoly. Article 68 of the AML provides that the exercise of intellectual property rights by a business operator in accordance with the laws and administrative regulations on intellectual property rights shall not be subject to the AML. However, the abuse of intellectual property rights by a business operator to exclude or restrict competition shall be subject to the AML.

1.5.3 Agriculture
Agriculture is a basic industry of the national economy. Out of policy considerations, article 69 of the AML provides that the AML does not govern the ally or concerted actions of agricultural producers and rural economic organisations in the economic activities such as production, processing, sales, transportation and storage of agricultural products.

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

According to article 2 of the AML, the AML is not only applicable to cartel conducts in China, but also applies to cartel conducts outside of China if they have exclusion or restriction effects on the market within China.

The extraterritorial application of the AML mainly includes two ways: anti-monopoly administrative enforcement; and anti-monopoly judicial litigation. There have been several cases in the past decade that exemplify the extraterritorial effects of the AML in practice.

2 Investigative Powers

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

Article 47 of the AML provides that when investigating any suspected monopolistic conduct, the AML enforcement authority may take the following measures:
(1) entering the business premises of the business operator being investigated or other relevant premises to investigate;
(2) questioning the business operator being investigated, the stakeholders or other entities or individuals involved, requiring them to explain relevant matters;
(3) accessing and making copies of relevant certificates, agreements, account books, correspondence, computer data and other documents of the business operator being investigated, the stakeholders or other entities or individuals involved;
(4) seizing or detaining relevant evidence; and
(5) checking the business operators' bank accounts.

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

A dawn raid is a targeted formal search of a certain range of the business premises without prior notice by the AML enforcement authority.

2.2.1 Places that may be investigated
Based on previous enforcement practices, the relevant premises that may be investigated include offices, factories, stores, warehouses, vehicles and may even include specific outsourcing companies. Dawn raids of these premises may be conducted simultaneously.

2.2.2 Who to ask and what to ask
In practice, the persons who may be questioned include company executives, relevant salesmen, head persons of essential departments and those directly handling the relevant business/documents. The AML enforcement authority may request clarification of the documents the officer is reviewing, where the documents can be located or explanations of the facts related to the case, etc.

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

As far as we are aware, and based on publicly available information, no such power is expressly given to AML enforcement authorities.

Additionally, according to article 57 of *Regulations of the Supreme People's Court on Certain Issues Relating to Evidence in Administrative Litigation*, evidential materials obtained by way of stealthily taking photographs, stealthily making sound recordings, wiretapping and any other means and that damage the legitimate interest of any other party shall not be used as the basis for confirming the facts of any administrative case.

2.4 Are there any other significant powers of investigation?

The 2022 AML provides a civil public interest litigation system, in which the litigation will be filed by people's procuratorates.

According to article 35 of *Rules for the Handling of Public Interest Litigation Cases by People's Procuratorates*, when handling a public interest litigation case, a people's procuratorate has the right to investigate and collect evidence. However, the people's procuratorate may not take any compulsory measures such as restricting personal freedom or sealing up, distraining or freezing any property.

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

AML enforcement authorities will carry out the investigation according to the AML.

A written report shall be filed with the main head person of the AML enforcement authority for approval when AML enforcement authorities need to enter the business premises of the business operator being investigated or other relevant premises.

One of the major controversies is whether the "other relevant premises" can refer to the residence of directors, supervisors and employees. Based on previous AML enforcement practices, there is no case in which the residence of directors, supervisors and employees has been searched. The AML does not expressly give AML enforcement authorities the right to enter residential premises for searching.

AML enforcement authorities are not legally obligated to wait for the arrival of attorneys before beginning an investigation. In practice, if the attorney can arrive at the company within a reasonable time, he or she may request the enforcement officers to wait temporarily through friendly negotiation. However, the enforcement officers have the right to insist on starting the investigation immediately.

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

Laws or regulations in China do not currently provide for such privileges, and the client under investigation is not immune from such 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.

Article 43 of the AML provides that any business operators under investigation and the interested parties have the right to state their opinions. The AML enforcement authority shall verify the facts, reasons and evidence provided by the business operators and the interested parties under 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?

According to article 62 of the AML, if business operators: refuse to provide related materials and information; provide fraudulent materials or information; conceal, destroy or remove evidence; or refuse or obstruct investigation in other ways, the AML enforcement authority shall order them to make rectification, impose to the entity a fine of less than 1% of the sales revenues in the previous year or, in the case where the infringer has no sales revenue in the previous year or it is difficult to calculate the sales revenues, a fine of less than five million yuan shall be imposed. In the case of an individual, a fine of less than 500,000 yuan shall be imposed.

Compared to the 2008 AML, the 2022 AML imposes stricter sanctions for the obstruction of investigations, and several companies have received such administrative sanctions mentioned above for obstructing investigations in practice.

According to article 277 of the *Criminal Law of the People's Republic of China*, whoever obstructs a functionary of a state organ from carrying out his functions by means of violence or threat shall be sentenced to a fixed-term imprisonment of not more than three years, criminal detention, public surveillance or will be fined.

To date, as far as we are aware and based on publicly available information, there have been no such criminal sanctions imposed in China due to obstruction of investigations during the AML enforcement process.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

According to article 56 of the AML and article 42 of the PPMA, where business operators reach a monopoly agreement and

perform it in violation of this Law, the anti-monopoly authority shall order them to cease doing so, and shall confiscate the illegal gains and impose a fine of 1–10% of the sales revenue in the previous year. If such operators did not have any sales revenue in the previous year, a fine of less than five million yuan shall be imposed. Where the reached monopoly agreement has not been performed, a fine of less than three million yuan shall be imposed.

According to article 43 of the PPMA, where a business operator organises other business operators to enter into a monopoly agreement or provides substantive assistance for another business operator to enter into a monopoly agreement, article 42 of PPMA shall apply.

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

According to article 56 of the AML and article 42 of the PPMA, where the legal representatives, major persons in charge and directly responsible personnel of a business operator have personal responsibility for concluding a monopoly agreement, a fine of less than one million yuan can be imposed.

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

The AML does not explicitly stipulate that the financial hardship or inability to pay is one of the bases for determining the fine.

According to the Law on Administrative Penalties, the business operator may apply to the AML enforcement authority on the grounds of financial hardship and inability to pay, and the AML enforcement authority will decide whether to approve or not, taking into account these specific circumstances.

3.4 What are the applicable limitation periods?

The AML does not specifically regulate the statute of limitation. Article 36 of the Law on Administrative Penalties provides that if the illegal conduct is not discovered within two years, no further administrative penalty will be imposed. If the illegal conduct involves the life and health of citizens or financial security and has harmful consequences, the above period is extended to five years, except as otherwise provided by law.

The statute of limitation is calculated from the date when the illegal conduct is committed. If the illegal conduct has a continuous or continuing status, the statute of limitation will be calculated from the date of the end of the illegal conduct.

In practice, if a monopoly agreement has been entered into and is in the process of being performed, it can generally be considered that the illegal conduct is in a continuous or continuing status.

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

The AML does not prohibit companies from paying legal costs and/or financial penalties on a former or current employee. However, this may result in a financial loss to the company and needs to proceed in accordance with the relevant provisions of the *Company Law of the Peoples Republic of China* or any other relevant regulations.

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 is no relevant provision in the AML. In addition, according to our understanding and public information, we have not found any other legal basis to directly require employees to be held liable for the legal cost and/or financial penalties imposed on the 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?

Currently, there is no legal basis on which a parent company should or may be liable in such a situation. However, it is worth noting that in the *Guidelines on the Identification of Illegal Proceeds Derived by Operators from Monopolistic Practices and the Determination of Fines (Draft for Comment)* issued by the National Development and Reform Commission in 2016, there was a provision that a parent company may receive penalties for monopolistic conducts committed by its subsidiaries, and the main factor for determining this is whether the parent company has decisive influence over the subsidiaries.

4 Leniency for Companies

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

Article 56 of the AML constitutes the legal basis for the leniency programme, according to which, where a business operator reports, on its own initiative, the monopoly agreement it entered into to the AML enforcement authority and provides material evidence, the authority may, at its discretion, mitigate or exempt the business operator from penalty.

The *Guidelines on the Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements* ("**Guidelines on Leniency**"), issued by the AMC, provide more specific details of the leniency programme.

4.1.1 Time for a business operator to apply for leniency

The business operator involved in a monopoly agreement may apply to the AML enforcement authority for leniency before the AML enforcement authority files the case or initiates investigation procedures under the AML, or after the AML enforcement authority files the case or initiates investigation procedures under the AML and before issuing the prior notice of administrative penalty.

The application materials shall include the following:

(1) a report on the situation related to the monopoly agreement, including but not limited to, the business operators participating in the monopoly agreement, the scope of products involved, the content of the agreement entered into, the method for entering into it, the specific implementation of the agreement, and whether an application was made to any other law enforcement authority abroad; and

(2) important evidence regarding the entering into or implementation of the monopoly agreement. Important evidence refers to evidence that the AML enforcement authorities have not yet possessed and can play a key role in filing a case for official investigation or determining a monopoly agreement.

4.1.2 Form of the application for leniency

The business operator's application for leniency may be reported orally or in writing.

4.1.3 Exemption or mitigation

For the first applicant, the AML enforcement authority may exempt the entire fine or mitigate the fine by not less than 80%. The AML enforcement authority will exempt all fines for the applicant who applies for leniency and is determined to be in the first position before the AML enforcement authority files a case or initiates investigation procedures under the AML.

However, if the business operator organises or coerces other business operators to participate in reaching or implementing a monopoly agreement or prevents other business operators from stopping the illegal conduct, the AML enforcement authority will not exempt it from the fine, but may mitigate the fine accordingly.

For applicants in the second ranking, the AML enforcement authority may mitigate the fine by a range of 30–50%. For applicants in the third ranking, the fine may be mitigated by a range of 20–30%. For applicants in the latter ranking, the fine may be mitigated by a range of not more than 20%.

The legal representative, chief person-in-charge, or any directly responsible personnel of the business operator who is personally liable for the violation shall be granted a mitigation of punishment by 50% or exemption of punishment by the AML enforcement authorities if they voluntarily report information related to the entering into of the monopoly agreement and provide important evidence to the AML enforcement authorities.

Table of Exemption/Range of Mitigation of Fine

Ranking of Applicants	Exemption/Range of Mitigation of Fine
Applicant in the first ranking	Exemption (100%) or not less than 80%
Applicant in the second ranking	30% to 50%
Applicant in the third ranking	20% to 30%
Applicant in the latter ranking	Not more than 20%

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

Details about the marker system are provided in the Guidelines on Leniency. The marker system in the leniency programme is mainly to encourage business operators to report the illegal conduct as early as possible.

For the first applicant who submits to the AML enforcement authority a report on the monopoly agreement and important evidence, the AML enforcement authority will issue a written receipt to the applicant, specifying the time and list of materials received. However, if the report submitted by the first applicant cannot meet the requirements, the AML enforcement authority will not issue a written receipt to the applicant.

If the report submitted by the first applicant meets the requirements, but the applicant fails to provide complete evidence, the AML enforcement authority may require the applicant to supplement the relevant evidence within a specified period. The period generally does not exceed a maximum of 30 days, and can be extended to 60 days under special circumstances. If the applicant fails to supplement relevant evidence as required within the deadline, the AML enforcement authority will remove its marker.

The first applicant who has applied for mitigation of penalty will be automatically adjusted to the applicant for exemption from penalty after the former marker is removed.

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

The report of the application for leniency may be in oral form. If the report is in oral form, it will be recorded and documented in writing at the office of the AML enforcement authority and confirmed by the reporter authorised by the business operator in signature.

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 reports and documents submitted by applicants to the AML enforcement authority for leniency in accordance with the Guidelines on Leniency shall not be disclosed to the public without the consent of the applicants, and no entity or individual shall have the right to inspect.

In subsequent civil cases arising from monopolistic conducts, the materials submitted by the applicants for leniency will not be disclosed.

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

According to article 10 of the Guidelines on Leniency, in addition to submitting reports and evidence, performing a prompt, continuous, full and sincere cooperation with the AML enforcement authority to investigate is one of the requirements. In principle, there is no specific time for the termination of this obligation to cooperate, but it should at least continue throughout the process until the final administrative penalty decision is made by the AML enforcement authority.

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

There are currently no provisions on leniency plus or penalty plus in the AML.

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.

5.1.1 Subject of report

According to article 46 of the AML, any individual or entity may report any suspected monopolistic conduct to the AML enforcement authority.

Internal personnel of business operators shall be encouraged to report, according to the law, acts by business operators suspected of monopolistic conduct.

5.1.2 Forms of report

Informants shall provide specific evidence of suspected monopolistic conduct and be responsible for the authenticity of their reported content.

Informants may do so verbally or in writing. Where informants report in a non-written way, the AML enforcement authority shall make their reports recorded.

5.1.3 Authority

A report shall be handled by the AML enforcement authority at or above the county level in the place where the reported act occurred.

Where a market regulation authority that receives a report does not have the authority to handle it, it shall instruct the informant to directly submit its report to the AML enforcement authority that has the authority to handle it.

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?

6.1.1 The regulatory talk system

According to article 55 of the AML, where any business operator, administrative agency, or organisation authorised by laws or regulations to perform the function of administrating public affairs is suspected to be in violation of this Law, the AML enforcement authority may launch a regulatory talk with their legal representative or head person and require them to put forward corrective measures. This regulatory talk system is a newly added system in the 2022 AML.

According to article 36 of the PPMA, in the regulatory talk, the business operator's suspicion of entering into a monopoly agreement shall be pointed out, explanations of the situation shall be heard, cautions shall be advised, and proposed measures for corrections and improvements may be required of the business operator to eliminate the harmful consequences of its action. The business operator shall make corrections and improvements in accordance with the requirements of the AML enforcement authority, propose specific measures to eliminate the harmful consequences of its action, time limit for the performance, etc., and submit a written report.

6.1.2 Undertaking's commitment system

Overview

According to article 53 of the AML, in respect of a suspected monopolistic conduct of a business operator being investigated, if the business operator being investigated undertakes to take specific measures to eliminate the consequences of such conduct within a time limit, which is recognised by the AML enforcement authority, the authority may decide to suspend the investigation. The decision to suspend the investigation shall include the details of the measures that the business operator has undertaken to take.

Scope

According to article 32 of the PPMA and the *Guidelines of the Anti-Monopoly Commission of the State Council for Undertakings' Commitment in Anti-Monopoly Cases*, in cases involving horizontal monopoly agreements between undertakings with a competitive relationship on fixing or altering commodity prices, restricting commodity production or sales quantity, segmenting the sales market or raw material purchase market, the AML enforcement authority shall not accept any undertaking's commitment to suspend the investigation. If the AML enforcement authority has determined a suspected monopoly agreement to be a monopoly agreement after an investigation, it must not suspend the investigation, and shall make a decision on the case in accordance with the law. In other monopoly cases, if an undertaking offers a commitment on its own initiative, the AML enforcement authority may decide to suspend or terminate the investigation procedure.

7 Appeal Process

7.1 What is the appeal process?

According to the AML, if a business operator does not accept a decision made by the AML enforcement authority on monopoly agreements, it may apply for administrative reconsideration or file an administrative litigation.

7.1.1 Administrative reconsideration

The applicant shall apply for administrative reconsideration within 60 days from the date of knowledge of the decision. The applicant may apply for administrative reconsideration in a written or oral form.

7.1.2 Administrative litigation

The business operators that intend to institute proceedings directly with a people's court shall do so within six months from the date on which they learnt of or should have learnt of the decision.

If business operators are dissatisfied with the reconsideration decision, they may, within 15 days after receiving the decision, institute proceedings with a people's court. If reconsideration organs fail to make a decision within the specified period, business operators may institute proceedings with a people's court within 15 days from the date of expiration of the period for reconsideration.

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

Generally, the execution of the administrative penalty decision shall not be suspended during proceedings of administrative reconsideration or litigation.

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

In administrative litigations, witness testimony is a kind of evidence. Witnesses may appear in court, and witness testimony should be presented in court and cross-examined 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?

8.1.1 Civil litigations

Any natural person, legal person or unincorporated organisation that suffers losses attributed to cartel conduct can directly file a civil litigation with a people's court.

In practice, stand alone actions are much more difficult than follow-on actions.

8.1.2 Civil public interest litigations

As mentioned above, where a cartel conduct carried out by a business operator infringes the public interest of the society, the people's procuratorate may file a civil public interest litigation with a people's court pursuant to the law.

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

According to the *Provisions of Supreme People's Court on Several Issues Relating to the Application of Law in the Trial of Civil Dispute Cases Arising from Monopolies*, where two or more plaintiffs filed the litigation separately to the same people's court with jurisdiction for the same monopolistic conducts, the people's court may consolidate the cases.

According to article 56 of the *Civil Procedure Law of the People's Republic of China*, with respect to a joint action where there are multiple persons comprising one party to the litigation, the litigants may elect representatives to participate in the proceedings.

8.3 What are the applicable limitation periods?

8.3.1 Commencement

Generally, the statute of limitation for claiming damages arising from a monopolistic conduct is three years, and shall commence from the date on which the plaintiff becomes aware or should have become aware that its interests are harmed.

8.3.2 Suspension

Where the plaintiff reports a monopoly for which a lawsuit is filed to the AML enforcement authority, the statute of limitation shall be suspended with effect from the date of the report.

8.3.3 Expiration and extension

The people's court shall not protect the rights more than 20 years from the date of the damage to the rights, and the statute of limitations may be extended only in a few extraordinary circumstances.

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

Laws or regulations in China are currently silent on "passing on" damages. However, since (i) damages for infringement in China are generally limited to the actual damages suffered by the plaintiff, and (ii) indirect purchasers are permitted to sue as plaintiffs in anti-monopoly disputes, defendants may raise the "passing on" defence in monopoly disputes.

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

Where the defendant has implemented a monopolistic conduct and caused the plaintiff to suffer losses, the people's court may, based on the request of the plaintiff and the facts investigated, order that the defendant shall bear civil liability, such as cessation of infringement, compensation of losses, etc.

The people's court may, based on the plaintiff's request, include reasonable expenses incurred by the plaintiff for investigation and curbing of the monopolistic conduct in the scope of losses for compensation.

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 judicial practice, there are successful cases of stand alone civil damages claims for cartel conduct. For example, in *Beijing Ruibang Yonghe Co. v. Johnson & Johnson*, the court of second instance held that Johnson & Johnson's restriction of the minimum resale price clause had the effect of excluding and restricting competition in the relevant market, constituting a monopoly agreement. Johnson & Johnson should be liable for the plaintiff's economic losses caused by its monopolistic conduct.

To date, as far as we are aware and based on publicly available information, there have been no successful follow-on civil damages claims in China, and there are no publicly available details of private out-of-court settlements regarding violations of the AML.

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.

9.1.1 The 2022 AML strengthens penalties for monopolistic conducts

In the case where the monopoly agreement entered into has not been implemented, the range of fines has been increased from a fine of less than 500,000 yuan to a fine of less than three million yuan.

In the case where the trade association violated the AML by arranging for business operators within the trade to enter into a monopoly agreement, the range of fines has been increased from less than 500,000 yuan to less than three million yuan.

As mentioned above, the 2022 AML also provides provisions for individual legal liability.

9.1.2 The 2022 AML establishes a diversity system

Civil public interest litigation filed by people's procuratorate

As mentioned above, the 2022 AML has added a civil public interest litigation system. The impact of monopolistic conducts is diffuse, involving the public, and infringes on the interests of an unspecified majority of people. It is undoubtedly of great significance to safeguard the interests of scattered, individual medium-sized enterprises or consumers who lack the ability and motivation to litigate.

Criminal liability

As mentioned above, the 2022 AML adds criminal liability for monopolistic conducts; however, the specific incrimination criteria and culpability must be further clarified.

9.1.2 The PPMA Strengthens Anti-monopoly Regulation in the Digital Economy

The PPMA has improved the relevant provisions in the field of digital economy from the perspective of monopoly agreements. For example, article 13 stipulates that business operators in competition with each other must not exploit any data, algorithms, technologies, platform rules, etc., to enter into a monopoly agreement by means such as any communication of intent, exchange of sensitive information, or concerted action. In addition, article 10 of the PPMA specifically states that the division of the sales market or the procurement market for a raw material also includes "data", which is not only considered as a means of production but also as a commodity in the scope of anti-monopoly regulation. Article 15 of the PPMA stipulates that a business operator must not enter into a monopoly agreement by exploiting any data, algorithms, technologies, platform rules, etc., to unify, limit, or automatically set the resale price of a product.

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

Article 64 of the AML provides that where a business operator is subject to administrative penalties as a result of its violation of the AML, such penalties shall be recorded in its credit record and announced to the public in accordance with the relevant regulations. The purpose of a credit record is to deter and restrain business operators with the help of the restraint mechanism for breach of trust (i.e., integrated punishment mechanism).

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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?

Being a Member State of the European Union, in the Czech Republic, besides national law, one must always consider the provisions of the TFEU (Art. 101), the relevant regulations, soft law and the case law of the European courts.

Since 2001, Czech Antitrust law is regulated by Act No. 143/2001 Coll. (hereinafter the "**Act**") which, besides the prohibition of cartels, is the basis for fines. The Act No. 40/2009 Coll. (hereinafter the "**Criminal Code**"), which entered into force in January 2010, provides additionally for criminal sanctions for various forms of horizontal hard core cartels. Private enforcement is governed by Act No. 262/2017 Coll. (hereinafter the "**Private Enforcement Act**"), subsidiarily by general civil law, i.e. the Civil Code and the Civil Procedure Code.

The law (also in English but not updated) and the relevant soft law can be downloaded at https://www.uohs.cz/cs/legislativa/hospodarska-soutez.html (in Czech).

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

The Act contains in Sects. 3–7 the material provisions for cartels. Sect. 3 para 1 is almost identical to part of the Art. 101 EC Treaty, declaring agreements between competitors, decisions of their associations as well as concerted practices to be prohibited and invalid unless an exemption exists in the law or is granted by the Czech Office for the Protection of Competition (the "**Office**"). Para. 2 contains a non-exhaustive list of six areas of arrangements; para. 4 excludes some agreements such as those leading to improvements in the production, etc.

Block exemptions are provided for in Sect. 4; at present, only the EU exemptions apply. The distinction between vertical and horizontal agreements is provided for in Sect. 5.

1.3 Who enforces the cartel prohibition?

The Office with its seat in Brno is the competent authority for enforcing the Act but with no competences under civil or criminal law. However, private enforcement in front of Czech civil courts is still a rarely used possibility. Damaged parties would usually decide for another jurisdiction to enforce claims.

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

The Office may start proceedings on its own motion, for instance, information received through a sector enquiry, through the ECN or on the motion of third parties. The Office regularly performs dawn raids, both for violation of European law, as well as for violation of Czech antitrust law.

Most cases would, however, be started with a letter from the Office; at a later phase the results are summed up in a more formal statement of objections. The parties concerned usually have sufficient time to answer: an extension of terms is usually granted. During this phase, the Czech Office has a long-standing practice of competition advocacy and the possibility to agree on a settlement (now becoming a standard because of the 10–20% reduction of fines). The parties also have the possibility to offer commitments during this phase.

The proceedings will end with a decision, possibly imposing a fine, prohibiting performance of an agreement or continuation of a practice; the latter is also possible during the procedure. It is possible to appeal; the first review will be carried out by the Chairman of the Office. The last years have shown a comparatively high number of successful administrative complaints, even in the most spectacular antitrust cases.

1.5 Are there any sector-specific offences or exemptions?

We are not aware of any sector-specific offences. At the time being, only the EU exemption for agreements in the agricultural sector is relevant (Sect. 4 of the Act). This exception could be divided into three parts.

The first part is the exemption where the full application of the competition rules is not required, which applies to agreements, decisions and conduct with an object that promotes the integration of the national market (i.e. conduct that approximates the markets of the Member States). This exemption is currently not fully exploited and could be said to have fallen out of use over time as most national organisations focused on agricultural products have been replaced by the EU Common Agricultural Policy.

The second part of the exemption covers agreements that are necessary to fulfil the objectives of the EU's Common Agricultural Policy. However, this needs to be interpreted restrictively, as the application of this exemption is very complex due to the fact that all conditions under Article 39 TFEU must be met. These conditions are nothing else than the stated objectives of

the EU's Common Agricultural Policy, which are, however, set out in very abstract terms and can be problematic in terms of interpretation.

The third and final part of the exemption concerns agreements between farmers (or associations of farmers) concerning the production, sale, storage or processing of agricultural products, provided that there is no condition to charge the same prices to customers and there is no risk of competition being jeopardised. A similar condition applies to fisheries. As with each exception, an exemption is determined on a case-by-case basis.

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

Czech antitrust law follows the effects principle meaning that it covers foreign country circumstances only if they lead to an actual or potential disturbance of the Czech market, Sect. 1 para. 5 of the Act.

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	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 (but not the practice)	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: * 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.

Whilst bid rigging and (since 2010) certain hard-core cartels can be qualified as a criminal act, it would usually be the Office, not police authorities, performing investigations in these areas.

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

In criminal investigations, surveillance powers including bugging would be permitted under certain circumstances, however, the Office does not use such measures in cartel investigations.

2.4 Are there any other significant powers of investigation?

No, there are not.

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

Teams from the Office (possibly together with EU investigators), possibly aided by police, will carry out the investigation; a short waiting period for legal advisors to arrive may be granted.

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

No, only with external counsel. It is recommended to have such advice marked as "attorney privileged" or similar.

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 Office ceased dawn raids for almost two years following the DELTA PEKÁRNY decision by the ECHR; as such, we may now assume that control by courts is safeguarded.

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?

Fines of up to CZK 300,000 (about EUR 12,000) or 1% of the last annual worldwide turnover may be imposed for lack of cooperation or a breach of an Office seal (Sect. 22a/3 of the Act). In 2022, the Office issued five fines for above EUR 1 million overall for such breaches.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The maximum fines imposed for cartels may be up to CZK 10 million (EUR 400,000) or 10% of the last annual worldwide turnover of the undertaking involved. The Office has published rules for establishing the amount of fines as soft law. In addition, exclusion from public tenders or criminal sanctions against the legal entity – in theory up to dissolution – may be issued but so far never have been.

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

Participation in bid rigging or horizontal hard core cartels may also be a criminal act by the individual, to our knowledge; sanctions have so far not extended to individuals.

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

The fine will, in a final evaluation, be reduced if it would lead to economic liquidation of the undertaking that has breached competition law, mere losses in a business year will not be sufficient.

3.4 What are the applicable limitation periods?

According to the Act, Sect. 23, an objective limitation period of 10 years from the breach is to be applied for procedural penalties of three years. This limitation period is stopped by sending a statement of objections or referring to the European Commission and will then start anew. The absolute limit is 14 years.

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

Penalties are never tax deductible; a gentlemen's agreement to pay a bonus in the amount of legal costs would be possible but certainly not favoured by the Office. D&O insurances are now very common.

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?

An employee is liable for damages caused to the employer in case of negligence and cannot exceed four and-a-half times the employee's average gross monthly earnings, in case of intent without limitation. Should the damage have been caused by an Executive/Member of Board, there is no limitation of liability and the burden of proof falls on the natural person.

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, it can. The parent company can be sanctioned without being personally involved in the infringement under certain conditions established in the CJEU case law. In order to establish liability, it is necessary to verify the economic, organisational and legal relationships between the subsidiary and the parent company in order to determine whether the subsidiary's behaviour on the market could have been independent of the instructions and management of the parent company.

4 Leniency for Companies

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

On 29 July 2023, a new leniency programme was announced replacing the previous one from 2007.

It is worded along the ECN Model Leniency Programme and the European Commission leniency programme, including distinction between Type I and Type II leniency and providing for full immunity or fine reductions of up to 50%. In many businesses it is important that the exclusion from public tenders may also be lifted for the applicant. In vertical agreements, successful leniency application can lead to a reduction of a maximum of 30%. Most features are very similar to the European Programme, for instance, the ringleader exemption, the obligation to cooperate fully and to terminate the participation in the cartel unless otherwise agreed with the Office.

Many applications have been filed in the meantime and leniency is becoming a common consideration among the Czech antitrust community, nevertheless, the increase of private enforcement risk has led to a decrease. Applications for full leniency must be made before receiving the Statement of Objections; applications for reduction of fines must be made within 15 days from the receipt.

The application may be filed electronically with a qualified signature, in writing or orally. Fax applications must be confirmed in writing within five days from the filing in order to have the desired effect. The date and time of the received application is confirmed by the Office.

Should there be aspects of cartels reaching beyond the Czech Republic into other EU countries, a summary application ("*souhrnná žádost*") is sufficient if the applicant for Type IA leniency files a full application with the European Commission.

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

Yes, but the decision to grant a "marker" lies fully at the discretion of the Office, as does the duration given to the applicant for providing information and proofs.

The Office also allows for a no-name ("hypothetical") discussion of a cartel and the proofs and information to be provided by the potential applicant (usually with a lawyer); such discussion will not grant a marker. Moreover, the information that must be provided is already so extensive that usually one would recommend a fast application for obtaining a marker.

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

The Office is fully aware of discovery problems and will accept oral deposits to be recorded.

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 soon as the statement of objections is issued to the other parties of the cartel, they will learn about the application. They will also have access to the files once proceedings have been officially started but not to the degree the information has been marked as a business secret. The Office will also inform the other members of the ECN about the ongoing proceedings.

The Office states clearly that it cannot protect its files if they are to be handed over to a court of investigators in criminal and civil procedures.

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

Cooperation must be provided through the entire proceedings until legal force of the final decision.

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

This is currently not applicable.

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 first cartel announced by a whistleblower was in 2019. In the meantime, the Ministry of Justice has set up a whistleblower structure, which was, however, hardly used. The (late) transposition of the European directive ensures that from December 2023, every Czech enterprise with 50 or more employees sets up an internal whistleblower structure and protects the whistleblower.

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?

Settlements are preferred by the Office, in particular, in vertical agreements (mostly resale price maintenance) which still lead to the majority of cartel investigations. The Office can end investigations faster, the decisions are shorter and the probability of appeals is much lower. A new policy has been announced in July 2023 allowing a reduction of the fine by 10–20%.

7 Appeal Process

7.1 What is the appeal process?

It is possible to appeal any decision by the Office. The first review will be carried out by the Chairman of the Office if the appeal is filed within 15 days from delivery of the decision to the undertaking concerned. Such appeal has a suspensive effect. In the last years, there were several cases of fines being reduced in this phase already.

The last years have also shown a comparatively high number of successful administrative complaints, even in the most spectacular antitrust cases. Such complaint must be filed within two months from delivery of the Chairman's decision.

The court decision itself can be challenged by so-called "*kasační stížnost*" to the Supreme Administrative Court in Brno within two weeks from the delivery of the court decision.

Finally, also in antitrust cases, constitutional complaints have been filed to the Constitutional Court; the term would be 60 days from delivery of the decision by the Supreme Administrative Court. The ECHR in Luxembourg has also become an institution to be thought of by Czech antitrust lawyers, the DELTA PEKÁRNY Decision changing the entire practice of dawn raids and in practice suspending them for almost a year.

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

Yes. An appeal has a suspensive effect but only in the first phase of the proceedings (according to the Act, Sect. 25a in connection with Section 85 of Act No. 500/2004 Coll., the Administrative Procedure Code). Fines must be paid after the appeal decision by the Chairman. At the request of the plaintiff, the court may grant the suspensive effect to the action only under strict conditions (Sect. 85 of the Administrative Procedure Code).

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

Witnesses can be heard; however, cross-examinations (such as in American procedural law) are rare.

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?

Since 2017 and transposing the relevant EU-Directive, the Czech Republic has a separate law, i.e. Private Enforcement Act, governing follow-on actions. It introduces joint and several liability among the members of the cartel and for the first time in Czech civil law a system of Discovery enabling the plaintiff to request documents from the defendant(s). There is no specialised court competent but instead this is referred to second degree regional courts.

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

There are various ways to achieve this effect, even though the law on mass claims by consumers has not been passed yet. Nevertheless, a decision by the highest civil court in summer 2023 does not encourage such bundling of claims and this has been later confirmed by the Constitutional Court as well.

The Czech Republic is obliged to introduce the institution of a class action which allows for the enforcement of consumer claims in a single court proceeding on the basis of EU-Directive No. 2020/1828. Since the transposition period lapsed on 25 December 2022, the Czech Republic is late with the timely transposition. At the time being, only the governmental proposal of the transposed act is being discussed.

8.3 What are the applicable limitation periods?

As a rule, the limitation period is five years, extended by up to one year during investigations.

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

Yes, the Act states expressly in its Sect. 29 that such defence is permitted.

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

Court fees (4 or 5% of the claimed amount, capped at CZK 2 million – about EUR 80,000), costs for court experts and attorney costs under the Advocate's tariff will be borne by the losing party in the amount of the loss.

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 very few reported cases. Parties would usually opt for another jurisdiction with faster and more plaintiff-friendly proceedings. Also, litigation financiers generally prefer other jurisdictions in which they already have experience.

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 Office still focuses on easy-to-detect RPM cases but in the general opinion of competition law practitioners it is not focusing enough on detecting horizontal agreements and in containing abuses of market power. Sectors of expected increased activity are food (including the Act on Significant Market powers which is enforced by the Office), pharma/life sciences and energy.

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

Compliance programmes will play a greater role in the future, not only as a mitigating factor in the setting of fines by the Office but also due to the new whistleblower legislation. Competition lawyers are also busy with the FDI control issues where the Czech Republic following the first regulation as late as in 2021 is slowly developing case law.

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bpv Braun Partners is one of the major business law firms in Prague and works closely with the other bpv LEGAL offices in the CEE region and the EU-practice in Brussels. Its dedicated trilingual competition law team boasts of decades of experience not only with merger control and compliance, including trainings and setting up of compliance structures in diverse sectors of business, but also with advising clients in cartel investigations, leniency applications and settlements with cartel authorities.

Moreover, bpv litigators and competition lawyers act in private enforcement of cartel damages, mainly on the defendant side, but they also work with a major litigation financier. The firm has special industry knowledge in the automotive, energy, retail, food and IT 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 legal basis for cartel prohibition is article L. 420-1 of the Commercial Code (*code de commerce*). It provides for a general prohibition from which sanctions of a different nature can be taken:

- administrative sanctions: the French Competition Authority (*Autorité de la concurrence*, "**FCA**") can impose fines to punish cartels;
- civil sanctions: private parties can seek damages and/or the invalidity of a contract, because of the existence of a cartel; and
- criminal sanctions: individuals can be sued if they took a personal and determining part in the conception, the organisation or the implementation of a cartel. The criminal sanction is set by article L. 420-6 of the Commercial Code.

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

Under article L. 420-1 of the Commercial Code (almost identical to article 101.1 of the TFEU), concerted actions, agreements, express or tacit undertakings or coalitions are prohibited, even through the direct or indirect intermediation of a company in the group established outside France, where they have the object or may have the effect of preventing, restricting or distorting free competition in a market.

It specifically targets price-fixing, output limitation and market-sharing agreements. Moreover, the prohibition covers both horizontal (concluded between competitors) and vertical agreements (concluded between companies operating at different levels of the production chain, for example, between a distributor and a supplier).

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced by the FCA. The FCA is an administrative body independent from the government.

The FCA is strictly divided between the investigation services, led by the *Rapporteur général*, and the *Collège* (a collective body of 17 members), which adopts the decisions. The two bodies are separated, both structurally and functionally.

The Minister for the Economy, through the DGCCRF (*Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes*), also has powers for enforcing the cartel prohibition:

- It can investigate anticompetitive practices and shall inform the FCA of the outcome of such investigations, so as to allow the FCA to take over the case if it wishes to do so.
- It can impose injunctions on and propose financial settlements to undertakings participating in local cartels ("micro anti-competitive practices"), if article 101 of the TFEU does not apply, and the turnover of the concerned undertakings is limited (turnover generated by each undertaking in France during the last financial year is < €50 million and aggregate turnover of all the undertakings is < €200 million).

Competition law can also be privately enforced by national courts. The FCA does not have jurisdiction to rule on civil consequences of anti-competitive agreements (claims for nullity or damages claims), as there is a special and exclusive jurisdiction in these cases.

At the first instance, eight trial courts and eight commercial courts have such jurisdiction. On appeal, the Paris Court of Appeal (more precisely the 7th chamber in charge of economic regulation, division 5, known as "chamber 5–7") has exclusive jurisdiction.

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

The basic procedural steps of a case before the FCA are the following:

- The opening of the investigation. An investigation can be initiated (i) by the FCA itself (upon a proposal from the *Rapporteur général*, *e.g.*, based on a leniency application), (ii) by the Ministry for the Economy, (iii) by other public entities, professional organisations, consumer associations and other various entities, or (iv) by any undertaking.
- The non-adversarial phase of the investigation. The investigation services investigate the case, without necessarily informing the concerned undertakings. They can use in that phase their investigative powers (see below).

- The adversarial phase of the investigation. This phase starts when the investigation services notify to the concerned parties a Statement of Objections, which they can respond to within two months. The investigation services then issue a report, which the parties can again respond to within two months. In some cases, the investigation services can decide not to draft a report, in which case the adversarial phase stops when the parties respond to the Statement of Objections.
- The hearing before the *Collège*. The *Collège* hears the investigation services, the parties, and a representative of the government (*Commissaire du Gouvernement*).
- The decision on the merits of the case by the FCA.

1.5 Are there any sector-specific offences or exemptions?

Article L. 420-4 of the Commercial Code provides for the exemption of the cartel prohibition:

- if the practices result from the implementation of a law or regulation;
- for certain practices in the agricultural sector (organising, under a single trademark or tradename, the volumes, the quality of production and the commercial policy), when they are indispensable to achieving "*economic progress*"; and
- for agreements that have the purpose of improving the management of SMEs, when they are authorised by decree, adopted after a binding opinion of the FCA.

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

The FCA has jurisdiction over practices that originated on French territory or which may have effects on French territory. Therefore, conducts located outside French territory still enter the FCA's jurisdiction if they may have effects on French territory.

Further, it should be noted that the FCA has no jurisdiction over the territories of French Polynesia and New Caledonia, which have their own competition authorities.

2 Investigative Powers

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

The FCA has the power to investigate, under certain circumstances, both business and domestic premises in case of suspected infringement of competition law.

There are two types of investigations (i) simple or "light", and (ii) substantial.

1. Simple investigation (without prior judicial authorisation)
Simple investigations are governed by article L. 450-3 of the French commercial code. They can be initiated without a prior judicial authorisation as the investigators have no coercive powers to carry them out, and can be carried out in the absence of any suspicion of anti-competitive practices. The agents may operate on public roads, can enter premises between 8 a.m. and 8 p.m. in all places used for professional purposes and places where services are provided, and can access all means of transport for professional use.

The investigators may require the communication and obtain or take a copy, by any means and on any medium, of books, or other professional documents of any kind. Where appropriate, investigators may require any means of deciphering which are likely to facilitate the accomplishment of their task as well as any means necessary for carrying out their verifications. They must formulate precise and proportionate requests so that the burden on the company is reasonable and does not lead to self-incrimination.

2. Substantial investigation (with prior judicial authorisation)
Substantial investigations require presumptions of anti-competitive practices. The decision to raid premises is the responsibility of the *Rapporteur général*, who may request the assistance of DGCCRF officials or the Minister for the Economy. The European Commission may also ask the FCA for the implementation of such a procedure by its agents as a preventive measure to avoid opposition from companies, or if private premises are to be visited.

Any dawn raid is subject to prior authorisation from the liberty and custody judge of the judicial court in whose jurisdiction the premises to be visited are located. The visit, which may not begin before 6 a.m. or after 11 p.m., shall be carried out in the presence of the occupier of the premises or his representative.

As regards mailboxes, the FCA seizes whole mailboxes, as soon as one email falls within the scope of the investigation, considering that the mailbox is not divisible. In case of difficulties as regards the possibility for the FCA to seize documents (*e.g.*, when the FCA seizes a mailbox with privileged documents), such documents may be placed under seal and opened at a later stage to review each email that the company considers protected by legal privilege.

It should be noted that investigators can search and seize documents, computers, mobile phones, etc. on the premises, even if they are owned by a person that is not a member of the investigated entity.

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

The FCA has some investigative powers that are different from those of the European Commission.

The FCA can, without any previous judicial or administrative authorisation, conduct "*light*" investigations. In these investigations, the FCA can enter into business premises and residential premises used for business purposes, ask for any professional document and interview any person on the premises.

However, the FCA can search the premises (dawn raid) only with a prior judicial authorisation. A police officer attends the dawn raid. He ensures that the search is properly conducted by the FCA's agents and liaises with the judge who authorised the search.

While the European Commission can conduct dawn raids over several days and seal the premises overnight, the FCA can seal premises only while the search is ongoing in order to make sure that no one enters a room while the investigators are searching elsewhere. Thus, the FCA will complete the search in one go, even if it has to stay overnight to finish the search.

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

The FCA does not have general surveillance powers. It cannot rely on sound recordings provided by plaintiffs and made without the consent of the recorded persons (Decision of the *Cour de cassation* of 7 January 2011). However, it can rely on transcripts of sound recordings that were performed in the context of criminal investigations. Since Ordinance No. 2021-649 of 26

May 2021, the practices referred to the FCA may be established by any means of proof as applicable in criminal matters, which will broaden the scope of admissible evidence.

2.4 Are there any other significant powers of investigation?

The FCA has significant powers as regards to the seizure of emails. The *Cour de cassation* allows the FCA to seize all of the emails of designated persons, as long as such persons' mailboxes are likely to contain elements that fall into the scope of the investigation. The concerned party can ask the FCA, afterwards, to return emails protected by the rule of privilege or by the protection of the employees' privacy. However, the fact that privileged or private emails are effectively seized does not vitiate the whole seizure.

Since Law 22 May 2019, the FCA is authorised to have access to data from telecommunication operators, *i.e.* mainly the lists of calls made and received from a phone number (*fadettes*). Moreover, since Ordinance No. 2021-649 of 26 May 2021, the FCA can access the data of companies under substantial investigation, regardless of where it is stored, and to access encryption keys.

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 authorised agents of the FCA or of the Ministry for the Economy. In any case, a police officer shall attend the dawn raid.

The agents in charge of the dawn raid are not bound to wait for the concerned undertaking's legal counsels before beginning the search, but they cannot hinder the company from calling its counsel as from the very start of the search.

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

Until now, the French rule is similar to the rule adopted by the European Court of Justice ("**ECJ**") in 2010 in the *Akzo* decision: in-house legal advice is not protected by the rules of privilege. The protection of the rules of privilege is limited to exchanges with independent external attorneys. However, the situation is changing as the Justice Ministry's orientation and programming bill is currently being voted on. It will introduce the recognition of the confidentiality of in-house legal opinions and consultations by lawyers when certain conditions are met.

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 to the FCA's investigation powers are:

- the attorney-client privilege;
- the privacy of individuals;
- the material scope of the judicial authorisation;
- the right not to self-incriminate; and
- the prohibition of using unfair evidence. In particular, the *Cour de cassation* considered in 2011 that sounds recordings made without the consent of the recorded persons cannot be used as evidence in a cartel procedure (except if they were made in the context of a criminal investigation). In 2016, however, the FCA adopted the reasoning of the ECJ and considered that evidence obtained unfairly can still be used if they are indispensable for proving the cartel. There is, thus, a balancing exercise to be made between the protection against unfair methods of investigation and the necessity to prove an infringement.

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?

Article L. 450-8 of the Commercial Code provides for criminal sanctions (up to two years of imprisonment and a €300,000 fine) for anyone opposing, in any way, the investigations.

Further, article L. 464-2 of the Commercial Code provides for the possibility for the FCA to enjoin companies to comply with a summons to meet with the FCA, or to provide answers or documents, with a penalty for each day's delay. The same article allows the FCA to impose sanctions (up to 1% of the undertaking's annual worldwide turnover) on companies that obstruct the investigation or communicate incomplete or corrupt documents.

In December 2017, the FCA used its power to sanction obstruction for the first time and fined Brenntag €30 million. In May 2019, the FCA used its power for the second time and fined Akka €900,000 for breaching a seal and for altering the reception of email. More recently, on 3 May 2021, the Fleury Michon group was fined €100,000 for obstructing an investigation. During the investigation, it appeared that the group had not informed the investigation services of an internal restructuring operation and the removal from the group of the company Fleury Michon Charcuterie, one of the originators of the practices, to whom the grievances had been addressed. As a result of its behaviour, the Fleury Michon group could have compromised the effectiveness of the investigation services' action. Two other sanctions for obstruction to an investigation were imposed in 2021: €5,000 on Nixon on 12 July 2021; and €100,000 on Nel on 9 December 2021, for not answering requests for information of the FCA.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Article L. 464-2 of the Commercial Code provides for sanctions that apply to all undertakings, whether they are incorporated as a company or not:

- injunctions to cease the practice within a specific time period, possibly with a daily penalty of up to 5% of the average daily turnover of the concerned undertaking for each day of delay. Since 2021, the FCA can issue structural injunctions (*e.g.*, the sale of a subsidiary or a business) as well as behavioural injunctions, in the context of a dispute. Since 2021, the FCA is entitled to impose interim measures on its own initiative, and not just in response to a request made by a company, in addition to an application on the merits;
- an order to publish the decision, under conditions specified by the decision, and at the concerned infringer's costs; and
- fines of up to 10% of the annual worldwide turnover of the group. Since Ordinance No. 2021-649 of 26 May 2021, organisations (or "associations of undertakings") are no longer subject to a specific penalty regime in the event of an infringement of the competition rules (they previously benefitted from a penalty ceiling of €3 million), but are subject to a much higher ceiling, equal to 10% of the total

turnover of the undertakings belonging to the association. This applies in particular to professional unions or professional associations.

In 2021, the FCA adopted new fining guidelines. They modified the previous methodology for setting fines and is very similar to the one adopted by the European Commission:

- First step: definition of the basic amount of the fine. It is determined with reference to the value of sales of the concerned undertaking. The FCA defines a percentage of this value of sales, between 0% and 30%, which depends on the gravity of the facts. It is generally set between 15% and 30% for horizontal cartels. Besides, since 2021, the duration has been explicitly introduced as an element for assessing the penalty. Indeed, before Ordinance No. 2021-649 of 26 May 2021, the duration was taken into account for one coefficient point for the first full year of the offence and then for half a coefficient point for subsequent years. Now, each year counts for one coefficient point. Moreover, the Ordinance deleted the reference to the existence of a "*damage to the economy*", a criterion specific to French law and used to determine the amount of the fine.
- Second step: adjustment of the basic amount. The FCA takes into account (i) aggravating circumstances (*e.g.*, leading role in the infringement), (ii) mitigating circumstances (*e.g.*, infringement authorised or encouraged by public authorities), and (iii) other circumstances (*e.g.*, size of the undertaking or fact that the undertaking is active only on the market concerned by the infringement).
- Third step: reiteration. The FCA then checks whether the concerned undertaking was already sanctioned for similar facts. In case of reiteration, the FCA can increase the fine by between 15% and 50%.
- Fourth step: final adjustments. Finally, the FCA checks whether the amount does not exceed the maximum amount of the fine as defined by law, if it exceeds the maximum amount applicable, the financial penalty will be reduced to this amount. It also checks whether the fine is to be reduced because of leniency applications. Finally, the FCA takes into account, if applicable, the inability of the undertaking to pay the fine.

However, the FCA can depart from these guidelines, if it can justify it with specific circumstances of the case or general interest reasons. The FCA regularly does so, in particular when the method as laid down in the 2021 guidelines would lead to an unreasonably high fine. In such case, the FCA sets a lump-sum fine.

If the concerned undertaking reached a settlement with the investigation services, the FCA sets the fine within the range provided in the settlement agreement. In this case, it does not apply the 2021 guidelines, and sets a lump-sum fine.

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

If individuals participated in the cartel as an undertaking (individual undertaking), then the sanctions are defined as detailed under question 3.1 above.

Employees or executives can be subject to criminal sanctions (up to four years' imprisonment and €75,000) if they took a personal and determining part in the conception, organisation or implementation of a cartel. Such sanctions are imposed by criminal courts, not by the FCA.

However, criminal sanctions in cartel cases remain rare and generally occur in cases related to infringements that caused prejudice to a public entity.

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

The 2021 fining guidelines issued by the FCA provide for the possibility to reduce the fine if the concerned undertaking is unable to pay the fine. In order to obtain such reduction, the undertaking must provide reliable, full and objective evidence of serious and current financial difficulties that prevent it from paying the fine, in full or in part.

This reduction varies case by case. For instance:

- in a 2015 case in the parcel delivery sector, the FCA granted reductions of up to 90%;
- in a 2016 case relating to model agencies, the FCA did not impose any sanction on companies that were already put into liquidation by the time the decision was taken;
- in a 2019 case in the liquid fertilisers sector, the FCA reduced a fine by 99%; and
- in another in 2019, in the meal vouchers sector, the FCA reduced a fine by 35%.

3.4 What are the applicable limitation periods?

Article L. 462-7 of the Commercial Code provides for two different limitation periods:

- Facts dating back more than five years may not be referred to the FCA if no attempt has been made to investigate, establish or punish them.
- In any event, infringements cannot be sanctioned when a period of 10 years from the cessation of the practice has lapsed without the FCA having ruled on it. This period is suspended in case of an appeal on dawn raids, on the FCA's decision, or on decisions of the *Rapporteur général* as regards the protection of business secrets.

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

Because there have been few criminal actions against individuals based on their participation in cartels, this is of limited relevance. As a matter of principle, a company can pay the legal costs of its employees but not penalties.

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?

Even though this is theoretically conceivable, it is difficult to provide a definitive answer because of the absence of clear precedents. To our knowledge, there has been one case where a former director was held liable for a fine paid by his company.

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. The FCA adopted the same rule as the European Commission. A parent company can be held liable for cartel conduct of a subsidiary if the latter does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company. A parent company is deemed jointly liable for its subsidiary's conduct if it owns, directly or indirectly, all or almost all of its shares.

4 Leniency for Companies

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

Article L. 464-2 of the Commercial Code provides for the possibility of leniency. The regime of the leniency programme has been detailed by the FCA in the 2015 guidelines. Under the leniency programme, companies can benefit from full or partial immunity. It is available for horizontal and "hub and spoke" practices, but not for vertical practices.

The FCA defined several types of leniency applications:

- Type 1 cases (full immunity):
  - Type 1A cases: the FCA has no information or evidence sufficient for initiating investigative measures, and the undertaking is the first to submit information.
  - Type 1B cases: the FCA already has information on the cartel, but it is not sufficient to demonstrate the existence of the cartel, and the undertaking is the first to submit information that allows the FCA to demonstrate the cartel.
- Type 2 cases (partial immunity): the undertaking does not qualify for a type A case but provides information that has significant added value compared to the information the FCA already possesses. The level of immunity depends on the rank of the applicant:
  - first type 2 applicant: 25% to 50% reduction;
  - second type 2 applicant: 15% to 40% reduction; and
  - subsequent type 2 applicant: up to 25% reduction.

Any leniency applicant is subject to similar obligations:

- to end immediately its involvement in the alleged cartel. However, the FCA can authorise the undertaking to continue to participate in the cartel, in order to preserve the confidentiality of the leniency application and ensure that subsequent investigation measures are efficient; and
- true, total, permanent and swift cooperation with the FCA, which implies (i) providing all information and evidence, (ii) refraining from questioning the facts it revealed to the FCA or the existence of the cartel, (iii) remaining available to answer any question from the FCA, (iv) refraining from destroying, falsifying or dissimulating information or pieces of evidence, and (v) maintaining a strict confidentiality over its leniency application.

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

Yes, leniency applicants are given a provisional marker that justifies their rank in the procedure. In order to obtain a marker, the applicant needs to provide some limited information. It is then given a deadline (generally one month) to finalise its application and provide the supporting evidence.

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. In practice, the applicant can either send a written application, or arrange an appointment with the FCA's Leniency Officer, in order to submit an oral application. The appointment usually consists of a meeting with the Leniency Officer and a senior member of the investigation services.

In case of an oral application, the FCA establishes minutes of the declarations. The company can request a copy of these minutes in order to prove that it applied for leniency.

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 the applicant is kept confidential by the FCA until it sends a Statement of Objections. The applicant is identified in the Statement of Objections, and in the final decision.

As regards disclosure to private litigants, article L. 483-5 of the Commercial Code, which implemented Directive 2014/104 into French law, provides that a judge cannot order the disclosure of transcriptions of oral leniency applications. This does not apply to the supporting evidence provided by the applicant.

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

The applicant is required to provide "continuous cooperation" to the FCA up until the final decision.

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

In France there is a leniency plus mechanism where if a new element of significant added value increases the seriousness of the infringement or its duration, automatically broadening the basis for calculating the fine, this element will not be taken into account when determining the amount of the fine imposed on the company concerned. In 2021, Daunat company benefitted from the "leniency plus" policy as the latter provided indisputable evidence making it possible to establish additional factual elements (in the present case, the temporal field of the cartel) that had a direct impact on the determination of the amount of the financial fine (decision 21-D-09). As a result, Daunat's fine has not increased.

Moreover, a participant to a cartel can apply for leniency as regards another related cartel, as long as it provides sufficient evidence to demonstrate the existence of this second cartel (type 1B case).

Finally, if the second cartel is discovered and the undertaking did not apply for leniency, the FCA is likely to take reiteration into account when computing the fines, which can substantially increase the final fine.

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.

There is a general protection for whistle-blowing employees in France. For cartel matters, this protection is subject to the employee reporting the infringement first to his employer and, as a second step, if no action is taken within a reasonable timeframe, to the relevant authorities. The law of 21 March 2022 and the decree of 3 October 2022 aimed at improving the protection of whistleblowers have drawn up a list of authorities competent to receive and process alerts, including the FCA for anti-competitive practices.

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?

Since 2015, French law provides for a settlement procedure. Under this procedure, undertakings that do not challenge the Statement of Objections can obtain a settlement proposal from the *Rapporteur général*, who would commit to proposing a fine within a certain range (*e.g.*, between €X and €Y).

The *Collège* is not bound by the range proposed by the *Rapporteur général*. If it considers the range to be inadequate, it can remand the case for further investigation. Therefore, in practice, the *Rapporteur général* is usually reluctant to depart from the methodology for setting fines laid out in the 2011 guidelines.

In December 2018, the FCA published guidelines related to the settlement procedure, which detail the different steps of the settlement procedures. In particular, the FCA indicates that it is very reluctant to accept a settlement if it does not concern all the cartel participants. It also indicates that all exchanges between the *Rapporteur général* and the parties remain confidential, and cannot be used before the *Collège* even if no settlement is reached. However, the guidelines do not provide any indication on the way the *Rapporteur général* determines the level of the range of fines proposed to the parties.

In June 2019, the Paris Court of Appeal took an important decision, by which it indicated that parties that enter into a settlement retain their right to appeal the decision of the FCA as regards the determination of the fine, even if such fine was in the range agreed in the settlement.

In 2023, the FCA fined Bongard and the Bongard Dealers Association for price fixing. It also fined these same entities and the central purchasing body Euromat for practices restricting passive sales. All the parties involved did not contest the facts and benefited from the settlement procedure. The FCA imposed a total penalty of €2,950,000.

7 Appeal Process

7.1 What is the appeal process?

Any party, as well as the *Commissaire du Gouvernement*, can file an action in annulment or reformation before the Paris Court of Appeal, within one month as from the notification of the decision.

Decisions of the Paris Court of Appeal can be referred to the *Cour de cassation*, by the parties, the Ministry for the Economy or the President of the FCA, within one month as from the notification of the decision.

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

The appeal does not suspend the requirement to pay the fine, unless the First President of the Paris Court of Appeal grants such suspension, upon request by the company. The suspension can be granted only if it has excessive consequences or if new facts have arisen.

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

There is no cross-examination of witnesses in French civil procedural law, to which the appeal process of FCA decisions is subjected.

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?

Damages actions are brought either before civil, commercial or administrative courts:

- Civil and commercial courts have jurisdiction over damages claims brought by private operators against the cartel participants.
- Administrative courts have jurisdiction over damages claims related to cartels that altered public law contracts to the detriment of the contracting authority (*e.g.*, bid-rigging cases).

There is one main difference between "follow on" and "stand alone" actions: "stand alone" claimants must prove the existence of the cartel, while courts are bound by the pre-existing findings of the FCA or the European Commission.

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

Since 2014, French law provides for a specific collective action open to "approved" consumer associations for claiming damages in case of competition or consumer law infringement. It is organised in two steps:

- First, the consumer association brings an action before a judge. The judge rules on the principle of the liability of the defendant, defines the categories of victims and sets a period within which consumers must join the action in order to be compensated.
- Second, eligible consumers can opt in the action and obtain damages from the defendant.

As of today, there has been no collective action concerning a cartel matter.

8.3 What are the applicable limitation periods?

Article L. 482-1 of the Commercial Code, implementing Directive 2014/104, provides that damages claims are subject to a five-year limitation period, starting on the day the claimant became aware or should have become aware of (i) the facts and that they amount to an infringement, (ii) the fact that the infringement caused him damage, and (iii) the identity of the authors of the infringement.

The limitation period does not start as long as the infringement has not ceased.

Finally, the limitation period will not start for the leniency applicant's victims as long as they were not able to sue the other cartel participants.

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

French law recognises a "passing on" defence. Prior to 2017, the *Cour de cassation* considered that claimants had to prove that they did not pass the damage on. Since the 2017 law implementing Directive 2014/104, the burden of proof lies on the defendant's shoulders.

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

There are two types of costs:

- The *dépens*, which correspond to a limited list of expenses (*e.g.*, translation costs or notification of a writ of summons). The losing party is condemned to the *dépens* unless the judge decides that the winning party should bear them, in full or in part. In such case, the judge must motivate its decision. Such a case is very unusual.
- The *frais non compris dans les dépens*, which correspond to all other costs that a party met in order to carry out the procedure (*e.g.*, legal fees). The losing party is condemned to pay such costs, unless the judge decides otherwise, and the amount is defined by the judge. In practice, such costs rarely correspond to the full legal fees paid by the winning 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 few successful civil damage claims for cartel conduct in France.

For example, in 2014, the Paris Court of Appeal condemned participants to the lysine cartel to pay Doux Aliments, an indirect purchaser of lysine, around €1.6 million in damages. With the implementation of Directive 2014/104 into French law, an increase of cartel damages claims has been noted. For example, in 2018, the Paris Court of Appeal, in a "stand alone" action, awarded a total of €20,000, a former distributor for loss of volume due to a local cartel on minimum resale prices within its network in the diving, swimming, fishing and underwater hunting equipment sector. More recently, in March 2023, the Commercial Chamber of the French Supreme Court essentially confirms the €180 million compensation awarded by the Paris Court of Appeal to Digicel Antilles for its losses in the follow-on case concerning anti-competitive practices implemented by Orange Caraïbe and France Télécom. Also in 2023, the French Supreme Court held that Cora and Supermarchés Match suffered "financial" damage as a result of the unlawful agreement between dairy product manufacturers over the period from 2006 to 2012, and set the damage suffered by Cora at a total of €2,044,220 and the damage suffered by Supermarchés Match at a total of €332,780.

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.

Among the changes introduced by the 2021 Ordinance, the FCA now has the power to set its own priorities and reject complaints that do not correspond to those priorities (known as "prosecutorial discretion").

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

This is not applicable.

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Aramis is a team of 30+ lawyers, including 10 partners, specialised in the fields of French and EU law that cover a wide spectrum of French and international corporations' needs.
The four-lawyer team in charge of competition and distribution law is led by Aurélien Condomines, one of the founders of Aramis. In the field of competition law, Aramis acts as an advisor for the assessment of contracts and the implementation of compliance strategies, but also in litigation matters before French and EU courts, the French Competition Authority or the European Commission. The team also has a significant merger control practice in France and many other countries.

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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 set out in section 1 of the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition – ARC, see https://www.gesetze-im-internet.de/englisch_gwb/index.html) dated 18 January 2021 (10th amendment to the ARC), as amended by a correcting Act dated 9 July 2021. Its general nature is hybrid: on the one hand, agreements that infringe section 1, ARC, are null, and void (section 134 *BGB* (German Civil Code, see https://www.gesetze-im-internet.de/englisch_bgb/index.html); and on the other hand, the competent competition authority can prohibit any infringement of the cartel prohibition (section 32, ARC)), or can impose fines imposed on undertakings and individuals (sections 81 *et seq.*, ARC). Only bid rigging constitutes not only an administrative offence but also a criminal offence, which can result in criminal sanctions imposed on the responsible individuals, but not on companies.

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

Section 1, ARC closely resemble the EU rules on restrictive agreements and concerted practices set out in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).

Section 1 of the ARC prohibits agreements between companies, decisions by associations of companies or concerted practices, which have as their object or effect, the prevention, restriction or distortion of competition. Any hard-core restrictions are generally illegal. Hard-core restrictions include:

- Price-fixing and bid rigging.
- Limitation of outputs or sales.
- Sharing of markets or customers.
- Various other restrictions listed as hard-core restrictions in the EU block exemption regulations, in particular, resale price maintenance and minimum advertised price.

However, the ban on cartels also covers various other kinds of anti-competitive practices.

1.3 Who enforces the cartel prohibition?

The enforcement of German competition law primarily lies with the *Bundeskartellamt* (Federal Cartel Office – FCO) (https://www.bundeskartellamt.de/EN/Home/home_node.html). In the case of restrictive agreements or concerted practices with only local or regional effect, the enforcement lies with the respective State Cartel Offices (*Landeskartellbehörden*).

In cases involving bid rigging, the competition authorities must partly refer (as regards the responsible individuals) the case to the public prosecutor.

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

Where the competent competition authority has indications of anti-competitive conduct through third-party complaints, leniency applications, or anonymous tip-offs, it usually opens a formal proceeding. In the further course of the proceedings, the competition authority has further investigative powers, both in fine proceedings (*Bußgeldverfahren*) as well as in administrative proceedings (*Verwaltungsverfahren*). Once the competition authority has completed its fact finding, it issues a statement of objections setting out the facts and its preliminary legal assessment. The companies then have the opportunity to comment on the allegations and are given access to the competition authority's file. If the investigation is not discontinued, the competition authority issues a final decision, either a fine notice or an administrative decision. While formal decisions in administrative proceedings are regularly published on the competition authority's website, this is not the case with fine decisions. Instead, the FCO, not the State Cartel Offices, regularly publishes a press release and a case report.

1.5 Are there any sector-specific offences or exemptions?

There are no sector-specific offences, but general as well as sector-specific exemptions from the cartel prohibition.

The general exemption is provided in section 2(1), ARC, which closely resemble the EU rules set out in Article 101 (3) TFEU. Agreements and concerted practices that contribute to improving the production or distribution of goods or to promoting technical or economic progress (efficiency gains) are exempted from the ban on cartels, provided that all of the following conditions are met:

- Consumers receive a fair share of the resulting benefits.
- The restrictions are indispensable to the attainment of the asserted efficiency gains.
- The agreement does not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

Section 2(2), ARC declares the EU block exemptions regulations applicable under German law *mutatis mutandis*.

Further exemptions exist with respect to certain cartel agreements between small- and medium-sized companies (section 3, ARC), in the agricultural sector (section 28, ARC), in the publishing sector regards resale price maintenance agreements (section 30, ARC), and in the water economy sector (section 31, ARC).

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

The provisions on the prohibition of cartels are applicable to all restraints of competition that have an appreciable effect within the scope of the ARC, even if they are initiated outside the scope of the ARC (section 185(2), ARC). Under this condition, the German competition authorities have the power to prosecute cartel agreements entered into outside Germany. However, their powers are limited to anticompetitive effects in Germany. In the case of cross-border cartels, this regularly requires coordination with the other competent competition authorities outside Germany, for example, within the European Competition Network (ECN).

2 Investigative Powers

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

The competition authorities may conduct all investigations and collect all evidence that is required. The so-called investigation principle applies, i.e. the competition authority has a general duty to clarify the facts. In principle, the competition authority bears the material burden of proof for the existence of the conditions for intervention. The investigative measures it uses for this purpose are left to its dutiful discretion. The most important investigative measure in cartel administrative proceedings is the request for information. According to this provision, the competition authorities have a right to information, a right of inspection and examination, a right to enter business premises and also the right to conduct searches by order of the district judge (*cf.* in detail sections 57 to 59b, ARC). These rights also exist to a comparable extent in fine proceedings (*cf.* section 82b, ARC). Within the framework of the 10th amendment of the ARC, the right of the competition authorities to obtain information in fine proceedings has been extended significantly. In addition, the competition authorities have the right to question defendants, witnesses and experts as well as the right of seizure. Irrespective of suspicions against specific companies, the competition authorities also have the right to conduct investigations into individual economic sectors and individual types of agreements (section 32e, ARC).

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 (section 97, Criminal Procedure Code – *Strafprozessordnung*, see https://www.gesetze-im-internet.de/englisch_stpo/). This requires that (i) the documents were created after the formal initiation of proceedings relating to the conduct under investigation, (ii) the documents specifically relate to the ongoing investigation, and (iii) the external counsel had been instructed with the defence when the documents were created. As such, the concept of legal privilege under German law is narrower than under EU rules which provide legal privilege as well for documents that were created in the run-up to the proceedings.

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

Under German law, surveillance measures are only permissible at all after judicial authorisation and on suspicion of certain serious criminal offences. Since cartel violations regularly do not constitute a crime, but are considered a regulatory offence, such measures are regularly ruled out in cartel proceedings. Only if the suspected cartel agreements comprises a collusion in public tenders is it permissible to order telephone surveillance (section 100a(2), Criminal Procedure Code).

2.4 Are there any other significant powers of investigation?

The competent competition authority 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?

Searches are carried out by the competent competition authority, often accompanied by police staff and IT experts. The search officers are not obliged to wait until the defence lawyer arrives before commencing the search. However, in general, the waiting time does not exceed 30 minutes.

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 an investigation, the undertakings and individuals concerned are protected by fundamental rights of defence. This include the freedom from self-incrimination (*nemo-tenetur principle*), the right to be heard, to be assisted by a defence counsel, and finally the right of access to file. However, according to the 10th Amendment to the ARC, the *nemo-tenetur principle* in fine proceedings has been restricted in a sensible manner: individuals acting for companies are now, in general, obliged within the context of requests for information, interviews or inspections to provide information or to release documents to the FCO. They may only 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. However, if the FCO

issues a non-prosecuting letter, the individuals must respond to any request for information, anyway. Generally, the investigatory powers are strictly limited to the object of the investigation. This means, that, e.g., searches may not comprise files or other documents that have no connection to 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?

Section 81(2), ARC provides for a number of detailed rules under which the competition authorities may impose fines of up to 1% of the total turnover of the undertaking concerned in the financial year preceding the decision for certain types of obstructions of investigations, both in administrative and fine proceedings. These include the failure to: respond to a request for information in time/correctly/completely; appear for questioning by the competition authority; and/or tolerate a search and breach of seal. The competition authorities can enforce the parties' obligations to act in this context by means of administrative fines. Intentional disruptions of searches, for example, by destroying evidence, can be ended by temporarily arresting the disrupter (section 164, Criminal Procedure Code). As far as can be seen, no fines have yet been imposed for the aforementioned statutory violations. However, some of the relevant provisions only became law in the course of the 10th amendment of the ARC in 2021.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Administrative fines of up to 10% (intentional violations) or up to 5% (negligent violations) of a company's worldwide group turnover in the last business year can be imposed on companies that have participated in restrictive agreements or concerted practices.

The competition authorities have discretionary powers in setting the amount of the fine, but must observe a catalogue of criteria set out in section 81d(1) and (2), ARC. The FCO is authorised to set general administrative guidelines on the exercise of its discretionary powers (section 81d(4), ARC). On this legal basis, the FCO has issued Guidelines for the Setting of Fines in Cartel Administrative Offence Proceedings on October 7, 2021. An English version of the Guidelines is available on the FCO's website (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines_setting_fines_Oct_2021.pdf?__blob=publicationFile&v=5).

If fines are not paid, they can be enforced according to the general enforcement rules of administrative law, in particular, by attachment orders over movable assets and monetary claims.

A secondary consequence of a fine sanction against companies is the entry of the sanction in the so-called *Wettbewerbsregister* (competition register), which is maintained by the FCO (see https://www.bundeskartellamt.de/EN/CompetitionRegister/CompReg_node.html.) This is of considerable importance for all those companies that apply for work for the government or other public contracting authorities, since the latter have legal power to exclude the company of which the fine is entered in the competition register from their tenders as long as the entry has not been deleted.

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

Fines of up to EUR1 million (intentional violations) or up to EUR500,000 (negligent violations) can be imposed on directors and managers who have participated in restrictive agreements or concerted practices (section 81c(1), ARC). Bid rigging constitutes a criminal offence and can be punished by imprisonment for up to five years or the imposition of a criminal fine on the respective company officer(s) responsible (sections 263 and 298, German Criminal Code – *Strafgesetzbuch*, see https://www.gesetze-im-internet.de/englisch_stgb/index.html).

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

When imposing a fine, the competent competition authority generally shall take into account the economic circumstances of the undertaking concerned (section 81d(2), ARC). However, only in the case of a demonstrable lack of economic capacity of the company, which threatens its existence, can the fine be reduced by way of exception, if payment by instalments, deferral or other payment facilities are not sufficient and the fine would be causal for the threat to the company's existence. Neither the law nor the FCO's guidelines provide an upper limit or framework within which the fine may exceptionally be reduced; the reduction depends on the individual case and the specific company concerned.

3.4 What are the applicable limitation periods?

The limitation period for violations of section 1, ARC or of orders of the competent competition authority, is five years from the termination of the infringement. The limitation period is interrupted if the company or natural person concerned is served with a request for information. The limitation period is suspended if a German competition authority, the EU Commission or the competition authority of any EU Member State opens an investigation with respect to that agreement or concerted practice (section 81g(1) to (3), ARC).

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

According to the case law of the Federal Court of Justice (*Bundesgerichtshof*), it is generally permissible for a company to pay the fines as well as the legal costs of a current or former employee. However, the company management must obtain the consent of all shareholders or the Annual General Meeting before making a corresponding commitment to the employee in order not to expose itself to the accusation of breach of trust (section 266, German Criminal Code) against the company.

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 ruling of the Duesseldorf Higher Regional Court (*Oberlandesgericht Duesseldorf*) as of 27 July 2023, no recourse can be asserted against the defendant regarding the fines imposed on the employer. The individual liability of managing directors and board members for corporate fines was ruled out to uphold the principle of antitrust law, which provides for separate fines for acting persons and companies. This applies even more if the board members and managing directors are covered by a "directors and officers liability insurance" and if the amount of coverage is far higher than the fine

imposed on the company. The costs for internal investigations and defence directly related to the fine proceedings against the company are also not to be reimbursed. The judgment is not yet final. The court has permitted an appeal to the Federal Court of Justice. However, to date, the Federal Court of Justice has not been issued a decision on this question.

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. The ARC provides the power to also impose fines on companies having direct or indirect control over one of the cartelists, even if those companies are not involved in the cartel (section 81a(1), ARC).

4 Leniency for Companies

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

The leniency programme applicable to both the FCO and the State Cartel Offices is provided in sections 81h *et seq.*, ARC.

The FCO is authorised to set general administrative guidelines on the exercise of its discretionary powers when operating the leniency programme and the structure of the proceedings (section 81h(3), ARC). On that basis, the FCO has published on 23 August 2021 the Notice no. 14/2021 (Guidelines on the Leniency Programme – https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Leniency_Guidelines_08_2021.pdf?__blob=publicationFile&v=6).

The leniency programme applies to cartels only (section 81h, ARC), that is, to severe horizontal restrictions of competition such as agreements and/or concerted practices between competitors. Vertical restrictions of competition are not covered by the leniency programme. However, the FCO has also previously granted immunity with respect to certain vertical restrictions, in particular, in cases comprising both horizontal and vertical restrictions. The leniency programme applies to investigations by the respective competition authority only. Thus, the leniency programme operated by the FCO and by the State Cartel Offices does not apply to criminal investigations by the Public Prosecutor.

The competition authority will grant full immunity from administrative fines if the applicant can satisfy all of the following conditions (sections 81k(1) and 81k(3), ARC):

- the applicant is the first cartel member to present evidence that enables the competition authority to obtain a search warrant for the first time at the time it receives the leniency application;
- the applicant has not taken any steps to coerce the other cartel participants to join or remain in the cartel; and
- the applicant fulfils the general requirements for leniency.

At the point at which the competition authority is in a position to obtain a search warrant, it will, as a rule, grant full immunity from fines if the applicant can satisfy all of the following conditions, provided that no other cartel member is to be granted full immunity under section 81k(1) of the ARC (see above) (sections 81k(2) and 81k(3), ARC):

- the applicant is the first participant to present evidence which, if the competition authority is already in a position to obtain a search warrant, will allow the offence to be proven for the first time;
- the applicant has not taken any steps to coerce the other cartel participants to join or remain in the cartel; and
- the applicant fulfils the general requirements for leniency.

An applicant who does not qualify for full immunity may still qualify for a fine reduction, if both (section 81l(1), ARC):

- Submit evidence of the cartel, which, regarding the proof of the offence, has a significant additional value compared to the information and evidence already available to the competition authority.
- Fulfil the general requirements for leniency.

Contrary to full immunity, more than one applicant can receive a reduction of fine by up to 50% under section 81l of the ARC. However, the ARC does not provide a fixed sliding scale of available leniency from fines. The percentage of reduction granted by the competition authority depends on (section 81l(2), ARC):

- The value of the information and evidence.
- The chronological order of the leniency applications received by the competition authority.

To satisfy the general requirements for leniency, every leniency applicant must:

- Disclose its knowledge of the cartel and its participation in it to the competition authority or, in the case of an application in his favour, co-operate fully with the clarification of the facts.
- Terminate its participation in the cartel immediately after the leniency application has been filed, unless, in the opinion of the competition authority, individual acts are necessary to preserve the integrity of its investigation.
- Fulfil its duty to co-operate sincerely, continuously and expeditiously, from the time of the making the leniency application until the end of the cartel proceedings, against all cartel participants.
- Not destroy, falsify or suppress information relating to evidence of the cartel and not disclose the intended leniency application or its intended content while considering making the leniency application, with the exception of disclosure to other competition authorities. (section 81j(1), ARC.)

Immunity from and reduction of administrative fines are available to individuals and corporate entities. A company's leniency application is considered as being made on behalf of the applicant's current and former employees as well, unless otherwise indicated (section 81i(2), ARC). As a consequence, those employees also benefit from any decision on immunity or reduction granted to the corporate entity. If a current employee does not co-operate with a corporate leniency applicant, this may result in the corporate leniency applicant's disqualification from leniency, because any such corporate leniency applicant must ensure that all employees from whom information and evidence can be requested co-operate fully and continuously (section 81j(1) No. 3 lit. c, ARC). In practice, however, the FCO may still grant the corporate leniency applicant (full or partial) immunity if the applicant satisfactorily shows that it has made sufficient efforts to ensure such co-operation. Regarding former employees, it will suffice if the applicant works towards the co-operation of that employee.

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

Markers are available under section 81m, ARC. The timing of the placement of the marker will determine the applicant's status (ranking).

A marker is a declaration of the applicant's willingness to co-operate with the competition authority. The marker can be placed orally, in text form, in writing or electronically, and can be filed in German, English or any other language of the EU. If the competition authority receives a marker in a language other than German, it may require the applicant to provide a German translation without undue delay.

In its declaration, the applicant must provide the following basic information:

- Name and address of the applicant.
- Names of the other cartel participants.
- Products and geographic areas concerned.
- Duration and the nature of the offence, in particular, concerning also the applicant's participation.
- Information on any previous or possible future leniency applications in relation to the cartel brought before any other competition authorities in Germany, other European competition authorities or other foreign competition authorities.

Following the placement of a marker, the competition authority confirms to the applicant the date and time of the placement of the marker upon request and sets a reasonable time limit for the submission of a complete leniency application.

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

Oral statements are accepted by the competition authorities when placing a marker (section 81m(2), ARC) (markers are usually placed via phone) as well as main submission (via a face-to-face interview with the applicant itself or its defence lawyer).

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 a leniency applicant remains confidential during the proceedings until the statement of objections is issued to a cartel participant. However, the FCO may exchange information (including the identity of the leniency applicant) on a confidential basis with other foreign competition authorities within the ECN, if the leniency applicant agrees to, or has applied for, leniency with the foreign competition authority that will receive the leniency application (section 50d(2), ARC). In addition, any competition authority must disclose the identity of a leniency applicant to the Public Prosecutor if the anti-competitive practice(s) may constitute a criminal offence.

Other companies and/or individuals under investigation have the right to access the competition authority's file once they have received a statement of objections. At this stage, those persons will be granted access to the submissions of the leniency applicant(s) as well. The competition authority can agree to remove certain trade and/or business secrets from the file, which are not relevant for the proceedings, but there is no guarantee that such information will not be revealed to the other parties under investigation.

The competition authority will usually limit the right of third parties to inspect the authority's files in leniency cases and, in particular, it will not disclose any information submitted by the leniency applicant, neither based on a third party's application nor based on a court order (section 89c(4), ARC).

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

The "continuous cooperation" requirement applies from the time of making the leniency application until the end of the cartel proceedings against all cartel participants (section 81j(1) no. 3, ARC).

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

No. Leniency protection only applies to the violation of competition law disclosed to the competition authority by the applicant. If the competition authority discovers additional violations during its investigation, those infringements are not covered by the leniency application.

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 FCO has been prepared for and has received anonymous tip-offs for several years. In June 2012, the FCO set up a standardised electronic whistle-blower system, which is made available through an independent service provider (see https://www.bkms-system.net/bkwebanon/report/clientInfo?cin=2bkarta151&c=-1&language=ger). Individuals can anonymously supply inside knowledge regarding cartels and other anti-competitive practices to the FCO by email (which will not be traced back to the individual). The FCO does not provide a whistle-blowing telephone hotline. However, anonymous tip-offs can still be submitted by post or telephone to one of the three competent Decision Divisions at the FCO, provided the individual's name, address, telephone number and/or other indications of their identity are not discernible.

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?

An administrative fine proceeding can be concluded by way of a settlement with the competition authority. Settlements are possible in all fine proceedings, and do not require all of the persons or companies concerned to agreeing to settlement, i.e. hybrid settlements are possible. Unlike in the EU, there is no formal procedure regarding settlements in German law. However, the FCO has published an information leaflet as guidance (https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet_Settlement_procedure.html?nn=3591462).

A settlement agreement requires a statement of confession by the person or company concerned, in which the person or company declares that they or it acknowledges the facts of the infringement and accepts the fine up to the amount announced. This can result in a fine reduction of up to 10% in a horizontal cartel. A waiver of the right to appeal is not part of a settlement declaration. A settlement can be achieved irrespective of whether an application for leniency has been filed. After a settlement has been reached, the proceeding is concluded by way of a short form decision which contains the minimum information required under section 66 of the Act against Regulatory Offences (*Ordnungswidrigkeitengesetz* – see https://www.gesetze-im-internet.de/englisch_owig/englisch_owig.html), only. However, if the fine decision is appealed, the competition authority will withdraw the short form decision and issue a detailed decision.

7 Appeal Process

7.1 What is the appeal process?

Fine decisions of the State Cartel Offices can be subject to appeal. An application for appeal must be addressed to the respective competition authority. The decision on whether to grant leave to appeal against an FCO decision lies with the Duesseldorf Higher Regional Court, or, with respect to a fine decision of a State Cartel Office with the designated Higher Regional Court. Appeals against fine decisions must be submitted in writing within two weeks following the date on which the decision has been notified to the appellant. In the context of the main hearing before the competent court, the fine notice of the competition authority only has the function of an indictment. The court itself determines the full facts of the case once again and makes an independent assessment of the allegations. If the court is convinced of a cartel infringement, it orders the companies or individuals concerned to pay a fine.

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

Yes. If a company or the natural person concerned lodges an appeal against a fine decision by the designated competition authority, the fine decision's legal effect and thus the obligation to pay the fine is suspended. This only revives if the appeal is withdrawn before the start of the main hearing before the Higher Regional Court. In the judicial appeal proceedings, the penalty notice only has the function of an indictment, so that the fine imposed by the appellate court must be paid after the judgment has become final.

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

Section 239, Criminal Procedure Code, which applies accordingly to appeals against fine notices, does provide for the possibility of cross-examination according to the Anglo-American model. However, in practice, this possibility, which is only opened at the joint request of the public prosecutor's office and the defence, is practically not used. Rather, after the regularly extensive questioning of the witness in question by the court, both the public prosecutor's office and the defence have the opportunity to ask the witness their own supplementary questions – in this way, an informal cross-examination takes place.

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?

Third parties (in particular, direct or indirect buyers) can claim damages for losses resulting from intentional or negligent violations of German (or EU) competition rules (section 33a, ARC). Both follow-on and standalone actions are possible.

Sections 33a to 33h of the ARC provide detailed rules for damages claims (that is, on the binding effect of decisions issued by the competition authorities, for pass-on, joint and several liability claims, on the limited liability of leniency applicants, and on settlements between claimants and cartelists, information disclosure, and limitation).

Designated district courts (*Landgerichte*) have jurisdiction to rule on cartel damages actions, irrespective of the amount of damages claimed. In follow-on actions only, the courts are bound by the finding that an infringement of competition rules has occurred to the extent that such a finding was made in a final decision by the FCO, a State Cartel Office, the EU Commission or a competition authority in any EU Member State. Sections 33g and 89b to 89e of the ARC provide special procedural rules for information disclosure and access to file. In general, cartel damage claims are governed by the procedural rules of the Civil Procedure Code (*Zivilprozessordnung*, see https://www.gesetze-im-internet.de/englisch_zpo/index.html).

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

German law does not provide for class-actions or representative claims. However, potential claimants can transfer their claims to a third party who may then bring an action based on such bundled claims in its own name and at its own expense. In the German cement cartel case, such a bundling of claims was deemed admissible by the Cartel Senate of the Federal Supreme Court (*Bundesgerichtshof*). In recent cartel damage claims, for example, against the truck cartel, claims were bundled and filed by third parties as a claim vehicle. A number of district courts (*Landgerichte*) have dismissed the claims as inadmissible. In 2021, the Second Civil Senate of the Federal Supreme Court held (in the "*Air Deal*" decision) that an action which is based on claims being bundled for the (sole) purpose of bringing an action is admissible. Even though this judgment did not specifically address a cartel damages claim, it appears likely that the same principles apply for cartel damages claims. However, since the Cartel Senate of the Federal Supreme Court has not yet adopted a final decision on this particular legal question, the admissibility of collective actions by claim vehicles is still open.

8.3 What are the applicable limitation periods?

Cartel damage claims generally become time-barred five years after the damage arose and the claimant obtained knowledge, or should have obtained knowledge, of the damage (without gross negligence) and the infringement has ceased. Irrespective of any knowledge or grossly negligent ignorance, claims are completely time-barred 10 years after they arose and after the infringement has ceased (section 33h, ARC).

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

Section 33c, ARC governs a "passing on" defence. A damage is not excluded on the grounds that a good or service was purchased at an excessive price caused by the cartel, but was resold. However, the damage to the buyer is compensated to the extent that the buyer has passed on a cartel surcharge to its customers (indirect customers). In favour of an indirect buyer, it is presumed that the cartel surcharge was passed on to him if the indirect buyer acquired goods or services that were subject of the infringement, however, the damaged party has the opportunity to rebut the presumption of passing on of damages. For this purpose, he must credibly show that the cartel surcharge was not or not fully passed on to the indirect purchaser.

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

According to general principles (section 91, Civil Procedure Code), the unsuccessful party must bear the costs of the legal dispute, in particular, to reimburse the costs incurred by the opponent, insofar as they were necessary for the appropriate prosecution or legal defence. This means, e.g., that even if the plaintiff is completely successful, the defendant only must reimburse legal fees in the amount of the statutory fees. In contrast, the plaintiff must, in principle, bear higher legal fees incurred on the basis of a fee agreement, unless the parties to the dispute agree otherwise in a settlement. The same applies to economic expert opinions commissioned by the plaintiff. Notwithstanding that, the losing party must bear the legally regulated court fees as well as the costs of a court-appointed economic expert.

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 recent years, the enforcement of damages claims by cartel-affected buyers has intensified considerably. However, the vast majority of cases have probably been and are being settled out of court, without any statistics being available on this and therefore without any possibility to assess the prospects of success. Insofar as cartel damage claims are asserted in court, the vast majority of actions are follow-on actions and are limited to a smaller number of cartels. Presumably due to the meticulousness of the vast majority of civil courts seized with cartel damage claims, there have so far been only a few final judgments ordering the defendant companies to pay specific damages.

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.

Due to the COVID-19 pandemic, cartel prosecution in Germany had also come to a virtual standstill in recent years, as the competition authorities were unable to conduct any searches. This has fundamentally changed again since last year; according to its own information, the FCO has conducted a number of searches on various cartel agreements. However, there has been a steady decline in leniency applications, which began around the same time as the implementation of the EU Antitrust Damages Directive in 2017. Even if other reasons, such as the increase in compliance efforts in companies and the growing complexity of leniency applications in international cartels, could play a role, the connection, although not demonstrable, seems more than plausible.

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

Also, against the background of the significant decline in leniency applications, the FCO is trying to uncover cartels by using other methods. An important source of information in this regard is information from insiders (employees or contractual partners), who have been able to contact the FCO confidentially since 2012 via the digital whistle-blower system. In 2021/2022, the number of anonymous tips submitted via this system reached a new high. In view of the fact that the FCO, as of July 2, 2023, has become the legally designated external reporting office within the German Whistle-blower Protection Act (*Hinweisgeberschutzgesetz*), the importance of this source of information is likely to increase further. In addition, according to its own statements, the FCO is increasingly using IT-based screening methods and employing them in appropriate cases, especially in cases of collusion in tenders.

Dr. Torsten Uhlig has been working in antitrust law since 1998. He is counted by *WirtschaftsWoche* and *Handelsblatt/Best Lawyers* as one of the leading lawyers in Germany in antitrust law.

In his specialist area of work, he comprehensively advises large- and medium-sized companies on all issues of German and European Antitrust Law. He focuses especially on the representation of corporate clients and senior management in cartel investigations and Antitrust damage claims, counsels on merger control proceedings in front of the German and European competition authorities and courts and co-ordinates multiple merger filings. Dr. Torsten Uhlig also advises on antitrust compliant conception of distribution systems, joint-ventures and co-operations. Not the least, his area of work comprises antitrust compliance programmes and compliance trainings. He has published papers on various antitrust themes and is a Member of the Studienvereinigung Kartellrecht e.V. (Association for the Studies of Antitrust Law) and the Netzwerk Compliance e.V. (Network Compliance).

Dr. Torsten Uhlig studied Law and Economics at the Georg-August-University of Goettingen, and did his doctorate under the supervision of Prof. em. Ulrich Immenga. He began his lawyer's career in antitrust law in 1998 at Gleiss Lutz, seconded at McDermott, Will & Emery in New York City, and joined Kümmerlein Simon & Partner in 2001, where he was promoted to Partner in 2003.

He recently advised and represented clients in cartel and monopoly cases relating to the following goods and markets:

- road construction, sewage duct construction, refractory construction *et seq.* (bid-riggings, several German investigations);
- steel (German investigation);
- propane gas (German investigation, Supreme Court);
- sausages and meat products (German investigation);
- automatic doors (German investigation); and
- district heating (several German investigations).

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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 Hong Kong, the term "cartel" is not defined in Hong Kong legislation. It generally refers to agreements or concerted practices amongst competitors to fix the price, share markets, restrict output or rig bids. The primary source of competition law in relation to cartels in Hong Kong is under the First Conduct Rule of the Competition Ordinance (Chapter 619 of the Laws of Hong Kong) (the "Competition Ordinance"), which strictly prohibits arrangements between market participants that prevent, restrict or distort competition in Hong Kong, including but not limited to price fixing, market sharing and bid-rigging. There are no criminal sanctions in respect of cartel infringements. The Competition Ordinance provides a wide range of potential sanctions for cartel infringements.

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

Section 6 of the Competition Ordinance sets out the foundation of the anti-cartel regime in Hong Kong, which provides that:

> "*(1) An undertaking must not—*
> *(a) make or give effect to an agreement;*
> *(b) engage in a concerted practice; or*
> *(c) as a member of an association of undertakings, make or give effect to a decision of the association,*
> *if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong…*"

Here, "undertaking" means any entity engaging in economic activity (including natural person). Moreover, such restrictions extended to any person that is involved in the contravention of the First Conduct Rule, including but not limited to, attempting, procuring or inducing any person to contravene the First Conduct Rule, whether directly or indirectly. Some entities are excluded from the application of the Competition Ordinance, including the First Conduct Rule, such as statutory bodies and entities related to the Hong Kong Exchanges and Clearing Limited.

1.3 Who enforces the cartel prohibition?

Pursuant to section 129 of the Competition Ordinance, a Competition Commission is established to investigate conduct that may contravene the competition rules and enforce the relevant provisions (the "Competition Commission"). Pursuant to section 134 of the Competition Ordinance, a Competition Tribunal is set up (the "Competition Tribunal") which consists of the judges of the Court of First Instance of the High Court of Hong Kong (the "Court"). The Competition Tribunal has jurisdiction to hear and determine applications made by the Competition Commission and private actions relating to cartels.

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

The Competition Commission issued the Guideline on Investigations and set out the process it will generally undertake to investigate suspected anti-competitive behaviour. It will generally do so in two phases: (i) the Initial Assessment Phase; and (ii) the Investigation Phase.

Initial Assessment Phase: During this phase, the Commission generally has not formed a view on whether it has reasonable cause to suspect that a contravention of the Competition Rules has occurred. Any information it requires will, therefore, be sought on a voluntary basis. This may include calls, meetings and interviews with persons who may have knowledge of the conduct.

Investigation Phase: During this phase, the Commission has formed a view that it has reasonable cause to suspect a contravention of the Competition Rules under section 39. The Investigation Phase may involve the use of the Commission's compulsory document and information gathering powers under sections 41, 42 and 48 of the Competition Ordinance. This may include issuing notice to compel the provision of documents and attend interviews, and conducting "dawn raids" (unannounced onsite inspection).

After an investigation, if there is evidence of serious cartel or serious anti-competitive conduct that infringes the Competition Ordinance, the Competition Commission may bring proceedings to the Competition Tribunal. The Competition Tribunal will hear and adjudicate the case and if the undertaking is found to have breached the Competition Ordinance, the Competition Tribunal may impose sanctions on the undertaking and/or any individual involved in the breach of the Competition Ordinance.

1.5 Are there any sector-specific offences or exemptions?

Mergers that have or are likely to have the effect of substantially lessening competition in Hong Kong are prohibited under the Competition Ordinance. The scope of application of the

Merger Rule is currently limited to mergers relating to undertakings directly or indirectly holding carrier licences issued under the Telecommunications Ordinance (Cap. 106), i.e. telecommunication industry. Pursuant to sections 15 and 20 of the Competition Ordinance, the Competition Commission may issue block exemption orders for a particular category of agreement (e.g. activities of a certain sector or industry) to be an excluded agreement that is excluded from the application of the First Conduct Rule. Some entities are excluded from the application of the Competition Ordinance, including the First Conduct Rule, such as statutory bodies and entities related to the Hong Kong Exchanges and Clearing Limited.

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

Section 8 of the Competition Ordinance provides a far-reaching extraterritorial application of the First Conduct Rule – so long as the anticompetitive conduct may affect competition in Hong Kong, it could be caught by the Competition Ordinance regardless of where the conduct takes place, where the agreement is entered into and where the undertakings are located or incorporated.

2 Investigative Powers

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

The Competition Commission is vested with a wide range of powers to investigate and prosecute suspected breaches. The Competition Commission may initiate investigations following complaints from businesses and individuals or based on the information from other sources such as the Competition Commission's own research or information gathered by market intelligence. The Competition Commission has the power to require the production of documents and information when the Competition Commission has reasonable cause to suspect that a person has the relevant information that may constitute a contravention of First Conduct Rule. During the investigation, the Competition Commission may also require any relevant person to attend an interview on any matter that is relevant to the investigation. When necessary, the Competition Commission may appoint an authorised officer, who will apply for a search warrant from the Court to enter and search premises for documents that are relevant to the investigation. If the Competition Commission satisfies that the First Conduct Rule has been contravened upon investigation, the Competition Commission may commence enforcement action and apply to the Competition Tribunal for pecuniary penalty to be imposed on any person that has contravened the First Conduct Rule or has been involved in the contravention of the same.

The Competition Commission may also request assistance from another government agency to carry out its investigation when necessary. The Competition Commission has signed a memorandum of understanding with other law enforcement agencies (e.g. the Hong Kong Police) and regulators to co-operate in investigations on matters that would touch on the jurisdiction of both bodies.

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

Under the Competition Ordinance, a person cannot remain silent at investigation interviews or refuse to produce documents or offer explanations based on the right against self-incrimination. Nonetheless, the evidence obtained by the Competition Commission under compulsion by Section 41 and Section 42 Notices of the Competition Ordinance is not admissible against that person in any criminal proceedings or proceedings concerning financial or pecuniary penalties.

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

The Competition Commission does not have general surveillance powers such as bugging. It does collaborate with the Hong Kong Police for joint investigations and the Hong Kong Police has surveillance powers such as bugging.

2.4 Are there any other significant powers of investigation?

See questions 2.1 and 2.2 above.

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

The Competition Commission officers will carry out the searches based on search warrants. They should be agreeable to wait for outside legal advisors to arrive if they are on their way to the premises within 15 to 30 minutes. However, if the company being searched has an in-house counsel on site, the Competition Commission officers might not wait for outside lawyers' arrival to start the search.

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

Yes, it is 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.

In the course of investigation, the Competition Commission is required to conduct its investigation in a fair and transparent manner. If there is abuse or unreasonable use of power, companies and individuals could apply to the Court for judicial review of the actions and conduct of the Competition Commission. The Competition Commission Officers are public officers and if they misconduct themselves deliberately (e.g. abuse of investigatory powers), that might be considered a misconduct in public office under common law and deemed a criminal 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?

Individuals and corporations are under a duty to cooperate with the Competition Commission in investigations, failing which they may be liable to criminal sanctions.

The Competition Ordinance stipulates criminal offences for providing false and misleading information, destroying or falsifying documents, obstructing a search or disclosing confidential information provided by the Competition Commission.

In December 2021, the Competition Commission referred a case to the Hong Kong Police for criminal investigation of the obstruction of its investigation powers. The Competition Commission alleged that during a search at the subject of investigation's office conducted by the Competition Commission, some individuals tried to delete electronic evidence potentially relevant to the case (such as commercial documents and shortcuts linking the computers of one company to the servers of another company). The Competition Commission will not tolerate any breach of the Competition Ordinance with any obstruction of its investigation and will take a serious stance on such breaches.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The Competition Commission may apply to the Competition Tribunal to impose civil penalties and other sanctions on companies found to have engaged in cartel conduct. The maximum penalty is 10% of the company's turnover in Hong Kong for each year the cartel was in operation, up to a maximum of three years. The Competition Commission can also issue orders to cease and desist the anti-competitive conduct and require the company to implement measures to prevent future anti-competitive conduct.

The Competition Tribunal may also impose a wide array of pecuniary and non-pecuniary penalties for cartel activities or other infringements of the First Conduct Rule.

The Competition Tribunal can order a person to pay damages to aggrieved parties who have suffered loss or damage as a result of a contravention of the competition rules, as well as paying the illicit profit gained and the investigation costs incurred by the Competition Commission to the government.

In addition to financial penalties, the Competition Tribunal also has the power to impose a number of sanctions, the same is set out in Schedule 3 of the Competition Ordinance. In a nutshell, the sanctions include: (i) a declaration that a person has contravened a competition rule; (ii) an injunction restraining or prohibiting a person from engaging in conduct that contravenes the Competition Ordinance; (iii) restoring parties to the position they were in prior to the contravention; (iv) restraining or prohibiting from dealing with property; and (v) declaring the whole or part of the agreement void or voidable.

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

Apart from the sanctions set out in question 3.1 above, upon the application by the Competition Commission, the Competition Tribunal may impose a director's disqualification order against a person for up to five years.

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

In terms of the fine amount, ultimately it is for the Competition Tribunal to determine. The Competition Tribunal will follow four steps for determining the level of the fine:

1. the Competition Commission may determine a "base amount", reflecting the nature and extent of the conduct that constitutes the contravention;
2. the Competition Commission shall consider aggravating, mitigating and other factors to make adjustments to the base amount;
3. the Competition Commission shall apply the statutory cap, being not more than 10% of the total turnover of the undertaking in Hong Kong of each year, up to a maximum of three years. If the amount has exceeded the statutory maximum after the first two steps, the Competition Commission will then adopt the statutory maximum; and
4. the Competition Commission shall take into account any co-operation reduction if applicable and the ability to pay.

3.4 What are the applicable limitation periods?

Under the Competition Ordinance, certain decisions of the Competition Commission (e.g. whether or not an agreement in question is excluded or exempt from the application of the First Conduct Rule) are reviewable by an application made to the Competition Tribunal. The application for review must be made within 30 days after the day on which the determination was made.

A person who has suffered loss or damage as a result of a breach of the First Conduct Rules (e.g. cartel prohibition) has a right of action (follow-on action) against any person who has contravened the rule and any person who is or has been involved in that contravention. The follow-on action may not be brought more than three years after the earliest date on which the action could have been commenced following the expiry of the period that is open to the undertaking to appeal the decision of the Competition Tribunal of violating the First Conduct Rule.

For contravention of the conduct rules, the limitation period is five years; this starts running either after the day on which the contravention ceases or the Competition Commission became aware of it, whichever is later.

For contravention of the merger rule, the limitation period is six months; this starts running either after the completion of the merger or the Competition Commission became aware of it, whichever is later.

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

Section 168 of the Competition Ordinance provides that no person may indemnify another person who is or was an officer, employee or agent of an undertaking against liability for paying the financial penalties for violating the conduct rules under the Competition Ordinance or the legal costs incurred by the former or current employee and any indemnity given is void.

The section does not prohibit any person from providing funds to another person who is or was an officer, employee or agent of an undertaking to meet the legal costs incurred by the other person (employee), if it is done on the terms that the funds are to be repaid in the event of the other person being required by the Competition Tribunal to pay the financial penalty and that the employee repay the funds no later than the date when the Competition Tribunal's decision becomes final.

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?

Section 110 of the Competition Ordinance provides that if an employer has suffered loss or damage (incurred legal costs and/or financial penalties) as a result of the implicated employee's act that has been determined to be in contravention of a conduct rule under the Competition Ordinance, the employer has a right of action against the implicated employee.

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?

Paragraph 2.6 of the Guideline on the First Conduct Rule (the "Guideline") provides that the First Conduct Rule does not apply to conduct involving two or more entities if the relevant entities are part of the same undertaking. Paragraph 2.9 of the Guideline further provides that an agreement between a parent company and its subsidiary will not be subject to the First Conduct Rule if the relevant controlling companies exercise "decisive influence" over their respective subsidiaries.

If the parent company and the subsidiary is considered to be the same undertaking by the parent's decisive influence, then the parent company might be jointly and severally liable with the subsidiary that is liable for cartel conduct, subject to the rebuttable presumption of decisive influence.

4 Leniency for Companies

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

Cartel activities are difficult to detect due to their secretive nature. Therefore, the Competition Commission has introduced a leniency programme to encourage companies to engage in the investigation of any suspected cartel conduct. Section 80 of the Competition Ordinance provides the framework for the leniency regime, which aims at incentivising cartel participants to report and aid competition authorities to uncover and combat cartel activities. In exchange for cooperation, the Competition Commission may make a leniency agreement with the person or undertaking, against whom the Commission will commit not to commence any proceedings in the Competition Tribunal in relation to the reported conduct (the "Leniency Policy").

In April 2020, the Commission published a revised Leniency Policy for Undertakings Engaged in Cartel Conduct (the "Leniency Policy for Undertakings") and a new Leniency Policy for Individuals Involved in Cartel Conduct (the "Leniency Policy for Individuals"), with a view to providing a stronger incentive for a cartel member to report cartel conduct. For the Leniency Policy for Undertakings, it is only applicable to undertakings. Under the old Leniency Policy for Undertakings, leniency was only available to the first undertaking that reports the cartel to the Competition Commission. Moreover, the Competition Commission would only agree not to commence proceedings against the successful leniency application for a pecuniary penalty, but could still initiate proceedings before the Competition Tribunal against the leniency applicant for an order declaring that the party has contravened the Competition Ordinance, based on which the applicant might become exposed to private follow-on actions for damages initiated by victims of the cartel conduct.

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

Under the leniency policy for individuals involved in Cartel conduct issued by the Competition Commission, the first step in obtaining leniency is to obtain a leniency "marker". A leniency marker holds a leniency applicant's place at the front of the queue for leniency for a period of time set by the Commission to allow the leniency applicant to gather information necessary to perfect its leniency application. Since only one leniency marker for individuals is available per cartel, no other individual can pass the leniency applicant and obtain leniency while the leniency applicant holds the leniency marker.

Upon being informed that a marker is available, an applicant can confirm acceptance of the marker either orally or in writing. If the applicant elects to accept the marker, the applicant will need to provide the following details to the best of his or her knowledge at that time: (a) the applicant's identity; (b) the identities of the undertakings participating in the cartel conduct (including, where applicable, the undertaking to which the applicant has a connection); (c) the identities of the key individuals involved at each of the undertakings; (d) the time period of the cartel conduct; (e) the geographic scope of the cartel conduct; (f) a general description of the cartel conduct, including any information or evidence uncovered by the applicant and why they consider this may amount to cartel conduct; and (g) in the context of cartels covering multiple jurisdictions, the other agencies which have been or will be approached by the applicant.

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

An individual, or their legal representative, may contact the Commission to ascertain if the leniency marker for individuals is available for particular cartel conduct. They can do so by using the leniency hotline or by e-mail. These initial enquiries may be made on an anonymous and/or hypothetical basis.

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?

Section 125 of the Competition Ordinance imposes a general obligation on the Competition Commission to preserve the confidentiality of any confidential information provided to the Competition Commission. Section 126 of the Competition Ordinance lists the exceptions to this obligation where the Competition Commission may disclose confidential information with lawful authority.

The Commission reserves the right to use and disclose Leniency Material with appropriate confidentiality protections in its investigations and any proceedings it has brought under the Competition Ordinance. However, it is the Competition Commission's policy not to release Leniency Material (whether or not it is confidential information under section 123 of the Competition Ordinance) in connection with other proceedings, such as private civil or criminal proceedings in Hong Kong or in other jurisdictions. Accordingly, where such proceedings are concerned, the Commission will firmly resist, on public interest immunity and other applicable grounds, requests for Leniency Material, including the fact that leniency has been sought or is being sought, where such requests are made, unless:

(a) it is compelled to make a disclosure by an order of the Competition Tribunal or any other Hong Kong court, by law or any requirement made by or under a law;
(b) it has the consent of the leniency applicant to disclose the material; or
(c) the relevant information or document is already in the public domain.

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

At an appropriate stage, the Competition Commission will issue a final letter to the individual to confirm that all conditions

(including continuous cooperation) under the leniency agreement have been fulfilled. This will usually be at the end of any proceedings by the Competition Commission before the Competition Tribunal or other courts against other participants in the cartel conduct.

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

The Competition Commission issued a Co-operation Policy. The Co-operation Policy introduced the "leniency plus" regime. Under this regime, an undertaking co-operating with the Competition Commission under the Co-operation Policy in relation to its participation in one cartel (First Cartel) may find that it also has engaged in one or more completely separate cartels (Second Cartel). The Competition Commission will apply an additional discount of up to 10% of the recommended pecuniary penalty for an undertaking involved in the First Cartel, provided the undertaking has entered into a leniency agreement with the Competition Commission in respect of the Second Cartel.

Under the Policy on Recommended Pecuniary Penalties ("Policy on RPP"), when the Competition Commission apply to the Competition Tribunal for a pecuniary penalty to be imposed, it will generally recommend to the Competition Tribunal an amount it considers to be an appropriate pecuniary penalty based on the Policy on RPP. The Competition Commission will recommend a Base Amount and consider if there are aggravating factors to increase the Base Amount. The Competition Commission will consider the following non-exhaustive aggravating circumstances:

(a) where an undertaking acts as a leader in, or an instigator of, the contravention;
(b) where an undertaking takes coercive and/or retaliatory measures against other persons to ensure the implementation, continuation, and/or concealment of the contravention;
(c) where directors and senior management are involved in the contravention;
(d) where an undertaking's conduct is of a particularly egregious nature;
(e) where the anti-competitive conduct is reflective of widespread industry practice such that there is a need for additional general deterrence;
(f) where the conduct is Serious Anti-competitive Conduct and the undertaking has continued with the contravention despite being aware of the Competition Commission's investigation; and
(g) where an undertaking obstructs the Competition Commission's investigation.

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 Competition Commission welcomes whistle-blowing as it is an important source for identifying cartel conduct. The Competition Commission will accept complaints and queries in any form, including those provided to the Competition Commission directly and/or anonymously or through an intermediary (such as legal advisor). The complaint can be made by visiting the website of the Competition Commission, by email, by phone, by post or in person at the Competition Commission's office (by appointment only).

The Competition Commission will generally seek to protect any confidential information received that includes:

- The identity of whistleblowers.
- Any confidential information provided by whistleblowers.

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?

With a view to incentivise cooperation and enhancing efficiency of investigations, the Competition Commission published the Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (the "Cooperation Policy") in April 2019, which is formulated as a supplement to the Leniency Policy and to enhance the Competition Commission's ability to conduct effective and efficient investigations into cartel conduct.

The Cooperation Policy aims to provide an extended scope of leniency to cartel members in furtherance of the Leniency Policy, by encouraging cartel members to which leniency in relation to the cartel conduct is not available to cooperate with the Competition Commission. The obligations of the cartel member who undertakes to cooperate with the Competition Commission generally include, but are not limited to, the following:

(i) providing and continuing to provide full and truthful disclosure to the Competition Commission;
(ii) taking prompt and effective action to terminate one's participation in the cartel conduct;
(iii) providing continuing full and truthful cooperation to the Competition Commission at one's own costs, including in enforcement proceedings against other members of the cartel; and
(iv) making joint submissions with the Competition Commission to the Competition Tribunal that one contravened or was involved in the contravention of the First Conduct Rule.

If the cartel member has decided to cooperate with the Competition Commission, he/she must indicate its willingness to cooperate with the Competition Commission under the Cooperation Policy by contacting the case manager concerned, on its own initiative or upon invitation by the Competition Commission. Further, the cartel member must provide documents and information to the Competition Commission, including a detailed description of the cartel conduct and its functioning, on a "without prejudice basis". The cartel member also provides access to evidence, such as by procuring its employees, officers, partners and agents to be interviewed by the Competition Commission.

The utmost incentive to the cartel member in exchange for its cooperation with the Competition Commission is the discount from pecuniary penalty the Competition Commission would have otherwise recommended to be imposed. The level of recommended discount is categorised into three bands. The applicable bands of discount depend on the order in which the cartel members express their interests to the Competition Commission to cooperate. In determining the level of discount within the applicable band, the Competition Commission takes into account the timing, nature, value and extent of cooperation provided by the cartel member. On the other hand, the Competition Commission may further agree not to bring any proceedings against any existing or former officers, employees, partners and agents of the cartel member to encourage the individuals to provide complete, truthful and continuous cooperation with the Competition Commission to facilitate its investigation and enforcement.

7 Appeal Process

7.1 What is the appeal process?

As set out in question 3.4 above, certain decisions of the Competition Commission are reviewable by the Competition Tribunal (the "Reviewable Determination"). Pursuant to section 86 of the Competition Ordinance, before or after an application to the Competition Tribunal for review of the Reviewable Determination, the Competition Tribunal may, either of its own motion or an application, refer any question of law arising in, or that has arisen in, the review to the Court of Appeal for determination.

Generally regarding any decision (including a decision as to the amount of any compensatory sanction or pecuniary penalty), the determination or order of the Competition Tribunal made under the Competition Ordinance could be appealed against as of right to the Court of Appeal.

For appeal to the Court of Appeal against any interlocutory decision, determination or order of the Competition Tribunal, the leave (permission) of the Competition Tribunal or the Court of Appeal is required.

The Court of Appeal's decision can be appealed to the Court of Final Appeal if the question involved in the appeal is of great general or public importance, or otherwise ought to be submitted to the Court of Final Appeal for decision.

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

Section 154(6) of the Competition Ordinance provides that except in the case of an appeal against the imposition, or the amount, of a pecuniary penalty (fine), the making of an appeal does not suspend the effect of the decision, determination or order to which the appeal relates.

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

The appeal process will consider the law and whether the lower courts or tribunal had erred in law so it will not involve 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?

A party can only bring a follow-on action once there has been a determination or admission that a contravention of a conduct rule under the Competition Ordinance has occurred. Individuals do not have a standalone right of private action to bring a competition law matter before the Competition Tribunal.

Section 110 of the Competition Ordinance provides that a follow-on claim may only be made in proceedings brought in the Competition Tribunal.

Section 93 of the Competition Tribunal Rules (Cap 619D) provides the mode of commencing follow-on actions by filing an originating notice of claim in a standard form and a statement of claim.

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

There is no class-action in Hong Kong. There is no representative claims provision in the Competition Tribunal Rules that govern follow-on claims. However, the Competition Tribunal may consolidate two or more proceedings or pending applications if:

(a) the proceedings concern common questions of law or fact;
(b) the relief sought is in respect of, or arises out of, the same act or a series of acts;
(c) the relief is sought against the same defendant or respondent; or
(d) it is desirable to make a consolidation for other reasons.

8.3 What are the applicable limitation periods?

Section 111(3) of the Competition Ordinance provides that proceedings for a follow-on action may not be brought more than three years after the earliest date on which the actions could have been commenced following the expiry of the relevant period provided for appeal on the Competition Tribunal's decision or any further appeal to the Court of Appeal or Court of Final Appeal.

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

The "passing on" defence is not recognised.

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

Pursuant to section 144 of the Competition Ordinance, the Competition Tribunal has the same jurisdiction, powers and duties as the Court of First Instance in respect of its practice and procedure, including in respect of costs. Generally, the court in Hong Kong has discretion in ordering the reimbursement of costs and the amount of such costs. The unsuccessful party in proceedings is usually ordered to pay the costs of the successful 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 not been any successful follow-on civil damages claims for cartel conduct. We are not aware of any substantial out of court settlements with respect to claims 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.

In March 2023, the Competition Commission takes the first cartel case relating to a government subsidy scheme to the Competition Tribunal.

The Competition Commission's case is that four undertakings engaged in practices including cover bidding (certain bidders agree to submit bids with higher prices or less attractive (or unacceptable) terms than the bid of the designated winner) when providing quotations for IT solutions in applications for government subsidy under the Distance Business Programme. The Competition Commission has reasonable cause to believe that such conduct amounts to serious anti-competitive conduct in the form of price-fixing, market-sharing, bid-rigging and/or sharing competitively sensitive information, in contravention of the First Conduct Rule of the Competition Ordinance. The Competition Commission analysed the data of 14,000 applications for the government subsidy scheme and identified a range of unusual bidding features that warranted initiation of a formal investigation.

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

The Competition Commission with the Hong Kong Police's help conducted a surprise visit to a centre after receiving intelligence that certain practitioners at the centre allegedly engaged in market sharing in contravention of the first conduct rule. This is the first time and a novel way for the Competition Commission to gather information without the use of search warrants or issuing notices to compel people to attend interviews. It also shows the co-operation between the Competition Commission and the Hong Kong Police in terms of cartel investigation.

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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 that:

(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. As per the recently introduced Competition (Amendment) Act, 2023 ("**Amendment Act**"), an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of such an agreement if it participates or intends to participate in the furtherance of such agreement.

1.3 Who enforces the cartel prohibition?

The Competition Commission of India ("**CCI**") is the nodal agency that 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.

The Amendment Act has introduced a mechanism for "settlement" and "commitment", allowing parties under investigation (for anti-competitive vertical restraints such as exclusive agreements or resale price maintenance, or contraventions related to abuse of dominance) to offer commitments or settle the matter with the CCI. However, the mechanism for "settlement" and "commitment" is not applicable for horizontal agreements including cartels covered under Section 3(3) of the Act.

In terms of timing of the offer for "settlement" and "commitments", the following has been provided in the Amendment Act:

(a) Commitments: Parties may apply for commitment any time after the CCI orders an investigation, but before the DG completes its investigation and shares the investigation report with parties.

(b) Settlements: Parties may apply for settlement only after the parties have received the DG's investigation report, but before the CCI's final order is issued.

1.5 Are there any sector-specific offences or exemptions?

The Ministry of Corporate Affairs of the Government of India had extended the exemption available to Vessel Sharing Agreements ("**VSAs**") of the liner shipping industry from being considered an anti-competitive agreement with effect from 4 July 2018 for a period of three years, which expired on 4 July 2021. The exemption applied to VSAs of carriers of all nationalities operating ships of any nationality from any Indian port provided such VSAs did not include concerted practices involving fixing of prices, limitation of capacity or sales and/or the allocation of markets or customers. During the subsistence of this exemption, parties entering into VSAs were required to file the relevant VSA and other documents with the DG of Shipping. However, the exemption has not been renewed by the Ministry of Corporate Affairs as yet.

In addition to the above sectoral exemption, under the Proviso to Section 3(3) of the Act, an exemption is also available to any joint venture agreement from being considered anti-competitive if the same increases efficiency in the production, supply, distribution, storage, acquisition to control of goods or provision 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, Section 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 an 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(10) of the Act read with the provisions of the Amendment Act 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 the 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 also include the power to conduct unannounced search and seizure operations (dawn raids), which has been exercised in 14 instances thus far (as per publicly available reports). 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.

The initial draft bill of the Amendment Act ("**2022 Bill**") included a provision allowing the DG to summon and depose, on oath, "legal advisors" of parties under investigation. The Parliamentary Standing Committee tasked with providing suggestions on the 2022 Bill concurred with the widespread criticism that this provision evoked. It had suggested that the provision in the 2022 Bill was contrary to the concept of legal privilege encapsulated under Sections 126 to 129 of the Indian Evidence Act, 1872, and the Bar Council of India Rules. The Amendment Act has now limited the scope of this provision to "persons employed as legal advisors" by parties under investigation.

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 the 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. To bolster the confidentiality regime, the CCI, on 8 April 2022, notified amendments to the confidentiality-related provisions of the General Regulations. The amendments provide the parties a choice to self-certify confidential information, facilitate the creation of a confidentiality ring and allow parties to seek confidentiality over any personal information gathered during an investigation (including during search and seizure operations).

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 penalty 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 under Section 43 of the Act (*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. The CCI recently opened an investigation under Section 42 of the Act concerning Google's alleged non-compliance with its order in *XYZ (Confidential) v. Alphabet Inc. & Ors. (Case 07 of 2020).*

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**") had 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. The Amendment Act has expanded the scope of turnover in the context of Section 27 of the Act to global turnover, derived from all the products and services by a person or an enterprise (as opposed to its approach on penalising parties basis Indian turnover).

India, at present, does not have penalty guidelines to determine the quantum of penalty to be levied in each case. The Amendment Act provides for the CCI to frame penalty guidelines to provide an objective process for the calculation of penalties. Therefore, we are likely to see clear principles on penalties soon which will guide CCI's practice in this regard.

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. However, as stated above, the Amendment Act has undone this jurisprudence legislatively by expanding the scope of turnover to global turnover for the purpose of imposing penalties under Section 27 of the Act.

In addition to monetary penalties contravening enterprises, monetary penalties may also be imposed on the directors and officers of the contravening entity who were in charge of its affairs at the time the alleged contraventions were committed.

The CCI also 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) provides that the CCI can impose penalties on such persons, not exceeding 10% of the average income for such persons for the last three preceding financial years. Section 48(2) of the Act 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(3), the consent, connivance or neglect of the relevant individuals is established by their *de facto* involvement and is therefore not rebuttable. Additionally, Section 48(3) 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. As per the Amendment Act, the inclusion of global turnover as the relevant turnover metric under Section 27 of the Act is applicable to "persons" as well.

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 (2) of the Act, the CCI imposed no penalty on them and only directed them to cease and desist from indulging in cartelisation practices.

At least in the context of directors, 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.

In *Beer Cartel (Suo Motu Case No. 06 of 2017)* ("**Beer Cartel Case**") and *Protective Tubes Cartel* (*Suo Moto Case No. 06 of 2020*), the CCI vide orders dated 24 September 2021 and 9 June 2022, respectively, in terms of Section 27(b) of the Act imposed penalty amounts on the relevant individuals uniformly, by taking their income details for the preceding three financial years, rather than calculating the penalty in reference to the duration for which they respectively participated in the cartel. However, the CCI also considered lesser penalty applications filed by some of the parties, and accordingly gave the same level of reduction in the penalty amount imposed on the individuals as well.

More recently, the CCI in *In Re: Cartelisation in the supply of Protective Tubes to Indian Railways (Suo Moto Case No. 06 of 2020)* imposed no penalties on certain individuals who had already been penalised by the CCI for their conduct in a cartel involvement for similar period of contravention and their employment with MSMEs. In the same case, however, the CCI imposed penalties at 5% of the average income for the last three preceding financial years.

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. Having said that, during the last couple of years (post the COVID-19 pandemic), in a number of cases (for example, the *Railways Break Blocks cartel* (order dated 10 July 2020), the *Axle Bearings cartel* (order dated 21 October 2021), and the *Paper Manufacturers cartel* (order dated 12 October 2022)), the CCI either did not impose any monetary penalty or imposed a token penalty even after finding cartel in view of the mitigating factors and ongoing economic crisis faced by entities, especially medium, small and micro enterprises ("**MSMEs**"), due to the ongoing COVID-19 pandemic.

3.4 What are the applicable limitation periods?

The Amendment Act has recently introduced a limitation period. The limitation period is three years from the date on which the cause of action arises in relation to any anti-competitive conduct. As such, any information filed before the CCI after such period will not be entertained, subject to permissible exemptions such as a sufficient cause. Further, 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 did not award 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. In 2021, the CCI passed three orders concerning leniency applications, out of which it imposed zero monetary penalties in one order. While the *Beer Cartel Case* order was a leniency order passed in 2021, the CCI, while granting a reduction of penalties, imposed hefty penalties on the manufacturers. 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 noted that the leniency application in this case 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.

In 2022, the CCI passed six orders concerning leniency applications, out of which it imposed zero penalties in two orders. In both orders where the CCI imposed zero penalties, the CCI considered various mitigating circumstances in favour of the Opposite Parties such as the MSME status and financial conditions, impact of the COVID-19 pandemic, filing of leniency applications and full cooperation with the investigation process.

The Amendment Act has introduced a novel provision in the Act which provides that if the CCI's has an ongoing investigation into an alleged cartel and during the course of such investigation, a producer, seller, distributor, trader or service provider discloses the existence of another cartel, then the CCI may impose lesser penalties on such parties in respect of the cartel already being investigated. Such lesser penalty shall be provided without prejudice of the parties obtaining lesser penalty regarding the newly disclosed cartel.

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 and in 2022 in the Shipping Lines Cartel, 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 both these cases, 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. Such confidentiality rings are likely to be seen even in other cases with the recent amendment to the confidentiality regime.

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 confidential treatment is requested by parties 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 Amendment Act has recently introduced the "leniency plus" or "penalty plus" policy in the Indian competition law regime. As per the newly introduced provisions in Section 46 of the Act, the CCI can now provide further reduction in penalties to a leniency applicant for its activities in one market that leads to another cartel in another market.

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. Through the 2017 amendment to the Leniency Regulations, individuals involved in a cartel can act as whistle-blowers

and can 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. The recently introduced Amendment Act has provided for a settlements and commitments regime, however, it is applicable only to cases concerning abuse of dominant position and vertical anti-competitive agreements under Sections 4 and 3(4) of the Act, respectively. Cases under Section 3(3) of the Act, including cartels have been specifically excluded from the settlements regime in India.

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 a 60-day period from the date of receipt of such order/decision. The Amendment Act mandates that any appeal can be filed to the NCLAT only after the appellant has deposited 25% of the penalty amount imposed under the CCI order. 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. Prior to the Amendment Act's introduction of the pre-deposit of 25% penalty rule, the erstwhile Competition Appellate Tribunal ("**COMPAT**") and, subsequently, the NCLAT as well as the Supreme Court, at their discretion, 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. The Amendment Act has introduced a provision for claim for civil damages in cases involving orders passed by the CCI for settlement under Section 48A of the Act.

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.

Competition (Amendment) Act, 2023

The standout significant development in Indian competition law regime is the introduction of the Competition (Amendment) Act, 2023 in February 2023. The work on future-proofing Indian competition law began almost five years ago when the Competition Law Review Committee ("**CLRC**") was constituted. A brief snapshot of the key developments in the field of cartels is discussed below:

- Penalisation of "hub and spoke" cartels: The Amendment Act specifically recognises "hub and spoke" anti-competitive arrangements/cartels. Parties which may not be engaged in identical or similar trade, such as a facilitator, a platform, an intermediary, or an agent, shall be presumed to be party to such agreements, if it appears that such parties have participated in or intended to participate in furtherance of the objectives of such anti-competitive agreements. Previously, such instances were covered by a wide interpretation of the provisions on anti-competitive agreements (Section 3(1)). Similar to the exclusion of horizontal anti-competitive agreements and cartels, "Hub and spoke" arrangements will also fall outside the scope of settlement/commitment provisions.
- CCI could now impose penalties based on global turnover of entities: The Amendment Act has expanded the scope of turnover in the context of Section 27 of the Act (the fining provision for anti-competitive agreements and abuse of dominance) to global turnover, derived from all the products and services by a person or an enterprise (as opposed to its approach on penalising parties basis Indian turnover). This move undoes the jurisprudence built over several years that culminated with the Supreme Court's decision in the *Excel Crop Care (AIR 2017 SC 2734)* case, where the Supreme Court reasoned that the CCI must be guided by the principle of proportionality while imposing penalty. Post Excel Crop Care, in most cases (though not all), the CCI has imposed penalties based on "relevant turnover". There are two far reaching implications of this change: (a) the CCI could theoretically fine the infringing party's income/ turnover from products and services not covered under its anti-competitive conduct; and (b) companies with a global presence may be penalised more than companies with turnover limited to India signalling potential protectionism.
- Calculation of penalties for individuals: At present, penalties for individuals are calculated at 10% of their average income recorded in the tax returns for the preceding three financial years. For cartels, the Amendment Act has introduced a penalty of up to 10% of the income of the concerned individual for every year of the continuance of the cartel. This would be in line with calculation of penalties for enterprises involved in such cartels where the penalty is calculated for each year of continuance of the cartel and not just three preceding financial years.
- Mandatory pre-deposit of a minimum fine before appeal: The Amendment Act has introduced levy of a mandatory 25% deposit on any person intending to appeal a CCI order before the NCLAT. Under the prevailing regime, the deposit amount is not specified. However, as a matter of practice, the NCLAT (at its discretion) directs parties to deposit 10% of the penalty amount, and in certain cases, has ordered larger deposits by parties (of 25%).
- Leniency plus provisions: The Amendment Act has introduced "leniency plus" provisions that enable a participant in a cartel (who is also a leniency applicant), during the investigation of such cartel, to disclose the existence of a second cartel not previously known to the CCI and get the benefit of lesser penalties for both cartels.
- Scope of "relevant product market": The Amendment Act has streamlined the definition of "relevant product market" with newer realities of doing business, and added new factors to assess harm to competition.

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

Exclusion of horizontal agreements and cartels from the settlements regime

The Amendment Act has excluded anti-competitive horizontal agreements (i.e., cartels) from the settlement option, despite recommendations from stakeholders and the Parliamentary Standing Committee on Finance. Inclusion of cartels would have been a pragmatic move towards the closure of proceedings for companies preferring to settle instead of litigating. The argument that "cartels" have the benefit of leniency ignores the foundational difference between the method of initiating investigations (leniency) and an efficient mechanism for closure of litigation (settlements).

Clarity on "information exchange" between competitors

The CCI passed a order in *In Re: Cartelisation by Shipping Lines in the matter of provision of Maritime Motor Vehicle Transport Services to Original Equipment Manufacturers (Suo Motu Case No. 10 of 2014)* where it found four shipping lines guilty of cartelisation in the provision of maritime motor vehicle transport services to automobile Original Equipment Manufacturers ("**OEMs**") for various overseas trade routes. With respect to information exchanges between the competing shipping lines, the CCI took a stern view and observed that even assuming that the discussion between the shipping lines with respect to freight served

as a reference, it failed to understand the need to discuss even reference levels between competitors. The CCI observed that once the competing shipping lines colluded with each other on freight rates, it distorted the price discovery process implying that any effort by the procurer to further negotiate the price would not achieve the same competitive freight rates that would have been discovered under competitive conditions.

The CCI clarified that the essence of Section 3(3) of the Act is to ensure competitive offerings and any "information exchange" which affects the process of ensuring competition between competing entities would likely be in contravention of the Act, irrespective of any seemingly legitimate justification offered.

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India's leading law firm, Cyril Amarchand Mangaldas takes forward values, going back 106 years, of the erstwhile Amarchand & Mangaldas & Suresh A. Shroff & Co. Tracing its professional lineage to 1917, the Firm has 1,000 lawyers, including over 170 partners, and offices in Ahmedabad, Bengaluru, Chennai, Delhi-NCR, GIFT City, Hyderabad, Mumbai and Singapore. The Firm advises a large and varied client base that includes domestic and foreign commercial enterprises, financial institutions, private equity funds, venture capital funds, start-ups and governmental and regulatory bodies. The Firm received "National Law Firm of the Year: India" at the *IFLR* Asia-Pacific Awards for the second consecutive years in 2023 and 2022 and "Innovation in Advancing Markets" award at the *Finanical Times* Innovative Lawyers Asia Pacific 2022 Awards. The Firm had won "India Deal Firm of the Year" at the *Asian Legal Business* India Awards and "Firm of the Year" at the *IFLR1000* India Awards in 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?

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., an unannounced search of business premises. The JFTC then 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 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 the 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 that 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) 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 a 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 to hold an implicated employee liable for the legal costs.

For directors and officers, shareholders often raise a derivative lawsuit to hold directors and officers liable for any damages caused by their involvement or failure to prevent illegal activities. These lawsuits usually covers legal fees and financial penalties as a part of damage suffered by the company.

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, as 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 Whistleblower 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) at 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.

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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 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 2004 (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:

> "*…[A]greements 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* (the "**Section 34 Guidelines**") 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 2 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 also introduced amendments to its guidelines, which provide clarity on the timelines and processes for commitment proposals. In particular, the amendments 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 subsequently extended by the Minister to 31 December 2020. A further extension, granted on 26 August 2020, extended the BEO to 31 December 2021. Upon the recommendation of the CCCS and pursuant to the Competition (Block Exemption for Liner Shipping Agreements) (Amendment) Order 2021, the BEO has been extended for another three years, from 1 January 2022 to 31 December 2024, in respect of vessel sharing agreements for liner shipping services and price discussion agreements for feeder services. The liner shipping BEO remains 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 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* (the "**Investigation Guidelines 2016**") specifies that the right to consult a legal advisor must not unduly delay or impede the inspection. 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 1893. The Investigation Guidelines 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 or conduct;
- 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 that 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 (the "**Penalties Guidelines**") 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**"), provided that the CCCS does not already have sufficient information to establish the existence of the alleged cartel activity. To earn full immunity, the applicant must also ensure that it:

- is the first to provide the CCCS with evidence of the cartel activity;
- 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 that 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 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:

> "*[E]ndeavour, 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. Examples of useful information include:

- companies/businesses who are part of the cartel;
- origins of the cartel;
- the nature of the industry where the cartel is operating; and
- documents or other information evidencing the agreements, decisions or practices of the cartel.

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 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 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(3) 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 4, Rule 6 of the Rules of Court 2021. 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.

On 20 July 2023, the CCCS sought public feedback on a proposed Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives ("**Environmental Sustainability Collaboration Guidance Note**"), which aims to clarify how the CCCS will assess such business collaborations in the context of the Section 34 Prohibition. The Environmental Sustainability Collaboration Guidance Note is intended to be read together with the CCCS's Business Collaboration Guidance Note that was earlier released on 28 December 2021.

The proposed Environmental Sustainability Collaboration Guidance Note will include guidance on the following:

a) clarification on what are considered environmental sustainability objectives;
b) examples of collaborations pursuing environmental sustainability objectives that would typically not be harmful to competition;
c) conditions under which competition concerns are less likely to arise from such collaborations;
d) how the CCCS would assess the economic benefits of collaborations and whether such collaborations may nevertheless qualify for the Net Economic Benefit exclusion even if there are competition concerns; and
e) a proposed streamlined notification process in relation to assessments of collaborations pursuing environmental sustainability objectives, for businesses who notify their agreements to the CCCS.

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 17 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;
- bid-rigging in tenders for maintenance services of swimming pools and other water features, the *Swimming Pools* Case, 14 December 2020; and
- price-fixing of warehousing services at Keppel Distripark, 17 November 2022.

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Corinne has also assisted in the drafting of sectoral competition codes and guidelines and has advised regulators and industry on sectoral competition codes in the telecommunications, media, energy, aviation, transport and financial services sectors.

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Drew & Napier LLC's Competition Law & 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 Law & Regulatory Practice comprises lawyers who are cross-trained in competition law and economics, 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 relevant legislation is the Slovenian Act on Prevention of the Restriction of Competition (hereinafter the Competition Act or ZPOmK-2), published in the Official Journal of the Republic of Slovenia No. 130/2022. The new Competition Act was adopted in 2022. The Competition Act is enforced by the Slovenian Competition Agency (hereinafter the Agency), which has the authority to impose administrative sanctions. 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 5 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 5 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 imposes administrative sanctions, including fines.

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.

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.

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 5(3) exemption;
- *de minimis* exemption; and
- block exemption.

According to Article 5(3) of the Competition Act, similar to Article 101(3) of the TFEU, the undertaking invoking the exception must demonstrate and bear the burden of proving the following cumulative conditions for the exception to the prohibition of restrictive agreements in Article 5(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 5 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 5(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 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.

The revised Competition Act expands the authority of the Agency to acquire information even before initiating an investigation. The Agency is now empowered to gather information through various means, including requesting information, issuing specific directives for information submission, or inviting representatives of businesses or individuals with pertinent information regarding the subject or the purpose of supervision to provide oral explanations concerning relevant facts and documents.

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 who is a 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. 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 up to 10 per cent of the annual turnover of the undertaking in the preceding business year shall be imposed on the undertaking for the infringement of the prohibition of restrictive agreements in Article 5 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?

Yes, since the adoption of the new Competition Act of 2022, inability to pay is one of the factors to be taken into account when setting up the fine.

3.4 What are the applicable limitation periods?

The limitation period is five years from when the infringement is committed, whereby the running of the limitation period shall be interrupted in certain cases prescribed by law.

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?

Yes, a parent company that exercised a decisive influence over a cartel member can be held liable for the infringement. The parent company and the company that committed the infringement are jointly and severally liable for the payment of the administrative sanction.

4 Leniency for Companies

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

The leniency programme is regulated in the provision of Article 93 of the Competition Act, and the Regulation on the procedure for the remission and reduction of the administrative sanction for companies participating in cartels (hereinafter: the Regulation).

The Agency can waive the administrative sanction that would otherwise have been imposed on an undertaking that discloses its participation in an alleged cartel on the territory of the Republic of Slovenia if the undertaking is the first one to submit evidence that, in the Agency's opinion, will enable an investigation into the alleged cartel, provided that the Agency does not already have sufficient evidence to conduct an investigation or has not yet conducted an investigation.

If, at the time of receiving or submitting the statement to the Agency, the Agency already has sufficient evidence available to carry out an investigation in relation to the alleged cartel, or has already carried out the investigation, the administrative sanction can still be waived if the undertaking is the first one to submit the evidence that enables the Agency to establish the infringement.

In addition to the aforementioned conditions, the company must fulfil some additional requirements prescribed by the law, such as to offer continuous cooperation to the Agency and to cease its involvement in the infringement.

If the undertaking does not qualify for immunity from a fine, they may still qualify for a reduction of the administrative sanctions under. In order to be eligible for a reduction, the undertaking must disclose cartel involvement, provide significant evidence, cooperate fully, cease cartel participation upon leniency application (unless against the investigation's interest), and avoid concealing or altering information, except when reporting to other competition authorities. The range of reductions is the following:

- first offender to fulfil conditions – 30–50%;
- second offender to fulfil conditions – 20–30%; and
- other offenders to fulfil conditions – up to 20%.

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

An undertaking can make an application for a marker if it does not have all the information needed to submit a full application for immunity. The application should contain the following information (if it is in possession of the application):

- The name and title of the company submitting the leniency statement.
- The reasons for concerns that led to the submission of the request.
- The names of all other companies involved or previously involved in the alleged cartel.
- Information about the relevant products and territories.
- The duration and nature of the alleged cartel.
- Information about leniency statements related to the alleged cartel that have been or may be submitted to competition authorities in another Member State or to competition authorities in third countries.

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

Yes, the application for leniency can be made orally. An application for a marker, however, must be made in writing.

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 new Competition Act also provides more detailed regulations concerning the use of data obtained from leniency statements. Under the new ZPOmK-2, access to a leniency statement is permitted exclusively for parties involved in the proceedings, and solely for the purpose of safeguarding their defence rights. Nevertheless, in cases where a court is reviewing a decision made by the Agency, a party may utilise information from a leniency statement or a settlement application, but only under specific conditions and when it is deemed necessary to protect their defence rights in the ongoing proceedings. This use is permissible solely for evaluating the allocation of an administrative penalty for which cartel participants share joint and several liability, or for assessing a decision in which the Agency has determined a violation of ZPOmK-2 or Articles 101 or 102 of the Treaty on the Functioning of the European Union.

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?

No, there is not.

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 procedure for individuals to report cartel conduct independently of their employer is regulated by the Reporting Persons Protection Act, the act that transposes the EU Whistleblower Directive.

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 new Competition Act introduces the possibility of reaching a settlement between the Agency and an undertaking during the process of establishing a violation of ZPOmK-2 or Articles 101 or 102 of the TFEU. This settlement can lead to a lower administrative sanction for the offender. It is a form of rewarding a company for actively participating in the proceedings before the Agency, which allows the Agency to expedite the process.

Initiating negotiations based on a settlement application can be proposed by either the undertaking or the Agency. An undertaking that has submitted a leniency application can also file a settlement application. Both the Agency and the undertaking must agree to initiate negotiations based on a settlement application.

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.

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.

The new Competition Prevention Act, ZPOmK-2, was passed on September 29, 2022. Among other provisions, Directive (EU) 2019/1, which enhances the role of competition authorities in EU Member States for the more effective enforcement of competition rules and ensuring the proper functioning of the internal market (commonly known as the ECN+ Directive), was incorporated into our legal framework.

ZPOmK-2 was brought into effect on 26 October, 2022, with its application commencing on 26 January, 2023.

Among the significant changes introduced by ZPOmK-2, particular emphasis is placed on the introduction of a unified administrative procedure for the determination of violations of competition law and the imposition of administrative sanctions on companies. Prior to the implementation of ZPOmK-2, two separate procedures were conducted by the Agency: one administrative procedure to establish the existence of violations; and another administrative offenCe procedure to levy fines on the offenders.

The Agency has long been striving to achieve this amendment which is expected to increase the efficiency of their operations.

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

In 2022, the Agency issued one decision regarding restrictive practices, in which it found a violation of para. 1, Article 6 of ZPOmK-1 and para. 1, Article 101 of TFEU in a case regarding of fixing of purchase prices of wheat. According to the Agency's Annual Report for 2022, the Agency currently has in total 12 open cases regarding the prohibition of restrictive agreements and prohibition of the abuse of a dominant position.

Irena Jurca has over 15 years of experience in representing leading companies in proceedings before the Slovenian competition authority and courts. She is particularly renowned for her expertise in regulated industries and has successfully defended clients in several prominent cartel cases. Irena has a remarkable track record in winning several competition cases before the Supreme Court and holds unparalleled expertise in the newly emerging field of antitrust damages litigation.

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Zdolšek – Attorneys at law is a Slovenian business law firm with over 30 years of experience in the region. The firm has long-standing experience in advising public and private companies, financial institutions and other businesses on all aspects of mergers, acquisitions, transfers of shares and assets, joint ventures, and reorganisations. Competition law has been one of the firm's four core practice areas since the beginning of the establishment of competition law enforcement in Slovenia. Clients benefit from the firm's unique cross-sectorial approach where the team combines the strengths of their leading litigation practice with their expertise in competition law. The integrated team draws upon competencies from different practice areas to provide all-encompassing advice and to execute the most complex transactions seamlessly and efficiently.

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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 Spanish Competition Act (Law 15/2007, of 3 July, on the Defence of Competition or **SCA**) modernised competition law and optimised the institutional framework of competition enforcement in Spain. The SCA reflected 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. In addition, Royal Decree 2295/2004 was enacted to implement all the amendments made at EU level to competition law provisions. Later, Law 3/2013 provided for the creation of a new authority in charge of both competition and regulatory matters, the *Comisión Nacional de los Mercados y la Competencia* (National Markets and Competition Commission or **CNMC**).

Likewise, the Spanish Government adopted Royal Decree 261/2008 for the implementation of the Competition Act (**RD 261/2008**), which came into force on 28 February 2008 and develops substantive and procedural matters enshrined in the SCA, such as the leniency programme, *de minimis* conduct, functions of the CNMC with regard to the promotion of competition, collaboration mechanisms with regional competition authorities, the European Commission or other NCAs, etc. Furthermore, the CNMC is entitled to apply Article 101 of the Treaty on the Functioning of the European Union (**TFEU**) in cases in which restrictive practices undertaken in Spain potentially affect trade between EU Member States.

In addition, Spain implemented EU Directive on Antitrust Damages Actions by means of Royal Decree-Law 9/2017 (**RDL 9/2017**), which amends the SCA and the Civil Procedure Act.

Last but not least, on April 2021, Spain enacted Royal Decree-Law 7/2021, transposing the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (**Directive ECN+**). The Directive ECN+ introduces relevant changes to the Spanish competition law regime. Additionally, the vast majority of infringements provided for by the law will be considered "very serious", which means that in all those cases fines of up to 10% of the turnover may be imposed.

The Directive ECN+ also strengthens the CNMC's powers of inspection and investigation. Thus, in addition to the inspections in both investigated companies and in the homes of their employees, the Directive ECN+ provides for access to any other places, including the headquarters or offices of third parties, where relevant information of the investigated company may be found.

The CNMC often resorts to soft law by adopting non-binding guidelines to clarify the interpretation of competition law provisions based on case law and its own decisional practice:

- A communication on the calculation of fines, which was published in February 2009. However, the Supreme Court quashed this communication via a number of judgments in 2015.
- In June 2013, the former CNC also published its Communication on the Leniency Programme, which replaced the former provisional guidelines relating to the handling of applications for exemptions and reduction of fines published in February 2008. Said guidelines aimed to explain practical aspects of leniency applications while increasing transparency.
- Since October 2015, natural and legal persons sanctioned for serious infringements that distort competition can be banned from contracting with public bodies for up to three years pursuant to Article 71.1.b) of the Public Sector Contracts Law (*Ley de Contratos del Sector Público*). The aforesaid prohibition was applied by the CNMC for the first time in 2019.
- In July 2016, the CNMC issued a communication on inspections where it summarised: (i) the legal framework; (ii) the powers of investigation of the CNMC; (iii) the procedure in which investigations are carried out; (iv) a detailed description of the duties of the companies under investigation; and (v) lastly, a list of conducts that may be considered as an obstruction to dawn raids.
- The CNMC published, in October 2018, provisional indications on the determination of sanctions under Articles 1, 2 and 3 SCA and 101 and 102 TFEU.

- More recently, in June 2020, the CNMC published Antitrust Compliance Program Guidelines as a way of fostering the use of compliance programmes by businesses in Spain. The document offers assistance to companies in their efforts of implementation and development of compliance programmes that can be effective in preventing or mitigating anticompetitive conduct. For that purpose, the CNMC lays down the basic criteria that it deems relevant to make a compliance programme effective. Similarly, the Guidelines introduce incentives to encourage companies to make such efforts, as well as to enhance collaboration between companies and the CNMC through the use of this tool, particularly with regard to leniency applications. The CNMC also published Guidelines on Confidentiality claims in antitrust proceedings, seeking to provide greater legal certainty to parties in connection with confidentiality claims and clarifying the criteria used by the CNMC based on its past decisional practice.
- In June 2023, the CNMC published a communication on criteria for the determination of the prohibition to contract for distortion of competition by the CNMC, which introduces a new system that will allow the geographic and product scope and duration of the ban to be set from the outset and will also enhance compliance programmes and competition culture.
- The CNMC also published guidelines to facilitate quantification of damages in private actions for competition law infringements in July 2023. The document presents relevant economic, statistical and econometric concepts with practical examples and checklists.

The SCA has a public and a private sphere. Regarding the public sphere, Spanish competition law aims to regulate market conduct by enforcing free competition, a role which is administrative in nature.

On the other hand, competition law has a commercial dimension as it affects commerce and commercial enterprises. Similarly, the Commercial Courts are responsible for the private enforcement of Spanish competition law. One of the main pillars of private enforcement of competition law is that of damages claims lodged by third parties affected by anticompetitive conduct. Actions for damages are becoming increasingly important in cartel infringements, and may lead to important sums in compensation for the victims of the cartel.

Cartel infringements are punishable by fines if the penalty is imposed by the national or regional competition authorities, or by an order for compensation for damages if the penalty is imposed by the Commercial Courts. Additionally, the Spanish Criminal Code provides a few exceptions rarely applied whereby cartel conduct is punishable by imprisonment (see question 2.1).

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

The prohibition of anti-competitive agreements is contained in Article 1 SCA, which is broadly similar to Article 101 TFEU, though without reference to the inter-State trade affection and expressly including parallel conduct as potentially illegal conduct. Article 1 SCA prohibits any kind of agreement, decision or collective recommendation or any concerted or consciously parallel practice which has as its object or effect the prevention, restriction or distortion of competition in all or part of the Spanish market, and in particular those that:

- directly or indirectly fix prices or any other commercial or service terms;
- limit or control production, distribution, technical development or investments;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions in commercial or service relations, thereby placing some competitors at a competitive disadvantage; and
- make the conclusion of contracts subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

It also 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 antitrust authorities (see the section below on fines), agreements or any other conduct falling under the scope of Article 1 SCA are illegal and void.

However, such agreements, decisions or concerted practices may benefit from an exemption if they improve the production or distribution of goods or promote technical or economic progress, subject to specific requirements established in Article 1.3 SCA. In addition, the prohibitions under Article 1 SCA do not apply to agreements resulting from the application of a law (Article 4) (see question 1.5).

In addition, Article 101 TFEU can be directly applied by the CNMC or regional antitrust authorities and takes precedence over Spanish law. Under the system of parallel competences established by EU Regulation 1/2003, the CNMC or regional antitrust authorities can simultaneously apply Article 101 TFEU and Article 1 SCA to any competition infringement. Also under EU Regulation 1/2003, the European Commission has exclusive jurisdiction to review a particular count of conduct once it opens antitrust proceedings.

Finally, although Spanish criminal cartel prosecutions are rare, the Spanish Criminal Code provides a limited number of provisions regarding unlawful competitive conduct. For instance: (i) Article 284 refers to the alteration of prices resulting from free competition, providing a term of six months to six years imprisonment and fines from one to two years; (ii) Article 262, which refers to bid-rigging in auctions and public tenders, providing a term of one to three years imprisonment and daily fines from one to two years and a ban for participating in public bids; and (iii) Article 281 prohibiting the withdrawal of raw materials or essential goods from the market in order to limit supplies or distort prices, providing a term of one to five years imprisonment and fines for one to two years.

1.3 Who enforces the cartel prohibition?

The SCA is enforced by the CNMC. In its Action Plan for 2020, the CNMC declared that "*We will continue to strengthen the tools for the detection of anti-competitive behaviour, in particular cartels as the most harmful behaviour*". In accordance with its 2022 Annual Report, the CNMC issued one decision punishing a cartel in 2022, specifically, the Scrap and Steel cartel (Decision of 4 March 2022, *CHATARRA Y ACERO*, file S/0012/19).

The CNMC is an autonomous authority organically and functionally independent from the Government. The CNMC consists of a chairman, a Council and four different investigation directorates: a specific Directorate for Competition (**DC**); and three further Directorates for Telecommunications and the Audio-visual sector, for Energy, and 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 composed of 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.

The DC is in charge of conducting investigations on cases and preparing files as well as analysis and reports. However, the Council has the final decision-making power.

Since the enactment of Law 1/2002, reflecting the de-centralised administrative structure of Spain, the enforcement of Spanish competition law is shared with the regional competition authorities who have assumed such powers (except for merger control). Competition law can be applied by regional authorities provided that the conduct in question has regional 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 having a significant impact on the regional territory.

The SCA expressly recognises the private enforcement of its Articles 1 (prohibition of anticompetitive agreements) and 2 (abuse of dominance). It also recognises the standing of Commercial Courts to hear any actions or claims lodged in relation to the application of these provisions. Furthermore, the Commercial Courts are competent to award damages based on the SCA without requiring a prior administrative decision finding an infringement (stand-alone claim). The SCA also provides for an *amicus curiae* system inspired by Regulation 1/2003, under which the CNMC and the antitrust regional bodies may submit observations regarding the application of the SCA (see section 8 below).

For instance, in March 2014, the CNMC issued a report at the request of a Commercial Court in the context of an ordinary lawsuit brought by a service station against an oil company with regard to clauses in an exclusive supply contract that allegedly infringed the SCA. As further described in question 8.6, the *amicus curiae* provided by the SCA is increasingly used by Spanish Courts.

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

The SCA establishes a two-phase procedure: an investigation is opened and carried out by the DC; and the decision is taken by the Council's Competition Chamber.

Proceedings are initiated by the DC either *ex officio*, at the request of the Council or as a result of a non-binding third-party complaint. Prior to the initiation of formal sanctioning proceedings, the DC opens a preliminary and initial investigation phase (*información reservada*). During this preliminary phase, the DC may carry out inspections and submit formal information requests. This preliminary phase is subject to no formal deadlines or time constraints for the DI, who can investigate in principle for as long as it wants without any formal indictment.

Once proceedings have been formally initiated (*incoación*) because the DC has obtained *prima facie* evidence of an infringement being committed, the companies under investigation are heard, and may submit allegations to the statement of objections (*Pliego de Concreción de Hechos*). The DC can resort to various investigation powers: it can carry out inspections in the homes of directors, managers and other staff members, the power to seal any business premises, to make copies and seize original documents, etc. – see section 2 below.

The Council can adopt interim measures at any time during the course of the proceedings. Once the DC has finished its investigation, it adopts a decision proposal (*Propuesta de Resolución*), granting the parties the opportunity to submit allegations in its defence once again. Thereafter, the DC will refer its decision together with the allegations 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 the imposition of fines.

The SCA provides that the maximum time limit for a procedure is 24 months (although under certain circumstances this deadline can be extended). RD 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 24-month maximum time limit may entail that the administrative procedure lapses. As a result, the CNMC may initiate once again the proceedings but must do so in the five-year limitation period (the limitation period was increased from one to five as a result of the Damages Directive).

In these cases of suspension of the 24-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.

1.5 Are there any sector-specific offences or exemptions?

One of the most important features of the SCA was the replacement of the individual authorisation system of restrictive practices with a more flexible system of self-evaluation and legal exemptions, in line with EU regulation). Therefore, the prohibitions contained in the SCA will not automatically apply, provided the criteria set out in Article 101.3 of the TFEU are met. Furthermore, the EU Block Exemptions will also apply to those agreements even in the absence of any cross-border impact. In addition, the Spanish Government can adopt block exemptions. For instance, under the 1989 Competition Act, the Government adopted Royal Decree 602/2006, implementing the block exemption on information exchange agreements relating to late payments.

Article 6 SCA includes a provision similar to Article 10 of Regulation 1/2003 whereby findings of inapplicability may be made.

In addition, agreements, decisions or concerted practices may benefit from an exemption if they improve the production or distribution of goods or promote technical or economic progress, subject to specific requirements established in Article 1.3 of the SCA.

Moreover, pursuant to Article 4 SCA, the prohibition set out in Article 1 does not apply to conduct deriving from the application of law (Act of Parliament). Naturally, this exception on the application of the Spanish competition rules shall not apply when EU competition law provisions are also applicable.

Similarly, the prohibition will not apply to conduct of minor importance that qualifies as *de minimis*, according to the criteria set out in Article 3.1 of RD 261/2008. The former CNC used this provision for the first time in the *Corral de Las Flamencas* case on 3 December 2009 (file S 0105/08). By 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 *Productos Hortofrutículas* case, 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 (Decision of 15 December 2016, *Laboratorios Martí Tors*, file S/DC/0592/16).

During the height of the COVID-19 outbreak, some competition authorities such as that of the UK or Norway published transitional sector exemptions to competition rules in order to allow 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 sanitary 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 already provides that any conduct "*which has as its object or effect the prevention, restriction or distortion of competition in all or part of the Spanish market*" is prohibited, any cartel conduct taking place outside Spain which affects or may affect all or part of the Spanish market may fall under the cartel prohibition. In this regard, it is worth noting that according to the SCA, any conduct restricting imports or exports is regarded as a cartel (see question 1.2). As an example, in the *Refrigerated Transport* case (S/0454/12), the restrictive practices concerned products originated in the Spanish market and intended for export to the European market (primarily to Germany, France, Italy, United Kingdom and the Netherlands).

The 2009 CNMC's guidelines (deemed illegal by a number of Supreme Court judgments) on the calculation of fines established 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. The Directive ECN modified this interpretation by expressly referring to a 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 (**Regulation 1215/2012**) 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 Regulation 1215/2012 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 Regulation 1215/2012 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. The European Court of Justice (**ECJ**) has decided that victims of cartel infringements have the choice of bringing an action for damages against several companies that have participated in the infringement, either before the courts of the place where the cartel itself was established, or where the cartel was reached, or before the courts of the place where the loss was incurred. Said forum is only valid for each injured party individually and is generally located in the domicile of the injured party. Hence, a claimant residing in Spain would be able to bring an action before Spanish Courts on said matter.

The abovementioned questions have been clarified in Spain through various first instance court judgments rendered in damages claims regarding the trucks cartel case. Even if none of the companies addressed in the EC'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 the said provision, the courts having jurisdiction to hear unfair competition claims in Spanish territory are the ones 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 European Court of Justice (**ECJ**) through a request for a preliminary ruling lodged by the Barcelona Provincial Court (case C-882/19), 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 stemmed from an infringement of Article 101 TFEU. The court of first instance had previously dismissed the action against the Spanish subsidiary of Mercedes Benz because the company lacked standing to be sued. The court considered that only legal entities that were addressed in the Decision may be held liable for damages.

Moreover, foreign companies are subject to sanctions under the SCA for antitrust infringements committed by their subsidiaries. Specifically, under Article 61(2) 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 European Commission 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 with the Chinese Ministry of Commerce. The Directive ECN+ contains several provisions aiming at increasing cooperation and coordination between the CNMC and other NCAs or the EC in terms of merger control, mutual assistance and limitation periods.

It is not clear that 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 criminal code (see above).

2 Investigative Powers

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

The DC may conduct the necessary inspections of the companies or associations, the private domicile of the entrepreneurs, administrators and other personnel of the companies that may be in possession of relevant information without prior notice. The DC must issue an investigation order which must contain: (i) the object and purpose of the inspection; (ii) the date on which it will commence; and (iii) must refer to the sanctions provided for in the SCA in case the subjects under investigation do not submit to the inspections or obstruct them.

The exercise of inspection powers involving the restriction of a fundamental right, i.e., the inviolability of the home, will require judicial authorisation. Normally, the CNMC requests judicial authorisation prior to the inspection from the competent judicial body.

CNMC inspectors and authorised personnel may access any premises, facilities, land and means of transport of the inspected entities and parties. In turn, they may seal premises, books or documentation, electronic devices and other goods. They may also examine any documentation on paper, computer or electronic support.

Likewise, in connection with the above, the CNMC may also make copies of books or documents; request explanations on relevant facts or documents from the company's representative or staff member.

Entities are obliged to submit to inspections. The refusal of the entity will result in the initiation of a sanctioning proceeding.

In matters of investigative powers, the CNMC will collaborate with the regional competition authorities, the European Commission, and the National Competition Authorities under the terms established in Regulation (EC) No. 1/2003, of December 16, 2003, No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, in Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings, and in Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018.

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

There are no unusual features of the investigatory powers in Spain. The investigative powers of the CNMC have been updated in accordance with the transposition of the Directive ECN+.

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.

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 RD 261/2008 establishes that CNMC staff may be accompanied by experts (*i.e.* IT operatives) duly accredited by the Director of the investigation. Indeed, the CNMC is supported in its powers of investigation by the information and Communications Technology Department which is a specialized IT unit. The IT support unit works very closely with the Competition Directorate during on-site inspections. The IT unit and the Competition Directorate jointly compile a catalogue of search criterion to be used during inspections together with software tools specifically designed for that aim.

Further, during the inspections, the appointed CNMC officials may call the police in the case of obstruction. As an example, on 15 October 2009, during the inspection of the construction company *Extraco*, in the context of a suspected bid-rigging cartel for road construction (S/0226/10), the officials of the former CNC called for the police in order to have access to a safe box because Extraco refused to open it.

Finally, the CNMC may send a request for information to the suspected companies or to other third parties. Should these parties fail to collaborate with the CNMC by not responding to such requests or by providing incomplete or misleading information, the CNMC may impose fines of up to 5% of the total turnover of the infringing company. As an example, the CNMC fined Mediapro €200,000 on 31 July 2012 and a €1,285,649 fine upon Cementos Portland on 31 May 2012. In April 2016, the CNMC imposed a fine to a company for providing a turnover figure lower than the one included in its annual accounts (Decision of the CNMC of 7 April 2016, *URBAN*, file SNC/DC/008/16).

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

Investigations into business and residential premises will be carried out by the CNMC (or Regional Competition Authorities) officials. They will have been duly authorised by the Director of Competition, with the corresponding judicial authorisation, should the affected party fail to provide its consent. See above comments regarding inspections in private domiciles.

In principle, CNMC staff do not have to wait for the arrival of legal advisors before starting to search; but 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, RD 261/2008 provides that the CNMC is the competent authority to collaborate on inspections of the European Commission and Competition Authorities of other Member States. Similarly, the officials of Regional Competition Authorities may collaborate on inspections carried out by the CNMC in their respective region.

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

Spanish law does not explicitly explain 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 DC in the *Stanpa*, *Salvat Logistica*, *Unesa* and *Consenur* cases, the current position is only external legal advice covered by legal privilege; and *sensu contrario*, in-house legal advice would not be privileged. Likewise, in *Altadis 2*, the CNMC expressly stated that only communications with external lawyers are protected by legal privilege on the basis of national and EU case law (Decision of the CNMC of 21 December 2017, *Altadis 2*, case R/AJ/060/17). This would be in line with EU case law (*Akzo Nobel*, judgment of the European Court of Justice of 14 September 2010).

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 exercise of the power to enter premises, private homes, land and means of transport shall require the prior express consent of the affected party or, failing this, judicial authorisation. As previously mentioned, in practice, the CNMC usually requests a judicial authorisation before taking action in order to avoid delays and/or denials.

The investigations carried out by CNMC personnel are restricted to the matter at hand and the information found cannot be used for other purposes different than those included in the scope of the investigation. Furthermore, documents drafted by external lawyers are protected by legal privilege, and personal documents shall be excluded from the inspection or redacted appropriately as the case may be.

In a judgment of the Supreme Court on 4 December 2012, in the *Stanpa* case (cartel of perfumery and cosmetics), the Court ruled that the former CNC was entitled, on the basis of a key-word search, to copy certain electronic documents which included personal communications and other documents not related to the investigation, but it was obliged to return those documents once identified. Likewise, the ECJ has recently decided that competition authorities are entitled to make copies of data without carrying 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 National High Court, in judgments such as the judgments of 21 July 2014 (*Renault* case) and 12 June 2014 (*BP* case), and the Supreme Court, on 9 June 2012, May 2011 (*Unesa* case) and April 2010 (*Salvat Logistica* case), have confirmed the investigative powers and the practice of the former CNC.

Nevertheless, the Supreme Court has showed a very strict approach when scrutinising search warrants and the compliance of the CNMC's inspections with the scope and aim of the search warrants (CNMC's orders of investigation and judicial authorisations). In this regard, by judgments of 10 December 2014 (*UNESA*), 10 December 2014 (*Campezo*), 27 February 2015 (*Transmediterránea*), 12 March 2019 (*Uder*) the Supreme Court annulled the CNMC's respective orders of investigations for not being sufficiently precise and not clearly indicating the scope and aim of the investigation; for not being consistent with the judicial authorisation; and lastly, for being too vague and imprecise. As a consequence of these annulments, the further appeals brought on the merits have derived on judgments overturning the respective 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?

The SCA provides that the following types of conduct, amongst others, constitute an obstruction of an investigation: (i) the lack of submission and the incorrect, misleading or incomplete submission of documents requested by the CNMC; (ii) the refusal to answer or the providing of incomplete, inexact or misleading answers to the questions formulated by the CNMC; and (iii) the breaking of seals affixed by CNMC personnel.

These infringements will be treated as serious infringements and fined with up to 5% of the total worldwide turnover of the undertaking concerned in the previous year. In the event that it is not possible to make such a calculation, the undertakings in question will be fined between €500,001 and €10 million.

In the case mentioned in question 2.4, on 6 May 2010, Extraco was fined €300,000 after having obstructed the inspections carried out by the former CNC by hiding documents, providing misleading information and impeding the inspections. However, the Supreme Court reduced this fine to €100,000 by the judgment of February 2015, considering that the fine should be adapted to the circumstances of the case.

Similarly, on 1 March of 2011 the former CNC fined manufacturer of office supplies and stationery Grafoplas del Noroeste €161,600 for obstructing the inspection work of the aforesaid authority during the inspection of its business premises. Said decision was confirmed by the National High Court in its Judgment of 29 November 2016, appeal number 31/2013.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The SCA includes a classification of infringements according to their seriousness (minor, serious and very serious). By way of example, cartels between competing companies are classified as very serious, anticompetitive vertical agreements as serious, as well as obstruction of CNMC inspections and, as minor infringements, having submitted a merger notification to the CNMC after the deadlines or failing to notify a merger requested by the CNMC.

The amount of the fine depends on the seriousness of the infringement, up to 1% (for minor infringements), 5% (for serious infringements) and 10% (for very serious infringements) of the total turnover of the infringing undertaking in the business year immediately preceding that of the imposition of the fine. When turnover cannot be calculated, the Council can impose a fine of up to €10 million.

The SCA sets out the criteria that are taken into account when calculating the exact amount of the fine (scope and characteristics of the affected market; market shares of responsible undertakings; scope of the infringement; duration; effects of the breach on consumers or any other undertaking; and unlawful profit). The SCA also lists a series of mitigating and aggravating factors.

The Supreme Court declared on 29 January 2015 that the CNMC's method for the calculation of fines (a method similar to that of the European Commission) 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, second, 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. In cases in which the undertaking benefits from a reduction in 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 because undertakings cannot foresee the amount of the fine that they could be facing. Some summary indications on fines have been published by the CNMC but they are not sufficiently clarifying for that purpose.

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 so-called *Decennial Insurance cartel* case (S/0037/08), the former CNC fined €120,728,000 on several insurance companies. The High Court overturned the fines for all companies, but the Supreme Court in May and June 2015 confirmed the existence of an anti-competitive conduct for four out of the six companies but referred those four cases to the CNMC in order to recalculate the fines to be adapted to the new method for calculation of fines. The European Commission intervened *ex officio* as *amicus curiae* for the first time in Spain.

There are many examples of the CNMC imposing large fines, such as that in July 2015 on car distributors amounting to €171 million for cartel practices, the highest to date. Large fines have been issued in sectors such as ports, milk production or television advertising, to name but a few.

In Spain also public authorities have on occasion been fined (6 October 2011 in the *Jerez Grape and Grape Juice* case) as well as professional associations which have often been on the radar.

There is currently no settlement procedure in Spanish antitrust law. The CNMC sometimes grants reductions of fines on the basis of attenuating circumstances.

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. The CNMC made use of this prerogative for the first time in March 2019 in connection with tenders of railway infrastructure (case S/DC/0598/2016, *Electrificación y Electromecánicas Ferroviarias*).

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 with up to €60,000.

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 allocation of public tenders of railway infrastructure. The total amount imposed to the directors was of €666,000. And as for the most recent decision, the CNMC imposed a fine of €285,000 in total to six managers in its Decision of 19 July 2023, *LICITACIONES MATERIAL MILITAR*, file S/0008/21.

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 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 anticompetitive 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, though it is not impossible as the CNMC is bound by the proportionality principle.

It is worth noting that, despite the financial turmoil, the former CNC did not seem particularly keen to reduce fines following requests for a reduction of fines 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 anticompetitive practices when the turnover amounted to zero (see, for instance, Decision of the CNMC of 28 April 2016, *Concesionarios Chevrolet*, file S/DC/0505/14, p. 72).

3.4 What are the applicable limitation periods?

Limitation periods for very serious infringements are of four years; 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, an implicated employee can be held liable for his/her employer for 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?

Yes, see response to question 1.6 above.

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 exerts a decisive influence on, and determines the conduct of, the wholly owned subsidiary (Judgments of the Supreme Court of 23 May 2019, appeal number 2117/2018, and 27 May 2019, appeal number 5326/2017).

The CNMC repeatedly cites this European case law in cartel cases to extend the liability of cartel members to their parent companies (Decisions of 22 September 2014 in case S/0428/12, *Pales* and 28 July 2015 in case S/471/13, *Car Manufacturers*). It is also worth mentioning that the parent company will also benefit from the leniency programme (see below) if the subsidiary meets the requirements.

4 Leniency for Companies

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

Yes. This system has been implemented by the RD 261/2008, which regulates those procedures. The leniency programme entered therefore into force in February 2008. As previously mentioned, on 21 June 2013 the Spanish Competition Authority published guidelines on the leniency programme aimed at providing further guidance to leniency applicants and increasing the transparency of its decisions.

Following the European model, the programme offers immunity from fines or reduction of the fine. Leniency is open not only to undertakings but also to individuals (either because the original applicant is an individual or because the company requests that leniency be extended to its employees).

The moment at which participants in a cartel reveal information (prior to or following the opening of an investigation) is relevant not only for immunity applicants (who must be the first to report the information), but also for undertakings or individuals seeking partial leniency. The range for the reduction of the fine imposed depends on that timing: 30% to 50% for the second party revealing information; 20% to 30% for the third party; and up to 20% for the remaining parties.

Immunity is therefore reserved for the first undertaking which provides evidence that, in the view of the CNMC, it will be enabled to carry out an inspection or to find an infringement of Article 1 SCA, and this is subject to the condition that the CNMC does not already have sufficient evidence on the infringement. Cartel instigators are excluded from the benefit of immunity. To benefit, the applicant is required to: cooperate fully throughout the investigation; end its involvement in the alleged cartel immediately following its application, unless otherwise directed by the CNMC to preserve the effectiveness of the inspections; not destroy relevant evidence relating to its application; and not disclose to third parties other than the European Commission or any other national authorities its intention to submit an application or its content.

Companies or individuals who subsequently provide additional evidence may have their fines reduced by up to 50%. Reductions can be granted when the undertaking provides the CNMC with evidence of the alleged infringement which represents significant "added value" with respect to the evidence already in the CNMC's possession. Furthermore, the applicant must meet the cumulative conditions set out above *mutatis mutandis*.

Leniency applications may also be submitted before the Regional Competition Authorities in those regions where the Competition Authority is in place. The Regional Competition Authorities shall communicate all leniency applications submitted to it to the CNMC.

Legal representatives or members of management bodies who have participated in the alleged infringement can also benefit from immunity and reduction of fines provided they cooperate with the CNMC.

When more than one Member State is affected by the infringement and subsequently more than one Competition Authority is well placed to act against the infringement, the Commission encourages all Competition Authorities affected to apply for leniency. The European Competition Network Model Leniency Programme is generally resorted to and in cases where the Commission is particularly well placed to deal with a case applicants typically submit summary applications with NCAs which might be well placed to act.

According to the last available annual report published in 2019, since 2010, the year when the first resolution pursuant to the leniency programme was adopted, 31 cartels have been discovered and sanctioned in direct relation with the leniency programme. This means that until 2019, close to €500 million in fines were imposed following the programme.

On 27 January 2010, the CNC published its first Decision stemming from a leniency application, in connection with a cartel in the Bath and Shower Gel Manufacturing Sector (S/0084/08). The proceedings had been initiated on the same date the leniency programme first came into effect. On that day, two of the cartel participants – Henkel and Sara Lee – submitted respective statements to the CNC disclosing the existence of the cartel and their participation, as well as the involvement of Puig, Colgate and Colomer. More recently, a company belonging to the Scrap and Steel cartel benefited from a 50% reduction of the penalty imposed, due to its cooperation with the CNMC in the framework of the leniency programme (Decision of 4 March 2022, *CHATARRA Y ACERO*, file S/0012/19).

Leniency applicants receive no immunity in connection with damages claims under Spanish law. However, the new provisions in the SCA resulting from implementation of the Damages Directive foresee that liability of leniency applicants shall be limited to the harm caused to their own direct and indirect purchasers (although 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?

Yes. With the transposition of the ECN+ Directive, an indicator was introduced in Regulation 261/2008. In particular, the Competition Directorate may grant, upon a reasoned request from the applicant, a marker for the applicant's place in an application for immunity from fines while it submits the information and evidence necessary to comply with the requirements of the SCA. The applicant's position indicator will be valid for a period of time to be determined by the Competition Directorate. The Competition Directorate will have the discretion to assess whether the information and evidence provided is sufficient to grant the position indicator regulated in this paragraph. Upon completion of the leniency application, the date of submission of the exemption application will be deemed to be the date of the application for the benchmark.

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

At the request of the applicant, oral applications for leniency are accepted. To do so, a meeting has to be arranged at the CNMC offices and, after the recording has been transcribed, the

declaration is registered. Thus, both the exemption and reduction of fines may be submitted orally, accompanied by the relevant information and evidence, recorded at CNMC premises with a transcript entered on the register. The transcript's entry date and time in the CNMC register will determine the order of receipt of that leniency application.

However, in order to ensure the effectiveness of the leniency system, the SCA provides that the CNMC cannot provide the Commercial Courts with the information obtained via immunity or reduction of fines applications. This provision affords some protection to applicants in the event of damages actions. In that regard, unlike the EU case law practice (e.g., *Pfleiderer* case), Spanish law is unambiguous in connection with the fact that all documentation and declarations made together with a leniency application, as well as the application itself, are confidential, as provided by Article 15 *bis* of the Spanish Civil Procedure Act, Article 42 of the SCA and Article 51 of RD 261/2008.

Only the interested parties may have access to the transcript. Neither mechanical nor electronic copies of the oral submissions may be made when requesting access to the CNMC's file.

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 request for immunity from a fine or a reduction application and all application data and documents will receive confidential treatment until the statement of objections is issued. Interested parties will then have access to that information provided that this is necessary to submit a response to the statement of objections.

A special separate file of all documents and data deemed confidential (including the applicant's identity) is open. However, the interested parties have access to all non-confidential information necessary to respond to the statement of objections (with the exception of the oral leniency statements).

Private litigants may not request that the CNMC or other Competition Authorities produce materials submitted within the scope of a leniency programme.

In order to protect the effectiveness of the leniency system, the SCA establishes that the CNMC cannot provide the courts with any information obtained through the applications for immunity or the reduction of fines.

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

The full, continuous and expeditious 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, RD 261/2008, states that the leniency applicant should cooperate with the CNMC throughout the entirety of the proceedings.

The CNMC applies high standards when determining whether undertakings have fully and continuously collaborated. In several cases in which the information provided by the undertaking had added value, the former CNC nevertheless withheld the benefits of the leniency programme on the basis that they had not complied with their collaboration obligations under the programme.

Cooperation must therefore 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 expressly states that the exemption granted to an undertaking shall also benefit its legal representatives or the persons comprising the management bodies provided that they have cooperated with the CNMC. The scenario of employees of the undertaking being the whistle-blowers is not expressly foreseen but might be considered to be covered by the SCA. To date, we are not aware that any whistle-blowing actions have been independently brought by employees before the CNMC.

In 2014, the CNMC opened an online and confidential "mailbox" in which any company or citizen may submit relevant information to the CNMC concerning anti-competitive practices. This mailbox is anonymous, which means that there is no need for the whistle-blower to provide his/her name to the CNMC.

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 or similar procedure applicable to cartels in Spain.

7 Appeal Process

7.1 What is the appeal process?

First, it must be noted that 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 last instance. For example, in 2019, the Council resolved 14 appeals against the acts of the Directorate where one was partially upheld, 10 were dismissed, two were inadmissible and one was shelved.

Secondly, the decisions – including fining decisions – and acts issued by 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) and, in a second review, appeal is possible in certain cases (e.g., where there is a cassation interest) before the Supreme Court.

A study carried out for the period 2014–2018, and released in May 2019, shows that the National High Court has confirmed on average 73.8% of the Competition Authority's antitrust

decisions. The percentage rises to 83% in the case of the Supreme Court. That percentage includes only judgments which confirm or reject the existence of the infringement observing due process. Instead, 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 those the confirmation percentage decreases to 71.5% and 52%, respectively.

During 2022, the High Court and the Supreme Court have handed down 110 judgments resolving challenges to CNMC decisions. Of these 110 judgments, 103 corresponds to the High Court and seven to the Supreme Court.

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

No, unless interim relief is sought from the court to stay payment of the fine.

Interim suspension is granted in practice if it is shown 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 the interim suspension is granted, a bond must be posted by the requesting party to ensure eventual future payment of the fine in full with the judgment on the merits. Alternative guarantees (share or asset pledge) can be accepted.

Although the High Court has traditionally granted the precautionary suspension, there are recent examples of refusal of the precautionary measure: the High Court rejected an application for suspension of the payment of a fine of €1,605,648 filed by a company involved in the road maintenance cartel, considering that the company's financial situation had not been sufficiently accredited (Order of 25 October 2022, appeal number 2508/2021). The bank fees associated to 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-Law 9/2017, of 26 May (**RDL 9/2017**), transposed Directive 2014/104/EU of 26 November 2014 on antitrust damages claims, amending the SCA and the Civil Procedure Act

The main changes introduced are as follows:

a) increasing the limitation period from one to five years. This period is suspended when a Competition Authority initiates a proceeding;

b) introducing a presumption of harm in cartel infringements, which generally facilitates claims. Claimants are allowed to obtain full compensation of the damages suffered, comprising the right to be indemnified for actual loss and loss of profit, plus interest;

c) introducing a presumption of harm to indirect purchasers. Spanish civil law states that the burden of proof in civil proceedings lies with the party that alleges the harm. Thus, indirect purchasers must provide evidence of the defendant's unlawful conduct, the causal link and the existence of harm and its quantification. In the RDL 9/2017, this rule is reversed, introducing a presumption of harm in favour of indirect purchasers. It is relevant to mention here that Spanish Courts have recognised the "passing-on" defence when considering a defendant's 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*);

d) 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. RDL 9/2017 modifies this regime and makes it easier for claimants to access evidence that is required to substantiate the claim, although claimants must justify the request and provide reasonable available evidence to support a damages claim, and must identify specific items, at least, relevant categories of evidence. Thus, RDL 9/2017 does not foresee the introduction of a discovery system in Spain. Moreover, the party who requests access is expected to 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;

e) in line with the Directive, making CNMC's final decisions declaring infringements of competition law binding on Spanish Courts. A final decision made by any other Member State's National Competition Authority creates a presumption that a competition law infringement exists;

f) 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 an anti-competitive behaviour. This principle of joint liability is exempted in cases involving small and medium-sized enterprises that meet certain requirements and beneficiaries of immunity; and

g) declaring the effective compensation of the damages caused before the adoption of a decision by the CNMC as a mitigating factor for the purposes of setting the amount of the antitrust fines.

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 conducts that may come to reduce the burden of proof or even to exempt the claimant to prove the unlawful practices; and in the absence of an administrative decision, *a stand-alone claim* is available where the court will need to make a deeper assessment to confirm the legality of business conduct as a pre-requisite for a damages award.

Prior to the current SCA there was an anomaly due to the fact that national competition law provisions could only be invoked in administrative proceedings, not in civil proceedings, whereas Articles 101 and 102 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: "*any persons who by action or omission causes harm to another by fault or negligence is obliged to repair the damage caused*", as well as Article 71 SCA: "*competition law infringers will be liable of the harm caused*".

Prior to the SCA damages cases for breach of the SCA were very scarce. 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 was some case 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 TFEU).

The first time the Supreme Court decided on an antitrust damages claim took place by means of judgments of 10 May 2012 and 7 November 2013 in relation to the *Sugar Cartel* case. The court adopted a victim-friendly approach and included a number of guidelines for companies and consumers who have been affected by collusive behaviour, and who seek compensation as a result of such conduct.

More recently, thousands of individual damages claims have been lodged against the Trucks Cartel (and more recently the Cars Cartel, a Spanish case) before first instance courts all over Spain. Since the first judgment on the Trucks Cartel was given in October 2018, hundreds of first and second instance decisions have been adopted. Those unfavourable to the interests of the claimants were often caused by poor economic expert evidence. The Supreme Court issued a first badge of decisions concerning the Trucks Cartel, largely confirming second instance decisions.

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 different ways to submit collective actions. The most straightforward collective action involves the consolidation of the claims of multiple claimants, though 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 grants 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.

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, after the implementation of the Damages Directive, the limitation period for antitrust infringements is of five years.

However, for infringements committed and declared by the CNMC before the entry into force of RDL 9/2017, the Civil Code applies, which provides for a limitation period of one year from the time when the infringement is known. This refers to damages claims based in non-contractual liability, or tort, which is the kind of damage claim contemplated under RDL 9/2017.

The limitation period for contractual claims is of 15 years from the moment there is a civil judgment declaring 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.

Determining whether the case relates to contract or tort law, and consequently whether the limitation period applies, can sometimes be a tricky issue. This is reflected in the judgment adopted by the Court of First Instance Nº 50 of Madrid (*Autos* 735/07) in the civil damages claim lodged against Azucarera Ebro, in relation to the *Sugar Cartel* case whereby the type of liability at stake was not clearly established. However, the Supreme Court finally confirmed the nature of tort liability of the damages (*responsabilidad extracontractual*) resulting from a cartel (*Sugar Cartel* case) and also on other antitrust infringement 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 is available containing the main information items enabling preparation of the damages claim (this is the case both before and after the Directive was implemented). In the recent judgments of the Supreme Court on the Trucks Cartel, the court established that the *dies a quo* was the day of publication of the EC Decision.

In order not to have 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 the RDL 9/2017 this rule is reversed, introducing a presumption of harm in favour of indirect purchasers. Although 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 v Ebro foods* (Judgment of 7 November 2013, appeal number 2472/2011), though it rejected it in that case by establishing a stringent standard of proof of harm having been passed 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 the Directive 2017/104/EU, similarly to the new limitation periods, cannot apply to the case, since it would mean a retroactive application of RDL 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 determined ultimately the Bar Association may 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 applied under the former SCA required firms a prior final decision issued by the Competition Authority, it was difficult for private parties to bring actions based on antitrust infringement proceedings as 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 telecom sector, such as, for instance 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 or the *Centrica v Endesa* case in January 2011.

The two abovementioned judgments of the Supreme Court in the *Sugar Cartel* case (see question 8.1) were the first two damages actions derived from cartel conducts in Spain (both follow-on actions).

Under the current SCA, individuals may bring an action for antitrust infringements before the Commercial Courts. Therefore, the number of successful civil damages claims is expected to increase significantly in the near future.

Besides the Truck Cartel, where claims are being generally successful, there has also been recent rulings from the Madrid and Barcelona Provincial Courts in follow-on damages claims stemming 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, 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 those are happening 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.

As asserted, the CNMC has recently published two guides, one on the prohibition to contract, and another one that helps to quantify the damages. Until now it was the Ministry of Finance that had to determine the duration and scope of the prohibition to contract with public entities, but now it is the CNMC that will set it taking into account the nature of the infringement and the potential impact of the prohibition on the markets. As for the second guidelines regarding the quantification of damages, it will help judges, lawyers, experts and consumers when intervening in proceedings for damages claims for infringements of competition law.

The transposition of the ECN+ Directive has introduced novelties in the Spanish law, increasing the fines for all anti-competitive agreements, the duties of information and collaboration and the powers of inspection have been extended, as detailed in the answers to the previous questions.

A bill on consumers collective actions (in principle applicable to antitrust damages) was published earlier this year, although it has not been finally adopted so far due to general elections taking place in summer.

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

There are none.

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Pedro leads Callol Coca's competition practice, which is recognised by the main international directorates such as *Chambers and Partners* and *The Legal 500* (who has selected him as one of the top individual competition lawyers in Spain). He was (twice) acknowledged at the time as one of the "top 40 under 40" by *Iberian Lawyer* and he is a competition law specialist currently recognised by *Global Competition Review* and *Who's Who Legal* as one of the eight "Thought Leaders" in the area of competition law.

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Mani Reinert

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/administrative.

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. In the past years, 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 single and continuous infringement in the EU case law; 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 when these unannounced inspections take place. In Switzerland, 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 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. However, to the extent that the regulatory framework does not permit competition, that sector is exempted from the cartel prohibition. However, this exemption is applied very narrowly by the Federal Supreme Court.

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 a member of the presidency 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 currently 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 privilege against self-incrimination extends to members of the formal or factual body of the company (but only to them). Members of the formal or factual body of the company cannot be compelled to incriminate the undertaking 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 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%. In some cases, however, lower basis rates of 1–5% were applied. Unlawful resale price maintenance and the restriction of passive sales have been fined with a basis rate of 2–6%.
- 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 or that the fine would significantly reduce its competitiveness.

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 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. The Federal Administrative Court has held that immunity is not to be granted if the applicant raises legal or factual objections against the existence of an inadmissible arrangement restricting competition.

An undertaking that is not entitled to full immunity can still be granted a reduction of up to 50% if 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 and the proposed fine.

Simultaneously, 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.

Additionally, if the undertaking admits the facts presented by the Secretariat, it can obtain a further reduction of the fine (up to 20%). In recent cases, the templates of the admission of facts as presented by the Secretariat also included admissions that were not covered by the evidence in the file. Parties are free to delete some of these admissions, however, the Secretariat may then reduce the reduction of the fine.

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 up to 20%, 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 often uses settlements to conclude cases. Moreover, ComCo often uses 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. ComCo may decide in some cases to conclude the procedure against the settling parties and to continue the contentious procedure against the non-settling parties. It may also decide, however, to decide against the settling and non-settling parties at the same time. The latter has become more frequent recently.

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. For example, 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 proposes the following amendments:

- In assessing whether a restriction of competition is significant, qualitative and quantitative criteria should be relevant. This also means that the actual effects should be investigated when assessing agreements.
- Consumers should have the right to file suits based on alleged infringements of competition law.
- The limitation period should be suspended during the investigation of ComCo and subsequent appeals.
- There should be certain time limits for concluding the investigation of ComCo and subsequent appeal procedures.

Parliament is also discussing the introduction of instruments of collective redress.

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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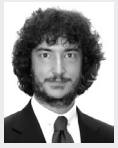
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1 The Legislative Framework of the Cartel Prohibition

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 Law No. 4054 on the Protection of Competition, 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 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 18 July 2023.)

(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 that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. 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") is able to decide not to launch a fully-fledged investigation for agreements, concerted practices and/or decisions of associations of undertakings that 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 applies to (i) agreements between competitors, provided 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, provided the market share of each of the parties does not exceed 15% in any of the relevant markets affected by the agreement. This principle is not applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply. With this 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 that has the "potential" to prevent, restrict or distort competition. Again, this is a specific feature of the Turkish cartel regulation system, recognising the broad discretionary power of the 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 that:

- 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 that, 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 that 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 Authority enforces the cartel prohibition and other provisions of the Competition Law in Turkey. 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 288 case handlers as of 1 January 2023. 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 became able to decide not to launch a fully-fledged investigation for agreements, concerted practices and/or decisions of associations of undertakings that do not exceed the thresholds (e.g., a certain market share level or turnover) that will be determined by the Board. This principle is not applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply. With this 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 30 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 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 written opinion). The defending parties will have another 30-day period, extendable for another 30 calendar days, to reply to the additional written opinion (third written defence). When the parties' responses to the additional written 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 the Competition Law. 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 was an effect in the Turkish markets. Additionally, 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 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 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 time frame. Computer records are fully examined by the experts of the Authority, including but not limited to deleted items.

Officials conducting an on-site investigation must be in possession of a deed of authorisation from the Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters that do not fall within the scope of the investigation (i.e., that which is written on the deed of authorisation).

As a recent development, the Constitutional Court of the Republic of Turkey ("Constitutional Court") published on June 20, 2023 its reasoned decision dated March 23, 2023 with the application no. 2019/40991, which may potentially impact the standard of due process in the Turkish Competition Authority's dawn raid practice. The Decision, in brief, rules that the Authority is obliged to obtain a court decision (i.e. a warrant) allowing the Authority officials to conduct a dawn raid. In the standard practice of the Authority, which was in full compliance with the Competition Law, the case handlers of the Authority have been able to legally conduct the dawn raids with the certificate of authorisations that can be issued by the Turkish Competition Board. However, the Constitutional Court found that although the Authority's practice has been compliant with the Competition Law in its dawn raid practices, the provisions of Article 15 of the Competition Law regulating the dawn raids is unconstitutional as it does not require the Authority to obtain a court decision before conducting dawn raids in contravention of Article 21 of the Turkish Constitution protecting the immunity of domicile. Since the Constitutional Court found that the Authority's practice has been in full compliance with the Competition Law but certain provisions of the Competition Law regulating the dawn raid are unconstitutional, the said provisions of the Competition Law is likely to be amended in the near future to comply with the Decision. Meanwhile, however, it is considered that the dawn raid practice of the Authority should not be significantly affected in a way that would lessen the frequency of the dawn raids of the Authority. Indeed, with a view to comply with the Decision, the Authority would now be expected to apply to the Criminal Court of Peace (first instance criminal courts) to obtain a warrant allowing the Authority's case handlers to conduct the necessary dawn raids. This application is already a process that is foreseen by the Competition Law and applied to by the Authority from time to time.

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 [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 does 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) falls 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 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; *DSM Grup,* 29 April 2021, 21-24/287-130).

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 105,688 (around EUR 3,500 at the time of writing) for the year 2023. 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 105,688 (around EUR 3,500 at the time of writing).

In 2022, the Board fined a number of undertakings for hindering on-site inspections. In this respect, in its *Çözüm* decision (22 December 2022, 22-56/878-363), Çözüm Dergisi Yay. San. Tic. Ltd. Şti. was fined 0.05% of its turnover generated in 2021 for hindering an on-site inspection. Similarly, the Board imposed a fine of 0.05% upon Natura Gıda Sanayi ve Ticaret A.Ş. on the grounds that its employees deleted the e-mails after the initiation of the on-site inspection, although the deleted e-mails had been recovered (*Natura Gıda* 8 September 2022, 22-41/599-250).

In 2022, the total amount of fines imposed on undertakings that obstructed on-site inspections was TL 115,268,235.48 (around EUR 3,819,472 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, a recent decision stands out:

(i) The highest monetary fine imposed by the Board on a single company as a result of a cartel investigation is TL 958,129,194.39 (around EUR 31,748,103 at the time of writing). This monetary fine was imposed by the Board on BİM Birleşik Mağazalar A.Ş. ("BİM") (28 October 2021, 21-53/747-360). This amount represented 1.8% of BİM's annual gross revenue for the year 2020.

(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 around TL 2.6 billion (around EUR 86 million at the time of writing) for the same case (28 October 2021, 21-53/747-360). The total fine was imposed on seven undertakings active in the retail sector and manufacture of food and cleaning products.

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 infringement 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 that 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 that 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 a 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 in 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 that 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 to 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. The Authority published the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position ("Settlement Regulation") on 15 July 2021, which set forth rules and procedures concerning the settlement process for undertakings that admit to the existence of a violation. Furthermore, the Authority published the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position on 16 March 2021, which set out principles and procedures in relation to commitments submitted by undertakings in order to eliminate competition problems. The Authority also published Communiqué No. 2021/3, which set out the principles regarding the criteria to be used to identify the practices of the undertakings that can be excluded from the scope of the investigation.

In its first ever settlement decision, the Board announced on its official website that its investigation against Türk Philips Ticaret A.Ş ("Philips Turkey"), Dünya Dış Ticaret Ltd. Şti., Melisa Elektrikli ve Elektronik Ev Eşyaları Bilg. Don. İnş. San. Tic. A.Ş., Nit-Set Ev Aletleri Paz. San. ve Tic. Ltd. Şti. and GİPA Dayanıklı Tüketim Mamülleri Tic. A.Ş., based on the allegation that Philips Turkey violated Article 4 of the Competition Law by way of determining its dealer's resale prices, was concluded with a settlement decision for each investigated party through the Board's decision (5 August 2021, 21-37/524-258).

The Board launched an investigation against Coca-Cola and found that Coca-Cola held a dominant position in the "carbonated drinks", "cola drinks" and "aromatic carbonated drinks" markets, and abused its dominance by way of using its rebate system and refrigerator policies that restricted its competitor's activities in the relevant market. The Authority addressed its competition concerns, and in the assessment found that the exemption previously granted to Coca-Cola for "non-carbonated drinks" must be withdrawn, that 40% of the space in refrigerators should be accessible to competitors and that the sales agreements and refrigerator commodatum (loan for use) agreements entered into by Coca-Cola and its distributors must be amended within four months. In light of the Authority's assessments, Coca-Cola proposed its commitments, including the amendment of the general agreements entered into with sales points and executing separate agreements for carbonated drinks and non-carbonated drinks, the termination of transitional terms and conditions across different product categories and increasing the refrigerator space accessible to competitors by 25%. The commitments offered and subsequently agreed by Coca-Cola were deemed to address the concerns raised by the Authority (2 September 2021, 21-41/610-297).

In another important decision where both settlement and commitment mechanisms were implemented, the Board had initiated a fully-fledged investigation against Singer sewing machines on 4 March 2020 with its decision (21-11/147-M). In the investigation, the Authority assessed that the dealership agreements Singer had with its resellers included a non-compete clause that was exceeding the time limit set by the legislation (i.e., five years), alongside resale price maintenance practices. During the investigation, Singer applied to both settlement and commitment mechanisms. Whilst Singer submitted its commitments addressing the deletion of the non-compete clause, it also applied before the Authority for conclusion of the investigation through settlement mechanism by accepting its resale price maintenance violation. The Board accepted Singer's commitments as it was deemed that the commitments were adequate to restore competition (9 September 2021, 21-42/614-301). Further to the acceptance of the commitments, the Board evaluated Singer's settlement application and the Board accepted the settlement application and rendered its decision to decrease the administrative monetary fine by 25% for resale price maintenance violation (30 September 2021, 21-46/672-336).

In another noteworthy decision, the Board rendered a decision where it accepted the commitments proposed by Türkiye Şişe ve Cam Fabrikaları A.Ş. ("Şişecam") and Sisecam Çevre Sistemleri A.Ş. to remedy the competition concerns relating to abuse of dominance in the glass production market. This decision marks the first time where the Board approved the commitments submitted in the preliminary investigation stage, since the Amendment Law was enacted (21 October 2021, 21-51/712-354).

In the recent decisions of the Board concerning Kınık Maden Suları A.Ş ("Kınık") and Beypazarı İçecek Pazarlama Dağıtım Ambalaj Turizm Petrol İnşaat Sanayi ve Ticaret A.Ş. ("Beypazarı") constitute the first combined application of the Settlement and Leniency Regulations. In its *Kınık* decision (14 April 2022, 22-17/283-128), the Board applied a 25% reduction under the Settlement Regulation (the highest reduction possible) and a 35% reduction under the Regulation on Leniency, amounting in total to a 60% reduction of the administrative monetary fine. Thus, the monetary fines imposed on Kınık decreased drastically from TL 2,322,328.75 to TL 928,931.50. Subsequently, in its *Beypazarı* decision (18 May 2022, 22-23/379-158), where Beypazarı made a leniency application after Kınık, the Board again applied a 25% reduction under the Settlement Regulation and a 30% reduction under the Regulation on Leniency, amounting in total to a 55% reduction

from the administrative monetary fine. Thus, the monetary fines imposed on Beypazarı decreased again drastically from TL 21,885,323.28 to TL 9,848,395.48.

Furthermore, in its *Şişecam* decision (February 23, 2023, 23-10/170-53), the Board recently revised the commitments finalised with its decision dated 21 October 2021 and numbered 21- 51/712-354 ("First Commitment Decision"). In the First Commitment Decision, the Board had decided that Şişecam, through its subsidiary Çevre Sistemleri, had abused its dominant position in the market for glass manufacturing, by way of excluding its competitors in the upstream market for recycled glass, utilised its buyer power to narrow the margin between its competitors' input and output and aggravated their activities through restricting their supply of waste glass. In the First Commitment Decision, the Board accepted the following commitments offered by Şişecam at the preliminary investigation stage and concluded the preliminary investigation against Şişecam:

(i) Terminating all procurement of unprocessed flat glass used in furnace-ready cullet from any undertaking that is outside the scope of Şişecam's economic integration (from third parties operating domestically), for five years beginning from the service of the short decision.

(ii) Terminating all procurement of unprocessed glass container products used in furnace-ready cullet from any undertaking that is outside the scope of Şişecam's economic integration (from third parties operating domestically), for two years beginning from the notification of the short decision and restricting dumping of waste glass containers up to 10,000 tonnes for the first year, 20,000 tonnes for the second year and 40,000 tonnes for the third year.

(iii) Terminating procurements of flat waste glass (for five years) and waste glass container (for two years) from undertakings established abroad (from third parties operating abroad) and outside the scope of Şişecam's Economic Integration.

(iv) The amount of furnace-ready glass procured from third parties shall not exceed 35% of the overall procured amount from third parties applicable for each financial year, lasting for five years from the notification of the short decision.

(v) A copy of notification made via a notary public regarding the termination of supply of waste glass contracts entered into force between Şişecam economic integration and third party undertakings, to be submitted to the Authority, lasting for five years.

(vi) A notification to be made to the Authority to observe the commitments that are being implemented with respect to transactions such as transfer, lease, etc. over the main elements of recycling activities (i.e facility, machinery-equipment), lasting for five years.

(vii) Annual submission of independent audit reports to the Authority prepared with the purpose of fulfilment of the commitments, for five years.

Following the earthquake that took place in Kahramanmaraş province and nearby cities, upon the application of Şişecam for revision of the commitments, the Board has decided that "[t]*here is a substantial alteration in any of the factors on which the decision was based*" in the face of the repercussions of the earthquake and accepted that the commitment in the item above is to be revised. By way of the revision, Şişecam commited to limit its procurement of unprocessed flat glass used in furnace-ready cullet from any undertaking that is outside the scope of Şişecam's economic integration (from third parties operating domestically), for five years beginning from the service of the short decision with an annual 15,000 tonnes.

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 Ankara Administrative Courts 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 Ankara Administrative Courts, 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; however, 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 decision statistics of the Authority for 2022, 78 of the 386 cases that the Board decided on are related to Competition Law violations: 64 of those cases related to Article 4 of the Competition Law; and 38 of those 38 cases related to horizontal agreements. Overall, the Authority recorded increased Article 4 and cartel enforcement under horizontal agreements assessments.

In respect of cartel enforcement activity, the Board issued a reasoned decision that concluded imposition of an administrative monetary fine against chain markets engaged in retail food and cleaning products and their supplier, for their cartel arrangement (28 October 2021, 21-53/747-360). The Board found that five chain markets, directly or indirectly, through their supplier, and their supplier:

- coordinated their prices or price transitions;
- shared competitively sensitive information;
- colluded on and heightened prices through retailers against the good of consumers; and
- observed and maintained the said collusion.

Thus, the Board decided that the relevant undertakings violated Article 4 of the Competition Law. In this respect, the Board imposed a total administrative monetary fine of over TL 2.6 billion on the undertakings.

Furthermore, in the *MDF* decision, the Board concluded that AGT Ağaç Sanayi ve Ticaret A.Ş., Çamsan Ordu Ağaç San. ve Tic. A.Ş., Divapan Entegre Ağaç Panel San. Tic. A.Ş., Gentaş Dekoratif Yüzeyler Sanayi ve Ticaret A.Ş., Kastamonu Entegre Ağaç Sanayi ve Ticaret A.Ş., Kronospan Orman Ürünleri San. ve Tic. A.Ş., İntegre San. ve Tic. A.Ş., Starwood Orman Ürünleri Sanayii A.Ş., Teverpan MDF Levha Sanayii ve Ticaret A.Ş., Yıldız Entegre Ağaç San. ve Tic. A.Ş. and Yıldız Sunta Orman Ürünleri İth. İhr. ve Tic. A.Ş, which are producers of medium-density fibreboards ("MDF") and chipboards, were involved in a cartel agreement to fix the price increase timing and the percentages regarding MDF and chipboard products (1 April 2021, 21-18/229-96). In the relevant case, although the violation occurred in two different time periods (2014 and 2016–2017), the Board determined that a single base fine for both time periods should be applied with respect to the violation.

Moreover, in the *Sunny* decision (18 May 2022, 22-23/371-156), the Board decided not to initiate a full-fledged investigation in a recent preliminary investigation concerning the allegations that Sunny Elektronik Sanayi ve Ticaret A.Ş. ("Sunny") prohibited its resellers' online sales and engaged in resale price maintenance and facilitated indirect information exchange between its resellers, namely CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş. ("CarrefourSA"), Migros Ticaret A.Ş. ("Migros") and Yeni Mağazacılık A.Ş. ("A101"), despite the fact that the case handlers of the Authority had suggested initiation of a full-fledged investigation.

The *Sunny* decision analysed the findings through the lens of a hub & spoke infringement and concluded that the findings in the particular case did not show any violation of such and hence deemed that there was no information and/or document indicating that Sunny, and the resellers of products supplied by Sunny, A101, CarrefourSA and Migros were involved in a restrictive agreement and violated Article 4 of the Competition Law and as a result, the Board decided not to initiate a full-fledged investigation.

In addition, the Board decided in its *FMCG II* Decision (15 December 2022, 22-55/863-357) that BİM Birleşik Mağazalar AŞ, CarrefourSA Carrefour Sabancı Ticaret Merkezi AŞ, Migros Ticaret AŞ, Şok Marketler Ticaret AŞ and Yeni Mağazacılık AŞ had violated Article 4 of the Competition Law by agreements or concerted practices related to a hub & spoke cartel.

The cartel aimed to determine the retail sale prices of many products offered for sale by the above retailers. It involved coordinating the price and/or price increases through indirect contacts between the said undertakings through common suppliers. They also exchanged competitively sensitive information such as future prices, price increase dates, seasonal activities, and campaigns through common suppliers. Moreover, undertakings interfered with the prices and imposed price increases on retailers that had not yet increased their prices during a period of general market price increases, through suppliers, to the detriment of customers. They observed the compliance with the collusion between undertakings by strategies such as product-specific price reduction in case competitor prices do not rise.

Therefore, the Board decided that an administrative monetary fine must be imposed on said undertakings pursuant to Article 16 of Competition Law. However, since an administrative fine was already imposed on the relevant undertakings pursuant to the Board's *FMCG I* Decision (28.10.2021, 21-53/747-360), in accordance with the general principle of law "*ne bis in idem*", the Board decided not to impose a new administrative monetary fine within the scope of the current investigation.

The pre-investigations and 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 that 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.

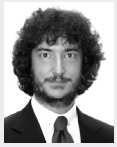
Similar to the rest of the world, technologies and digital platforms are on the Authority's radar. The Authority announced plans for the strategy development unit to focus on digital markets in May 2020 and launched a sector inquiry focused on e-marketplace platforms on 16 July 2020. The Authority published its Final Report on its Sector Inquiry on E-Marketplace Platforms on 14 April 2022. In the Final Report, it stated that that the Authority is working on digital market regulations and mentions Regulation (EU) 2022/1925 ("Digital Markets Act") as a basis for legislative action concerning digital markets. It is expected that regulations focusing on gatekeepers mentioned in the report will be incorporated as an addition to article 6 of the Competition Law which regulates abuse of dominant position or possibly as a separate article, while also being reflected in secondary legislation. The amendment is expected to constitute the most drastic change to Turkish law on digital markets and is speculatively expected to compound the Digital Markets Act with increasing antitrust focus on digital markets; however, the proposed text of the Turkish act is not publicly available and its details remain unknown.

Moreover, on 7 April 2023 the Authority published its Preliminary Report on Online Advertising Sector Inquiry which was initiated in January 2021 together with the an expected DMA-type legislation in Turkey.

On 18 April 2023, the Authority published the Study on the Reflections of Digital Transformation on Competition Law, which provides an overview of the competition law framework for digital markets and highlights the challenges posed by data practices, algorithmic collusion, interoperability, and platform neutrality.

On a final note, on 30 March 2023, the Authority published its Final Report on its Sector Inquiry on the fast-moving consumer goods sector.

In 2022, the Authority participated in the following programmes: (i) the "2022 ICN Cartel Workshop" organised New Zealand Trade Commission, together with the ICN Cartel Study Group; (ii) the "Global Competition Forum", organised by the Organisation for Economic Co-operation and Development ("OECD"); (iii) the 7th International Conference on "Anti-monopoly Policy: Science, Practice and Education" organised by Federal Antimonopoly Service-FAS; (iv) the Startups. watch Ankara 2022 event; (v) the 16th Competition and Regulation European Summer School and Conference, ("CRESSE"); (vi) the "Competition Law and Policy Intergovernmental Experts Group" meetings organised by the United Nations Conference on Trade and Development ("UNCTAD"); (vii) the CMA Data, Technology and Analytics Conference organized by Competition and Markets Authority ("CMA"); (viii) the "Competition Law Izmir Symposium" organised by Izmir Democracy University; and (ix) the "hub & spoke cartels workshop" organised in cooperation with the OECD-Republic of Latvia Competition Council.



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In addition to his continuing private practice as an attorney, primarily through ELIG Gürkaynak, Gönenç is an Honorary Professor of Practice at UCL Faculty of Laws in London. In addition to his academic role at University College London, he also teaches competition law at Bilkent University Faculty of Law in Ankara/Turkey since 2005, and he has taught competition law in more than 10 universities in Turkey, in the EU, in the UK and in the US in the last 18 years.
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ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by the founding partner, Dr. Gönenç Gürkaynak, along with four partners, nine counsel and 40 associates.
In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings, and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority. ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms.
ELIG Gürkaynak has in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations, and all forms of restrictive horizontal and/or vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations. In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law, and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis in a wide range of business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

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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, which 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 other entities similar access to the information that 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 is not, ordinarily, protected. For example, an employee requesting a lawyer's opinion about the legal issues posed by a merger would likely 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 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 that 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 prohibiting 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 has traditionally been 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 the leniency policy has seen changes in recent years. 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.

In April 2022, the Division further updated the leniency policy to include a new condition for leniency. In addition to the prior conditions, a leniency applicant must also "upon its discovery of the illegal activity, promptly report it to the Antitrust Division". Although the new guidance does not define "prompt", it does state that it will be measured from "the earliest date on which an authoritative representative of the applicant for legal matters – the board of directors, its counsel (either inside or outside), or a compliance officer – was first informed of the conduct at issue". In the time since this policy change, we have not yet seen how promptness will be interpreted by the Division – or by courts – going forward.

The April 2022 policy change also implemented a new requirement for restitution. Although leniency applicants have always been required to pay restitution in order to receive a final leniency letter, the new guidance requires applicants to produce a "concrete, reasonable achievable" leniency plan before receiving a conditional leniency letter. This requirement forces leniency applicants to make decisions on restitution early in the investigation rather than developing those plans throughout the investigation as more information comes to light.

While the full effects of these new policies have yet to be seen in practice, they may make the decision to pursue leniency more difficult given the new emphasis on both moving quickly and making significant decisions at the outset of the investigation. It is also possible the policies 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 can also 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 non-disclosure 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 that 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". Although the previous administration narrowed that portion of the memo to apply only to individuals "substantially involved in or responsible for the criminal conduct", the current administration has announced an intention to return to the broader applicability of the original Yates Memo.

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 a 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 treble 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 generally 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.

The Division has continued to pursue its recent view of labour market collusion as criminal conduct since its 2016 joint announcement with the FTC that naked "no-poach" agreements would be prosecuted. Both the previous and current administrations have publicly stated an intention to continue that policy, and the Division conducted its first criminal trials alleging labour market violations in 2022. Those cases alleged wage-fixing between physical therapist staffing companies and non-solicitation agreements between dialysis providers.

Although courts have been generally receptive to the Division's view of labour market collusion, the Division has been relatively unsuccessful in related prosecution efforts. Both 2022 trials ultimately ended in acquittal on the antitrust grounds. In the wage-fixing case, the Eastern District of Texas denied the defendant's motion to dismiss, reasoning that wage-fixing is a variation of price-fixing and thus a *per se* Sherman Act violation. In the non-solicitation case, the District of Colorado similarly denied the defendant's motion to dismiss on the ground that an agreement between competitors not to solicit each other's employees was a horizontal market allocation, which also is traditionally subject to *per se* analysis. Most recently, the Division has suffered an additional setback in its prosecution of six defendant employees of aerospace engineering companies on allegations of labour market allocation. Following the government's case-in-chief in a bench trial, the District of Connecticut granted the defendants' motion for acquittal because numerous exceptions to the alleged hiring agreement meant that there was no cessation of meaningful competition.

In addition to the possibility of criminal prosecution for such conduct, the Division's view of labour market collusion may affect civil actions by increasing the likelihood that such conduct may be viewed by civil courts as *per se* violations of the antitrust laws rather than conduct to be analysed under the rule of reason. In July 2022, in a civil action filed by truck drivers alleging no-poach agreements between competing trucking companies, the Division entered a statement of interest arguing that the court should "reject" the view that the agreements "deserv[e] anything less than *per se* treatment". Given the Division's continued interest in pursuing this view in both criminal and civil actions, it is likely that this area of antitrust will become increasingly significant.

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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