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2023

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About the editor

Anna Lyle-Smythe
Slaughter and May

Anna Lyle-Smythe is a partner in Slaughter and May's Brussels office. She has a broad competition practice, including advising on mergers, cartels, state aid and market investigations. She has dealt extensively with the European Commission and the UK Competition and Markets Authority, as well as other regulators around the world. Her highlights include advising DuPont on the EU investigation of the chloroprene rubber cartel, and in the subsequent appeals to the EU General Court and European Court of Justice. She is a member of the Brussels Bar (A list), as well as being qualified as a solicitor (England and Wales).

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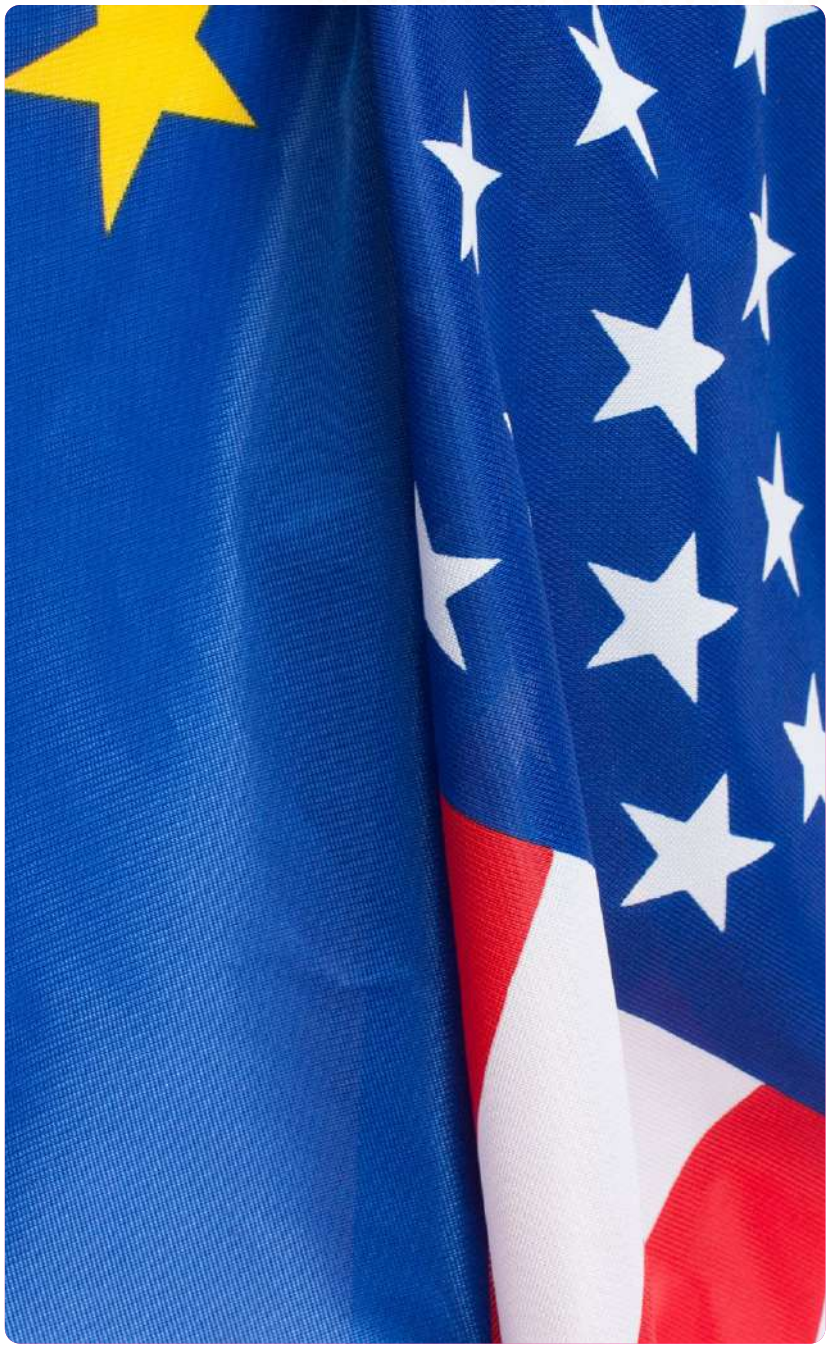

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Europe–US Overview

Elvira Aliende Rodriguez is a partner in the antitrust practice of Shearman & Sterling's Brussels office. She focuses on EU and Spanish competition law.

Elvira advises clients across a range of sectors, including air transport, chemicals, telecommunications, energy, pharmaceuticals, steel, hotel accommodation, textiles and financial services. She has extensive experience in advising clients on article 101 (restrictive agreements) and the equivalent provisions under Spanish law. She has also participated in state aid procedures and in article 102 (abuse of dominance) cases before the EU competition authorities. She has in-depth knowledge of working before the European Commission and the European Courts.

Djordje Petkoski is a partner in the antitrust practice of Shearman & Sterling's Washington, DC office. He focuses on cartel investigations, complex antitrust litigation, and strategic counselling with an emphasis on antitrust and competition law.

Djordje has represented many corporate and individual clients in cartel investigations by the US Department of Justice and enforcers in other jurisdictions, including as lead counsel for significant corporate clients. Individual clients have included chief executives and senior executives accused of criminal antitrust violations, including price-fixing and alleged 'no-poach' agreements. He has written extensively on antitrust and compliance issues, served as a panellist on these issues at American Bar Association events and taught classes on antitrust and compliance at the Wharton Business School.

Introduction

This chapter discusses a number of significant developments in cartel enforcement practice in the past year in the European Union and the United States. First, general enforcement trends reveal a level of enforcement activity that remains relatively low in the US and the EU despite EU authorities conducting an increased number of dawn raids in 2022, and notably in private homes. Second, there has been new guidance on leniency policy in both the EU and the US, fighting a global downward trend in leniency applications. Third, while there is a new focus on labour markets, the US is taking the lead in prohibiting wage-fixing and no-poach agreements. Fourth, the European Commission (the Commission) has published new guidance on the applicability of article 101 of the Treaty on the Functioning of the European Union (TFEU) to the relation between a jointly controlled JV and its parent. Fifth, the US Department of Justice (DOJ) has withdrawn its benchmarking safety zone guidance, considering it no longer fit for purpose. Another significant development concerning antitrust enforcement is the DOJ's announcement that it will start pursuing criminal prosecutions of alleged violations of section 2 of the Sherman Act. Finally, the European Court of Justice (ECJ) gave important clarifications on the assessment of 'by object' infringements and the preservation of fundamental rights in the staggered hybrid settlement procedure in its recent *HSBC* judgment.

General enforcement trends in the US and the EU

In the US, cartel enforcement activity has continued to remain at relatively low levels compared with previous years. While the number of individuals charged in 2022 did increase by roughly 7 per cent over the previous year, the number of corporations charged dropped almost 36 per cent. Total criminal penalties collected also dropped from US$151 million in 2021 to US$2 million in 2022. While criminal penalties have consistently remained low since a peak in 2015 when the DOJ imposed nearly US$3.6 billion in penalties, the past two

years indicate a downward trend, with US$2 million being the lowest amount collected in the past decade. The average prison sentence has also been declining over the past two decades, from an average of 20 months between 2000 and 2009 to 15 months since 2020.

One potential bright spot of the cartel enforcement programme has been the Procurement Collusion Strike Force (PCSF), which was created in 2019 with prosecutors from various agencies, including DOJ's Antitrust Division, the United States Attorney's Offices, the Federal Bureau of Investigation and the Department of Defense. Its goal is to investigate and prosecute antitrust crimes related to government procurement, as well as to facilitate training for procurement officials and government contractors about antitrust risks. The PCSF has so far opened more than 60 criminal investigations and prosecuted over 30 companies and individuals,

> "The nature of hybrid working arrangements post-pandemic means the home can be just as integral as the office when it comes to gathering evidence. The frequency and scrutiny of home-raids is therefore likely to increase."

involving over US$350 million worth of government contracts. The PCSF was especially active in 2022.

As to the EU, European competition authorities are conducting more dawn raids, continuing a comeback from the covid-19-related suspensions of 2020. In 2022, the Commission conducted raids in sectors including online food delivery, water infrastructure, fashion, natural gas in Germany and end-of-life vehicles. The Commission also confirmed that it raided the home of an individual employee, 'for the first time in many years'. While the Commission has for a long time had the power to inspect private homes, these were rarely used. However, the nature of hybrid working arrangements post-pandemic means the home can be just as integral as the office when it comes to gathering evidence. The frequency and scrutiny of home-raids is therefore likely to increase.

The ECN+ Directive (2019/1/EU) has also been adopted in almost all member states, paving the way to strengthen competition authorities' powers and cooperation between national competition authorities, including those concerning dawn raids. In 2022, national competition authorities conducted raids in Greece (eg, white goods and medical products), Spain (oil producers), France (leather goods), Norway (finance), the Netherlands (street furniture) and joint raids in Spain and Portugal (woodchips), among others.

Updates on leniency policy in the EU and the US

The downward trend in leniency applications saw global cartel investigations drop to record lows. Leniency applicants can be concerned about follow-on damages claims (particularly after implementation of the EU Damages Directive, eg, *Trucks Cartel*), uncertainty around non-traditional cartels such as technological development (*Car Emissions*), no-poach agreements (concerning the Portuguese Competition Authority) and buyers' cartels (*Styrene Monomer*; *Car Battery Recycling*; and *Ethylene*).

At a European level, the decline of leniency applications is no exception to the general trend. Though the Commission claims that applications have tripled compared to 2020 and doubled compared to 2021, with a total of 12 leniency applications received in 2022, this is mostly due to the almost nonexistent applications during those years in the context of the pandemic and is still a severe decline compared to the 46 applications submitted in 2014.

In order to ensure the transparency and accessibility of its leniency programme, the Commission published a Frequently Asked Questions (FAQs) document on 25 October 2022, comparable to that published by the US DOJ to clarify its corporate leniency policy. The Commission's guidance introduces a new role of leniency officer and the possibility for no-names enquiries. It also clarifies protections for leniency applicants, including resisting requests for disclosure of leniency submissions to third countries. While such clarifications will give some additional comfort to potential leniency applicants, the ever increasing risk from private litigation damages and other risks

linked to navigating international leniency requirements still remain significant deterrence factors. Discussions on further initiatives to increase cartel detection include growing *ex officio* investigations and technologically sophisticated discovery systems.

In the US, one notable policy development in the last year is the update of the DOJ Antitrust Division leniency policy FAQs in April 2022. The new guidance specifies that an applicant must 'promptly' self-report the alleged illegal activity, or it may not be eligible for amnesty, without providing any guidance on what defines as 'prompt' reporting. This requirement creates a significant difference to the European leniency regime, where so far the granting of immunity hinges on the added value of the submission but not on its expediency as such. Moreover, companies must now also undertake remedial measures to redress the harm caused by the illegal activity and improve their compliance programmes to mitigate the risk of future illegal activity. Finally, the new FAQs also clarify that former directors, officers and employees are 'presumptively excluded from any grant of corporate leniency'.

In January 2023, the DOJ Criminal Division also announced changes to its corporate enforcement policy, including additional incentives and discounts for 'immediate' voluntary self-disclosure upon awareness, and 'extraordinary cooperation' provided to DOJ investigators. This would apply to all matters handled by the Criminal Division, and while the Antitrust Division has its own leniency policy in place, it remains to be seen whether the Antitrust Division will adjust its policies to better align with the corporate enforcement policy.

US focus on labour markets

In recent years, the DOJ has brought several indictments against individuals and companies alleging agreements not to poach or solicit one another's employees, or to fix wages. Two of the cases that went to trial in 2022 survived motions to dismiss, but both juries

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ultimately found the defendants not guilty of the alleged antitrust crimes. In *United States v DaVita*, the court instructed the jurors that the government had to prove not only that the defendants had entered into a non-solicitation agreement but that they had intended to allocate the market for labour, which effectively raised the DOJ's evidentiary burden at trial. In *United States v Jindal*, the judge agreed with the DOJ's theory that the wage-fixing alleged was a form of price-fixing that the defendants could be criminally liable for. The defendants in both cases were acquitted of the antitrust charges, but Jindal was convicted of obstructing the Federal Trade Commission's original investigation of the alleged wage-fixing. Finally, in October 2022, in *United States v VDA*, DOJ secured its first criminal guilty plea in a no-poach case. VDA pleaded guilty to conspiring with another healthcare staffing company to allocate nurses and fix their wages and was sentenced to pay US$62,000 in criminal fines and US$72,000 in restitution.

"When determining liability for cartel fines, the Commission and courts have adopted an expansive concept of an undertaking, allowing parents to be held accountable for cartels involving jointly controlled JVs."

In the EU, the Commission announced in October 2021 its intention to enforce against wage-fixing and no-poach agreements, but no publicly announced investigations have followed yet.

Commission publishes revised Draft Horizontal Guidelines

In March 2022, the Commission published its revised draft horizontal guidelines, which, inter alia, attempt to clarify the applicability of article 101 TFEU in the context of a joint venture and its parent companies – a topic that has generated confusion and frustration in equal measure. Article 101 only applies to agreements between separate undertakings. However, the question of whether a jointly controlled JV is part of a single undertaking with its parents appears to depend on the context.

When determining liability for cartel fines, the Commission and courts have adopted an expansive concept of an undertaking, allowing parents to be held accountable for cartels involving jointly controlled JVs. For example, in the *Dow* and *Du Pont* cases, the CJEU held that the parent companies each formed a single undertaking with a 50:50 joint venture over which they exercised decisive influence, but 'only for the purposes of establishing liability for participation in the infringement'. In other contexts, such as the application of article 101 with regard to information exchange between a joint venture and its parents, the same entities cannot rely on being treated as a single undertaking. This is because the Commission's current guidelines provide that decisive influence is only assumed in the case of a parent and its wholly owned subsidiaries and are otherwise silent on information exchange in the context of jointly controlled JV. This has important practical ramifications as, in order to ensure compliance with article 101, parents and their joint ventures often take a conservative approach and set up intricate and burdensome information sharing protocols.

The revised horizontal guidelines are an opportunity for the Commission to take the initiative and provide clear guidance to companies with jointly controlled JVs but lack the clarity that many businesses are seeking. The draft text provides that:

> *when it is demonstrated that the parents exercised decisive influence over the joint venture, the Commission will typically not apply Article 101(1) to agreements and concerted practices between the parent(s) and the joint venture concerning their activity in the relevant market(s) where the joint venture is active*

While this clarification is certainly helpful, it is somewhat a missed opportunity that the Commission does not go further and say definitively that, for the duration of the JV, it will not apply article 101 to these agreements. Such an approach would not be inconsistent with the existing case law, including *Dow* and *Du Pont*, or the Commission's enforcement practice and would give businesses greater clarity. Further, information exchange in this context is rarely contentious, and while the revised draft guidelines are largely a restatement of the case law, it also appears to be more restrained than is strictly required. It may be that the Commission does not want to limit its discretion by providing such an exemption, but, given the lack of appetite for enforcement in this context, it is unfortunate that businesses will still have to adopt conservative policies to mitigate the residual risk.

DOJ withdrawal of benchmarking safety zones

In February 2023, DOJ withdrew three policy statements concerning antitrust enforcement in healthcare markets. The withdrawal means the elimination of safety zone guidance which, although contained in policy statements originally directed at the healthcare industry, had been widely interpreted to apply across industries and served as a basis for companies seeking to structure benchmarking and information exchanges in compliance with the antitrust law (including

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the use of third-party intermediaries, the exchange of historical data and appropriate aggregation). In remarks announcing the withdrawal of the policy statements, Doha Mekki, the Principal Deputy Assistant Attorney General of DOJ's Antitrust Division, presented DOJ's view that adherence to the previous safety zone guidance no longer necessarily eliminates the risk of anticompetitive harm. Mekki also indicated that DOJ is particularly concerned about the use of pricing algorithms and other artificial intelligence tools that may provide insights about strategies of competitors or lead to tacit or express collusion. DOJ's withdrawal of the prior guidance and Mekki's statements point to increased DOJ scrutiny of information exchanges. While not directly related to criminal enforcement, DOJ investigations of information exchanges are likely to increase, with potential spillover into criminal enforcement in cases where the exchange of information between competitors crosses the line regarding agreements to fix prices or other hardcore conduct DOJ pursues criminally.

DOJ pursues criminal prosecution of monopolisation offences

In a potential sea change, DOJ announced that it would start pursuing criminal prosecutions of alleged violations of section 2 of the Sherman Act, which prohibits monopolisation and attempted monopolisation. This represents a major departure from prior practice. For decades, DOJ's policy has been to only bring criminal charges for hardcore violations of section 1 of the Sherman Act, most notably price-fixing and bid rigging. DOJ had previously not brought a criminal section 2 case in nearly 45 years. In April 2022, Assistant Attorney General Jonathan Kanter announced that 'if the facts and the law, and a careful analysis of Department policies guiding our use of prosecutorial discretion, warrant a criminal Section 2 charge, the Division will not hesitate to enforce the law', and in October 2022, DOJ announced that it had obtained a guilty plea from a construction company president for attempting to monopolise the market for highway crack-sealing services in Montana and Wyoming. According to the felony charge, the president had reached out to a competitor and proposed that their companies should allocate regional markets. Shortly thereafter, in December 2022, a second criminal section 2 case was announced – an 11-count indictment with 12 defendants who allegedly used violence, threats and extortion to fix prices, allocate the market and eliminate competition in the transmigrate forwarding industry in Texas. Both cases present unique facts. The former essentially alleges a horizonal market allocation scheme, which is per se unlawful under traditional section 1 principles, while the latter also alleges tortious conduct in addition to concurrent section 1 claims. It remains to be seen whether DOJ is willing to bring criminal charges against more stand-alone monopolisation offences.

Other enforcement actions in the US

October 2022 marked the end of a spate of criminal cases against executives in the chicken industry that began after DOJ opened an investigation into alleged price-fixing and bid rigging in 2019. DOJ

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went to trial against multiple defendants but failed to secure any convictions after three tries. The three trials ended in hung juries, and DOJ ultimately dismissed the charges against two former Pilgrim's Pride executives after the court ruled much of the government's evidence inadmissible. Before its unsuccessful trials, DOJ had secured one guilty plea.

As noted above, DOJ, through the PCSF, has been particularly active in investigations and cases brought against alleged bid rigging on government contracts. For example, in March 2022, two South Korean nationals were indicted for bid rigging and price-fixing in connection with operation and maintenance work for US military bases in South Korea. In April 2022, an indictment was brought against three Florida contractors charged with rigging bids for promotional products to the US Army, and in May 2022, another indictment was announced against a military contractor for rigging bids on public military contracts in Texas and Michigan, which lead to a guilty plea in January 2023.

ECJ gives further indications on 'by object' restrictions of competition law

In an important judgment of January 2023, *HSBC* (C-883/19 P), the ECJ, setting aside part of the General Court's judgment, clarified the legal test applicable for finding a 'by object' restriction of article 101 TFEU. In that case, the European Commission, confirmed on the substance by the General Court, fined seven banks (including HSBC) a total of almost €2 billion for collusive conduct infringing article 101 TFEU by object in relation to euro interest rate derivatives (EIRDs).

In its appeal before the ECJ, *HSBC* contested the General Court's reasoning on the finding of a 'by object' restriction. Regarding the three-month tenor of Euribor (3m Euribor), HSBC argued that the General Court misapplied the legal test by failing to assess whether the parties had any incentive to restrict competition, claiming a mere theoretical ability to distort competition would not be sufficient. The

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ECJ rejected that claim, confirming that, where conduct is sufficiently harmful to be restrictive of competition by object, it is not necessary to assess whether the infringing party lacked the incentive to actually distort competition or to prove an impact on consumers.

In a separate plea relating to information exchanges on EIRD 'mids' (mid-point prices), HSBC claimed that the General Court failed to use the correct legal test for finding a by object restriction by disregarding proof of pro-competitive effects that the reduced uncertainty would enable traders to offer better prices to customers. The ECJ partially upheld HSBC's claim. Applying the legal test set out in *Generics (UK)* (C-307/18), it reasserted that when assessing the by object nature of an act, pro-competitive effects must be duly taken into account as part of the economic and legal context. If pro-competitive effects are significant enough to create a reasonable doubt as to the sufficiently harmful nature of the conduct, they will preclude a by object finding and require an 'effects' assessment. In *HSBC*, the ECJ, however, concluded that the pro-competitive effects raised by the appellant did not meet that requirement. The ECJ held that by exchanging

"The ECJ clarified for the first time that to protect the presumption of innocence in respect of a non-settling party, the settlement decision must not contain a premature judgment as to its participation in the cartel."

information on key parameters of competition and to the detriment of other market participants, HSBC pursued an anticompetitive object regardless of the direct effect on prices paid by end users.

The ECJ's clarification on pro-competitive effects in *HSBC* will be of great importance to other upcoming judgments in the financial sector, like the pending *Credit Suisse Group* case (T-84/252), in which Credit Suisse claims that the Commission failed to take pro-competitive effects into consideration when assessing its conduct in the foreign exchange (Forex) spot trading market.

EU staggered hybrid settlement procedures must comply with the non-settling party's fundamental rights

The *HSBC* case is also significant in the context of the Commission's hybrid staggered settlement procedure, specifically in relation to a non-settling party's presumption of innocence and right to have its affairs handled impartially. Under the 2008 Commission Notice on Settlements, a company can obtain a 10 per cent fine reduction by entering into a settlement with the EC, which includes accepting liability for the infringement. Where the settlement procedure is not accepted by all the parties or where some of them withdraw from it, the EC has typically adopted a hybrid staggered approach, concluding the accelerated settlement procedure first and subsequently adopting a standard infringement decision for the non-settling parties.

The ECJ clarified for the first time in *Pometon* (C-440/19) that to protect the presumption of innocence in respect of a non-settling party, the settlement decision must not contain a premature judgment as to its participation in the cartel (ie, there must be no legal qualification of the non-settling party's behaviour). Further, any explicit reference made to a non-settling party in the settlement decision must be necessary (ie, there cannot be any superfluous reference to the non-settling parties). The consequence of such a breach on the legality of the standard decision issued against the

non-settling party was addressed in *Icap* (T-180/18). The General Court found that, while the Commission's settlement decision violated the non-settling party's presumption of innocence, the standard decision addressed to Icap (being separate and independent to the settlement decision) could only be annulled if Icap could prove that it lacked objective impartiality. In particular Icap had to prove that where it not for the irregularity, the standard decision would have been different in content (also called '*Suiker Unie* test').

In *HSBC*, the ECJ has now overturned this approach and clarified that when fundamental rights are at stake, parties do not need to prove that the decision addressed to them would have been different, but for the irregularity. While reasserting the two-pronged test set out in *Pometon*, the ECJ found that the General Court erred in law by applying the *Suiker Unie* test. Following Advocate General Emiliou's Opinion, the ECJ held that the *Suiker Unie* test is not applicable to breaches of fundamental rights, which are more serious than, and not comparable to, procedural errors with little influence on the final decision. Where the Commission violates a non-settling party's presumption of innocence and the principle of impartiality in the settlement decision, such an infringement is 'capable of vitiating the entire procedure'. In *HSBC*, the ECJ did not find any infringement of the presumption of innocence or of the principle of impartiality and therefore does not explicitly address what the legal consequences of such violations on the legality of the settlement and standard decisions would be.

This is nonetheless a valuable clarification. By overcoming the requirement of a *probatio diabolica* resulting from the *Suiker Unie* test, the ECJ gives its full meaning to the principle of impartiality and to the presumption of innocence enshrined in articles 41 and 48(1) of the Charter of Fundamental Rights of the European Union in the context of staggered hybrid settlement procedures. By conferring direct legal implications to a violation of a parties' presumption of innocence and of the principle of impartiality, the ECJ reasserts the value of the rights of the defence in competition law procedure. It now remains to be seen how extensive the scope of those rights will be interpreted by the ECJ, particularly in the pending *Scania* case (C-251/22 P) where Scania, the non-settling party, argues that the Commission violated its presumption of innocence by relying on the same case team that adopted the settlement decision for its investigations against Scania.

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Elvira Aliende Rodriguez
elvira.alienderodriguez@shearman.com

Djordje Petkoski
djordje.petkoski@shearman.com

Shearman & Sterling
Brussels and Washington, DC
www.shearman.com/en

Read more from this firm on Lexology

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Brazil

Paola Pugliese at Demarest graduated from the University of São Paulo in 1999 and obtained her LLM from the Albert Ludwig University of Freiburg in 2004. She has 16 years' experience in competition and antitrust matters, and her cartel practice includes preventive compliance counselling; dealing with antitrust authorities; private litigation; and seeking and obtaining leniency. Her clients include Braskem, Netflix, Delta Air Lines, Santander, Air BP, Galvão Engenharia, Bombardier, Peugeot-Citröen, EBE – Empresa Brasileira de Engenharia, Estácio Participações and Air France.

Milena Fernandes Mundim graduated from Faculdades Milton Campos in 2003, obtained her postgraduate degree in corporate law from Centro de Atualização em Direito and subsequently specialised in competition law at the University of Brasília and obtained her LLM in competition law from Queen Mary University of London. Milena focuses on competition and antitrust and has extensive experience in merger control and high-profile cartel cases. She advises multinational companies such as Santander, Royal Bank of Scotland, AkzoNobel, InVivo, Ashland, CJ Cheil Jedang Corporation, Delta Air Lines, Unilever and Peugeot Citröen.

QUESTIONS

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

There is no single infringement receiving a differentiated focus from the Administrative Council for Economic Defense (CADE) with regard to enforcement. Out of the most recent cartel investigations opened recently, four stand out.

In late-2021, CADE accused Alchemy, Alkaloids, Boehringer Ingelheim, Linnea, Transo-Pharm Handels, Vital Laboratories Pvt Ltd and others of colluding to fix production quotes, resale pricing, territorial divisions and raising barriers to entry, all supported by a sensitive information exchange structure in the global scopolamine-n-butyl bromide (SnBB) market.

In early-2022, CADE opened an investigation against media and telecommunications' companies, a sector that has been garnering increased attention from the antitrust authority with recent high-profile merger cases. The accusation refers a sensitive information exchange structure between B4 Capital, Dentsu, the European Broadcasting Union, Infront, MP Siva, U! Sports, Telefonica, IMG and related individuals in the international market of acquisition of sporting events transmission rights.

Quite recently, in January 2023, CADE accused B2T, DBC, Deliver IT, DW Brasil, K2 Information, Logiksm Maxtera, MicroStrategy, Positive Seven, PTV, Qubo, SysTech, SysVision, Tech Solutions, Telemikri, Trend Consultoria and VIP Treinamento of colluding to fix prices and creating a bidding ring for the governmental acquisition of business intelligence licences and services. a hardcore bidding ring accusation.

In parallel, CADE's investigation into wage-fixing agreements and sensitive information exchange in the healthcare labour market

Paola Pugliese Milena Fernandes Mundim

has seen significant developments. In 2022, Siemens, Edwards, Baxter, PerkinElmer, Olympus and Stryker all undertook settlement agreements with CADE, granting the innovative HR-market investigation a new level of robustness as far as enforcement goes. Time will tell if the novelty of HR-related sensitive information exchange as a potential antitrust infringement associated with a profusion of settlement agreements and 22 leniency-plus marker requests in 2022 will spell out the next big trend in Brazilian antitrust enforcement.

All the above cases are still in the defendant-summoning phase, with no further developments yet.

As a side note, CADE has significantly increased its enforcement activities for unilateral conduct in recent years, even creating a dedicated unit for the prosecution of this type of infringement

> "CADE has significantly increased its enforcement activities for unilateral conduct in recent years, even creating a dedicated unit for the prosecution of this type of infringement."

following criticism by the OECD's 2019 peer review on the antitrust watchdog's limited experience on the matter.

Recent notable mentions in this regard are Heineken's POS exclusivity accusation against Ambev (AB InBev) - ongoing, the two cases against Latin America's largest foodtech company, iFood, the Brazilian Association of Worker's Benefits (ABBT)'s self-preferencing accusation – ongoing – and POS exclusivity accusation by Rappi – recently settled – and also the most-favoured nation accusation by TotalPass against Gympass, both wellbeing services platforms – recently settled.

With regard to statistics, in 2017, CADE opened 40 new probes, which was followed by an important shift in 2018. Updated statistics show that CADE opened 74 cases in 2018, 89 cases in 2019, 76 in 2020 and 60 in 2021. The number increased to 103 new investigations in 2022, reaching the highest number since 2017. Conversely, the combined value of fines imposed in all administrative proceedings decided by CADE slightly dropped to 1.1 billion reais in 2022, almost the same value of the previous year (1.3 billion reais). This decrease is associated with the drop in the number of investigations concluded: from 25 in 2021, to 12 in 2022, and possibly also to the nature of the cases decided.

2 What do recent investigations in your jurisdiction teach us?

Leniency agreements are certainly CADE's major source of evidence. However, the current cases under scrutiny show that settlement – in connection with 'leniency-plus'– has also been a very powerful instrument, not only in terms of conducting and expediting investigations, but also in relation to opening new inquiries.

Leniency-plus can be proposed by a defendant in an ongoing investigation: the defendant discloses a new cartel through the leniency programme and benefits twice (ie, by obtaining full immunity in relation to the new cartel and also a fine reduction of one-third to two-thirds of the applicable penalty in the existing investigation).

According to the authorities, over 107 leniency agreements have been executed since 2003, with a record 33 agreements in 2017, most of which related to *Operation Car Wash*. *Operation Car Wash* began in March 2014 and initially involved the state-owned oil and gas company Petrobras and several construction companies, but new leniency applications led to cartel investigations beyond the oil and gas market. Inquiries were extended to the energy sector, transportation and diverse civil construction projects. After almost seven years of intense work and media coverage, the *Car Wash* task force was redeployed in February 2021 and is now part of a broader elite group fighting organised crime.

Seven leniency-plus grants were made in the first half of 2017 alone, and 34 settlement proposals were considered in the same period, with

a very low rejection rate. According to CADE, at least one settlement agreement was signed in the majority of leniency applications to date.

Another significant aspect of recent investigations is how the intense cooperation between the different authorities – including CADE, the federal police and the federal and state prosecution services – has changed the way investigations are handled. CADE has benefited greatly from the evidence collected by those authorities, which have been able to share a significant volume of the documents gathered in the course of their own inquiries. By way of example, in 2017, CADE conducted at least one dawn raid, compared with two in 2016, five in 2014 and six in 2012, although this trend began to change in 2018, when it carried out four dawn raids; three were carried out in 2019, none in 2020, two in 2021 and another two in 2022 (although the effects of the pandemic and social distancing measures might have contributed).

As a result of the positive outcomes from the leniency and settlement programmes, as well as the experienced gained, CADE has been very open and flexible about discussing new proposals.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

Leniency is still generally the standard source of, and instrument for, cartel detection in Brazil. The authorities continue to strongly encourage new applications and have constantly been trying to make rules clearer and more transparent.

In 2016, CADE made efforts to formalise aspects of the leniency system in Brazil. In May of that year, CADE published leniency guidelines (both in Portuguese and in English), providing answers to 90 frequently asked questions and describing in step-by-step detail

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the leniency process in Brazil. This is intended to allow potential whistle-blowers to understand the process, with commitments and obligations presented in a straightforward, didactic manner.

The Superior Court of Justice (STJ) had an intensive debate in 2018 on how to encourage private enforcement of antitrust damages without undermining public enforcement against cartels. Finding the right balance between the incentives and the risks of jeopardising the successful leniency and settlement programs created by CADE was considered a key point in this matter. STJ then decided to allow access to confidential documents contained in a leniency and in settlement agreements to an individual that may have been harmed by a cartel, while establishing that CADE should be the one in charge of the decision on which documents should be shared and which ones should be kept confidential.

Since then, CADE started debating regulations that could satisfy the need for document disclosure and that, equally, protect its own public enforcement. This was the context in which Resolution No. 21/2018

"While leniency applications are greatly encouraged, the General Superintendent has also been sending a message to potential applicants that fulfilment of the requirements for leniency agreements has to be very strictly observed, in that only applications that provide sufficient evidence of cartel activity will be accepted."

and Resolution No. 869/2019 were created on access to documents and information deriving from leniency agreements, settlement agreements and dawn raids.

This regulation is intended to balance the conflicting interests between private enforcement and the confidentiality of leniency applications – an issue that is widely discussed, and not yet settled, among the various competition authorities across the globe.

Furthermore, in September 2021, CADE published the 'Guide of Evidentiary Recommendations for Leniency Proposals'. The document was based on the analysis of the evidence of cartel violations and uniform behavioral incentives identified in cases judged by CADE's Tribunal (the Tribunal) over the past 27 years. The recommendations are structured based on the following items: cartel evidence examples in CADE's court cases; direct evidence of the existence of an agreement; indirect evidence of an agreement; evidence of the effects of the conduct in Brazil; the sufficiency of the body of evidence; evidence considered insufficient when submitted individually; the validity of the evidence presented; and evidence of the level of institutionalisation of the conduct.

While leniency applications are greatly encouraged, the General Superintendent has also been sending a message to potential applicants that fulfilment of the requirements for leniency agreements has to be very strictly observed, in that only applications that provide sufficient evidence of cartel activity will be accepted – possibly as a means of focusing resources in the right areas. Since the former General Superintendent took office in 2017, he has announced CADE's intention to make changes to the leniency agreement policy, including the maintenance of confidentiality of documents provided as part of the leniency application, even after the case is decided. The purpose of this is to encourage companies to enter into such agreements, by reducing the chances that the evidence they produce will be used against them in the future.

In this sense, it is important to note that confidential documents related to administrative proceedings could in theory be disclosed to parties seeking damages, if they obtain a judicial decision determining that the documents must be shared, or through the specific procedure established by Resolution 21. Very briefly what Resolution 21 establishes is that confidential documents may be provided if requested by third parties if it does not harm the ongoing investigation, so generally after the cartel investigation is over and if the documents do not fall under the exceptions provided in article 2 o (eg, if the documents are not self-incriminatory). However, up to this moment, we have seen only six requests presented through this type of procedure, and none of them have been granted by CADE.

Irrespective of this, the statistics show a growth in marker requests (leniency proposals) in the years of 2017, 2018, and 2019, with 20 leniency agreements in the first half of 2017, six in the whole of 2018 and 11 in 2019. In 2020 the number of leniency proposals started to drop; only two proposals were filed, despite the increase for five leniency agreements in 2021. The number of agreements decreased again in 2022, reaching only one leniency proposal. In the majority of cases involving leniency, a settlement was reached between CADE and at least one of the defendants, suggesting that leniency and settlement programmes have a mutual connection and a complementary role in cartel enforcement.

Although the decision to engage in a leniency agreement is never an easy task, some elements that should always be considered before proceeding include the increasing level of fines imposed on companies, the criminal liability that may be imposed on individuals, the restrictions on public financing or participation in public tenders and also the reputational risks involved.

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4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

Settlement agreements are certainly the most commonly applied and most effective of the tools used by CADE to streamline decision-making in inquiries, particularly in cartel cases. Settlement not only reduces the number of defendants – as the investigation will be suspended in relation to those who settle – but also expedites the fact-finding phase and the production of evidence, as a result of the collaboration and new evidence brought by settling entities or individuals.

The constant increase in the number of settlements executed by CADE is notable. CADE signed 61 agreements in 2016, 75 in 2017, and 60 in 2018. Despite the decrease in the number of agreements signed in the following years, 19 in 2019, 17 in 2020, and eight in 2021, these numbers surge in 2022, when CADE signed 37 agreements. The

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sharp decrease in the number of settlements in the years of 2019, 2020, and 2021, does not reflect a shift in CADE's policy, but rather simply reflects the significant number of settlements in the previous years and the focus given to certain cartel cases. Settlements are contributing to the recent reduction in the length of investigation periods. CADE's statistics show, for instance, that the percentage of cases lasting more than 10 years is constantly decreasing.

Clients should know that a settlement agreement can be proposed and negotiated at any time during the investigation process, and that the point at which they decide to do so is likely to influence the level of the settlement amount to be paid. While there is no minimum discount on the expected fine, the first to settle is eligible for a 50 per cent discount, the second is eligible for 25 per cent to 40 per cent and the third for up to 25 per cent. It is also within CADE's discretion to reject settlements, although this is not common, at least to date.

The payment of a settlement amount is mandatory in cartel cases, as is the obligation to acknowledge guilt and the commitment to cooperate. In a few cases, CADE has waived parties' obligation to submit new evidence as a result of settlement, although this is more likely to happen when CADE believes it has sufficient proof to convict the other defendants, and when a couple of settlements have already been executed. Generally, parties are expected to draft a history of conduct document and present new evidence.

It is only possible to propose settlement once, which means that if the negotiation is not successful, there will not be a second chance for a new proposal. Unlike leniency, settlement does not provide for immunity at the criminal, civil or administrative levels, which means that – as a result of confession – individuals may be exposed to criminal charges, and legal entities to other administrative and civil claims, in particular damages recovery.

In February 2021, CADE published a study entitled 'Settlement Agreements in Law No. 12,529/11', which presents the results of research that extensively analysed 349 settlement agreements signed between 2012 and 2019. According to the study, most settlement agreements were entered into in the context of investigations of hardcore cartels (51 per cent), followed by unilateral conduct (22 per cent) and influence of uniform conduct practices (12 per cent). Among several other conclusions, the study revealed that the involvement of the investigated individuals in discussions of a settlement substantially shortened the period of negotiations, especially in investigations of hardcore cartels.

5 Tell us about the authority's most important decisions over the year. What made them so significant?

The most relevant topic of discussion in CADE's cartel proceedings was the further consolidation of the 'advantage obtained' method for calculating fine amounts.

CADE's usual practice of calculating fines in cartel cases has always been to ascertain the fine based on the companies' revenues in the year preceding the investigation (0.1 to 20 per cent), effectively bypassing the other part of the Brazilian Competition Law (Law 12,529/2011), which set forth that the fine should never be less than the 'advantage obtained'. However, in 2020, 2021 and 2022 CADE's Tribunal decided to replace the traditional revenue methodology for the 'advantage obtained' calculation in four cases.

In December 2020, the 'advantage obtained' methodology was applied on a cartel case involving a public bid for the acquisition of mobile healthcare units and medical equipment (known as the *Leech* cartel (Administrative Proceeding No. 08012.009732/2008-01)), and in February 2021 this discussion came back in a case

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involving private bids of Telemar and Telefónica for the acquisition of telecommunications electronic components (Administrative Proceeding No. 08700.000066/2016-90).

In June, 2021, the advantage obtained methodology prevailed again in a decision where CADE's Tribunal convicted six companies and 12 individuals for participating in a cartel in public bids for the acquisition of uniforms and school supplies kits for students of the public education system (Administrative Proceeding No. 08700.008612/2012-15). This decision brought up again the lengthy and controversial debate surrounding the application of the advantage obtained criteria for fine calculation in cartel cases.

Reporting Commissioner Paula Farani compared the amounts of fines if calculated based on the companies' revenues versus an estimate of the advantage gained by each company. As there is no parameter set forth in the legislation or precedents to estimate the benefit obtained with the cartel, CADE estimated the overprice at 20 per cent (which has been based on an international benchmarking already used

"The most relevant topic of discussion in CADE's cartel proceedings was the further consolidation of the 'advantage obtained' method for calculating fine amounts."

by CADE in previous precedents (OECD 'Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation' (https://www.oecd. org/competition/cartels/35863307.pdf, p. 25)) and multiplied the overprice by the total value of the tenders won by each of the convicted companies. The Reporting Commissioner's approach was confirmed by a majority vote of CADE's Tribunal.

For only one of the investigated companies (Capricornio SA), did the 'advantage obtained' methodology exceeded the amount based on the company's gross revenues. Therefore, Paula Farani voted for the advantage obtained methodology for Capricornio and for the application of fines calculated based on gross revenues for all the other companies. It should be noted that in the case of three other firms, it was not possible to estimate any advantage gained because they had not won any bids, resulting in the application of CADE's traditional fine application method based on gross revenues.

On 11 May 2022, former Commissioner Paula Farani again voted to apply the 'advantage obtained' method against Oi, Claro and Telefónica for the illegal formation of a consortium to participate in bids conducted by the Brazilian Mail & Telegraph Public Company (ECT). The Commissioner applied an estimative 20 per cent surcharge on top of the total bid value. This resulted in imposed fine amounts increasing substantially. The majority of CADE's Tribunal agreed with the Reporting Commissioner's approach.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The judiciary branch will act only when provoked by either the administrative authority, in cases where CADE seeks the judicial enforcement of its decisions, or by private parties bringing forth:

QUESTIONS

(1) anticompetitive conduct damages claims; or (2) annulment suits against a decision rendered by the competition authority.

A recent decision issued by Brazil's constitutional court, the Supreme Federal Court, stated that there would be a 'duty of deference' that should be followed by the judiciary, with respect to CADE's technical expertise and institutional capacity in matters of economic regulation, specifically regarding the merits of the decisions issued by regulatory agencies and the competition authority.

Upon taking office in the presidency of the Supreme Federal Court and the National Council of Justice in September of 2020, Minister Luiz Fux returned to the subject, and listed it among his objectives for the next two years: 'My guidance on this Court will be based on the most elementary lesson that I have learned over decades in the exercise of the judiciary: the necessary deference to the other powers within the scope of their abilities, combined with pride and vigilance in the protection of public freedoms and fundamental rights', adding that 'After all, the commandment of harmony between the powers is not to be confused with contemplation and subservience'.

A recent development in this sense was recommendation No. 135/2022 issued by the National Justice Council (CNJ)'s, the body responsible for monitoring and regulating the judiciary branch's exercise of its functions. It recommends that judges at large request a hearing with CADE prior to granting injunctions in proceedings related to ongoing investigations at the Brazilian antitrust authority.

Despite this, the fact is that, in recent years, the number of decisions rendered by the competition authority that were judicially confirmed decreased significantly: 73.5 per cent in 2018, 65.25 per cent in 2019, 54.91 per cent in 2020 and 57.5 per cent in 2021, according to recent statistics published by CADE itself. There is no data available for 2022; however, CADE's superintendent, Alexandre Barreto, stated that

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80 per cent of CADE decisions, challenged in judiciary courts, were confirmed by the judiciary branch in recent years.

Even with these statements regarding a duty of deference, CADE still holds the position of an administrative authority, regardless. As such, the decisions rendered in the administrative sphere will always be subject to the analysis of the judiciary branch due to the constitutional principle of the non-voidability of judicial control, as provided for in article 5 item XXXV of the Brazilian Federal Constitution, which states that: 'the law shall not exclude from the appreciation of the judiciary any injury or threat to a right'.

The Brazilian Competition Law's enforcement is executed in an administrative proceeding that usually originates in the General Superintendence, with the General Superintendent holding the necessary powers for the opening of both investigative and accusatory proceedings, in addition to conducting the fact-finding phase via, inter alia, the request of information from public and private sector entities and dawn raids.

"The decision issued by the Tribunal is final and is not challengeable by a higher administrative court or authority; it may only be annulled or modified by the Brazilian judiciary branch."

In an accusatory proceeding, after the defendants have presented their defences, the General Superintendence will issue its opinion for their conviction or shelving of the proceeding, with the former necessarily being reviewed by the Tribunal, whereas the latter will become final after a 15-day waiting period has elapsed. The decision issued by the Tribunal is final and is not challengeable by a higher administrative court or authority; it may only be annulled or modified by the Brazilian judiciary branch.

7 How is private cartel enforcement developing in your jurisdiction?

Competition defence in Brazil is predominantly administrative, with public enforcement being entirely driven by CADE. CADE's decisions are not subject to administrative review but may be challenged in court. And in fact – as we have discussed – a good portion of CADE's administrative decisions are challenged before the courts by convicted companies.

In terms of damages, Brazilian antitrust law provides that victims of anticompetitive conduct may seek damages to recover losses incurred because of anticompetitive conduct. Thus, any company or individual that can demonstrate its losses, establishing the link between the defendants' conduct and the losses, must be duly indemnified. Damage claims in Brazil are not as common as in the US and EU, for instance, but this is clearly shifting – albeit slowly. Efforts to develop legal mechanisms for the entitlement of companies to recoup damages are incipient and still face some basic challenges, such as statutes of limitations, jurisdiction and legitimacy of claim proposals. In addition to the well-known delays inherent in the judicial system, the Brazilian legal system does not create the appropriate level of incentives for damages claims, as it does not provide for certain legal

instruments such as an opt-out model for class actions or provisions of treble damages.

CADE is aware of the need to balance public and private enforcement. The competition authority has been fostering private enforcement especially through regulations on access to documents and evidence produced in its administrative proceedings as well as by promoting debates on how to stimulate private actions for antitrust damages related to cartels, without undermining the associated public enforcement policy adopted.

The Brazilian Superior Court of Justice, in recent decisions, allowed access to confidential documents contained in a leniency agreement to an individual that may have been harmed by the overcharges of a cartel. The court also established CADE's Tribunal decision as final regarding document confidentiality. Since then, CADE has been studying the matter to design regulations that can satisfy the need for document disclosure and, equally, provide means to develop cartel damages claims, without harming its own public enforcement, such as Resolution No. 21/2018 and Resolution No. 869/2019.

Due to the number of cases involving antitrust matters being submitted to its consideration, the judiciary has sought ways to improve the provision of justice in this type of lawsuit. In this context, Resolution No. 445/2017 of the Federal Courts Council provided for the creation of federal courts specialising in competition law and international trade matters, with concurrent competence for the trial of these types of claims.

Also, a recent legislative development that occurred in 2022 should foster the private enforcement of competition law in Brazil. Following final review and approval by the President of Brazil, Bill 11,275/2018 (PLS 283/2016) was enacted, entering into force as Law No. 14,470 on 16 November 2022. Law 14,470/2022 amends the Brazilian Competition Law with the purpose of settling controversial procedural

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matters concerning antitrust damages claims, while providing tools to facilitate the filing of this type of claim.

The new law bolsters the private enforcement of competition law in Brazil, providing incentives that encourage potential claimants to seek compensation for damages resulting from antitrust violations, such as cartels. Law 14,470/2022 establishes that those harmed by antitrust violations provided for in article 36, paragraph 3, items I and II of the Competition Law (which includes practices of collusion, such as cartels) will be entitled to claim for double damages.

The new law also addresses concerns regarding potential disincentives to the entering into of new leniency and settlement agreements with CADE – as such agreements can potentially expose signatories to damages claims. In order to address the issue, Law 14,470/2022 establishes that double damages will not apply to leniency applicants and to defendants that decide to settle with CADE, meaning that, in these cases, the parties will only be liable for the compensation of the actual damage. Similarly, the new Law

"The Brazilian Superior Court of Justice, in recent decisions, allowed access to confidential documents contained in a leniency agreement to an individual that may have been harmed by the overcharges of a cartel."

determines that the parties that enter into such agreements will not be held jointly and severally liable for damage caused by other companies involved in the same practice.

In addition, the new law settles case law regarding statute of limitations for antitrust claims. Law 14,470 provides that the limitation period will not be triggered while an investigation is active within the scope of CADE. It further establishes a limitation period of five years, which is triggered by the unequivocal acknowledgement of the harm by the aggrieved party, which will be the date of publication of CADE's decision in the administrative proceeding for the claim, while also establishing CADE's administrative decision as ground for claimants to seek injunctive relief on antitrust damage claims.

Regarding recent private enforcement cases, in 2021, the Brazilian Foreign Trade Association (AEB), a private entity that represents the interests of the foreign trade sector in different sectors of the economy, proposed a collective damage claim against 19 banks accused of participating in the offshore currencies exchange rate cartel. The AEB considers that CADE's public enforcement excludes the need to prove the existence of a cartel, since the banks have already stated their participation in the collusive conduct in leniency or settlement agreements. The association is seeking 19 billion reais in damages.

In parallel, there is also a damage claim filed by Petrobras (a separate lawsuit), in which Petrobras sued ABN AMRO, BNP Paribas, BTG, Citibank, Fibra, Itaú BBA, Santander, Société Générale and Bradesco (due to the incorporation of HSBC) for their conduct in the onshore currency exchange rate market, considering daily damage and spanning the years 2008 to 2012. The state-owned oil company made a sensitivity analysis of the exchange rate manipulation and points out that, regarding its transactions, if the cartel had reduced the exchange rate by 0.01 reais, the company would have lost approximately 1.911 billion reais.

According to media coverage, damage claims related to the Forex investigation and to the Brazilian real/USD rate (PTAX) (ie, both inquiries concerning alleged manipulation of exchange rates) are already expected in Brazil. Apparently, a few companies (including the state oil company Petrobras) have already indicated their intention to seek damages and have filed notices to stay the statute of limitations. In addition to these claims, there are also 28 judicial proceedings presented by potential claimants formally stating their interest to present a future claim, and, therefore, restarting the clock for the statute of limitations to prevent a future damages claim from being time-barred.

Lastly, on an extremely recent update, the Federal Prosecutors Office (MPF) filed a damage claim on March 2023 against the members of the *Oranges* cartel, composed of companies and businesspeople in the orange juice industry. The administrative investigation on the Orange Juice Cartel was the longest administrative proceeding in CADE's history, ending in 2018, after the signing of settlement agreements by part of the defendants. According to MPF, the defendants still need to provide compensation for the competitive damages, estimated by MPF at over 12.7 billion reais.

8 What developments do you see in antitrust compliance?

New anticorruption legislation in the form of Law No. 12,846/2013, which was further amended by Decree No. 8,420/2015, has, together with *Operation Car Wash*, resulted in significant changes in the business environment, generating 'positive externalities' that extend to antitrust, environmental, labour and other areas of law. On one side, regulators have started showing their teeth more markedly, and, as a result, on the other side of the table, companies have reacted positively by strengthening their compliance programmes.

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A recent trend in Brazilian competition authority decisions in cartel cases is the imposition of compliance programmes in the context of cartel convictions, showing that the authorities' intention is not only to sanction the conduct, but also to prevent new instances of this behaviour, and to implement a new way of conducting business in certain industries that have repeatedly demonstrated problematic behaviour.

During settlement negotiations in the context of *Operation Car Wash* investigations, public prosecutors ordered the hiring of compliance monitoring officers for a certain period. Companies are also being stimulated to carry out internal investigations and audits to anticipate any antitrust and anticorruption risks that they may be exposed to, making it possible for these companies to better evaluate which strategy they should adopt, including the possibility of executing a leniency or a settlement agreement.

Moreover, in practice, the increased level of enforcement has led entities to seek to establish compliance programmes.

"A recent trend in Brazilian competition authority decisions in cartel cases is the imposition of compliance programmes in the context of cartel convictions, showing that the authorities' intention is not only to sanction the conduct, but also to prevent new instances of this behaviour."

QUESTIONS

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

It is expected that anti-cartel enforcement will remain the authorities' priority. Enforcement is currently particularly strong in relation to bid rigging investigations, and this is not likely to change in the near future. Cooperation among local authorities is growing stronger year after year.

One particular challenge that is likely to crop up sooner or later is the double jeopardy discussion that inevitably arises when competition authorities, seeking to impose penalties for cartel violations, investigate companies and the Federal Court of Accounts or public prosecutors also investigate the very same companies, on the same facts but on the basis of different legislation, and seek the imposition of penalties for bid rigging violations.

Clients are eager to see how this evolves and would welcome a one-stop-shop solution, whereby the negotiation of one single settlement agreement would be enough to eliminate investigations on several fronts. Also, CADE has achieved a level of maturity such that – provided it receives the proper financial and labour resources – it envisages engaging in higher levels of scrutiny of anticompetitive unilateral practices by dominant and super-dominant firms in Brazil.

In addition to other highly concentrated sectors in Brazil, the technology sector is one of the main candidates for this scrutiny. In September 2018, CADE issued Resolution No. 21/2018 on access to documents and information deriving from leniency agreements, settlement agreements and dawn raids to substantiate damages claims actions, as this type of lawsuit (particularly in cartel cases) would benefit greatly from access to such documents.

The Resolution states that, as a rule, the documents and information contained in these procedures should be open to public access. However, it also provides for exceptions for documents that must always remain confidential, such as the history of conduct (a document drafted by the CADE General Superintendence based on a self-accusatory document provided voluntarily by the party negotiating the leniency or settlement agreement.

In addition, the Resolution also determines that access to files may also be granted in international cooperation situations when there is limited risk to ongoing investigations. The Resolution was created in light of the relatively low number of antitrust damages actions filed in Brazil, as that may point to the fact that additional mechanisms are necessary to enhance private enforcement. In general terms, the Resolution foresees the reduction of fines imposed on participants to anticompetitive conduct whenever damages arising from the misconduct are awarded in courts. Also, Bill 11275/2019, which is currently under assessment, aims at encouraging compensation in damages lawsuits in Brazil. It includes, for instance, the obligation to compensate up to twice the amount of the cost of the damage – with exceptions made for leniency applicants and defendants that enter into settlement agreements with CADE, as we discussed earlier.

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

In recent statements, both CADE's president and General Superintendent reaffirmed the antitrust authority's active role in cartel enforcement during the pandemic period. According to the General Superintendent, the pandemic crisis made necessary the adoption of initiatives that allowed the antitrust agency to dedicate more attention to the affected markets to ensure their full operation. Especially regarding the healthcare market, the superintendent

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considers that the crisis is an opportunity to review the sector's regulation, in order to re-analyse the existing problems and adopt more energetic measures to protect Brazilian society, consumers and competition.

Among other initiatives undertaken in connection with the covid-19 pandemic, CADE also raised competition concerns with respect to some measures that were being proposed or adopted by government institutions at the beginning of the health crisis. One of them, for example, is the establishment of a price ceiling for the resale of liquefied petroleum gas (LPG), known as cooking gas. The Department of Economic Studies of the agency released in April 2021 a technical note presenting evaluations on the harmful effects that interventions of this type can generate to the competitive environment and to consumers.

When evaluating CADE's performance in the context of the pandemic, the president of CADE affirmed that the agency proved to be prepared to develop its work in unstable environments and did not soften its

performance during this period, either in the investigation of antitrust violations or in the analysis of economic mergers.

About his expectations regarding the operation of markets in a post-pandemic scenario, the President stated that it is not admissible, under the guise of dealing with an economic crisis in the pandemic, to allow the concentration of markets that would be harmful to consumers and to society in general.

In particular, with respect to cartel enforcement, he said that the agency closely analysed proposals for agreements between competitors to avoid 'opportunistic behaviours', which can happen if companies ask for cooperation, alleging problems that are not directly related to the coronavirus pandemic. The president declared that it is not CADE's role to soften analysis in a moment of crisis (ie, not to allow agreements that would not win the scrutiny of the agency in a normal environment).

> "Among other initiatives undertaken in connection with the covid-19 pandemic, CADE also raised competition concerns with respect to some measures that were being proposed or adopted by government institutions at the beginning of the health crisis. One of them, for example, is the establishment of a price ceiling for the resale of liquefied petroleum gas (LPG), known as cooking gas."

Paola Pugliese
ppugliese@demarest.com.br

Demarest Advogados
São Paulo
www.demarest.com.br

Milena Fernandes Mundim
mmundim@demarest.com.br

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QUESTIONS

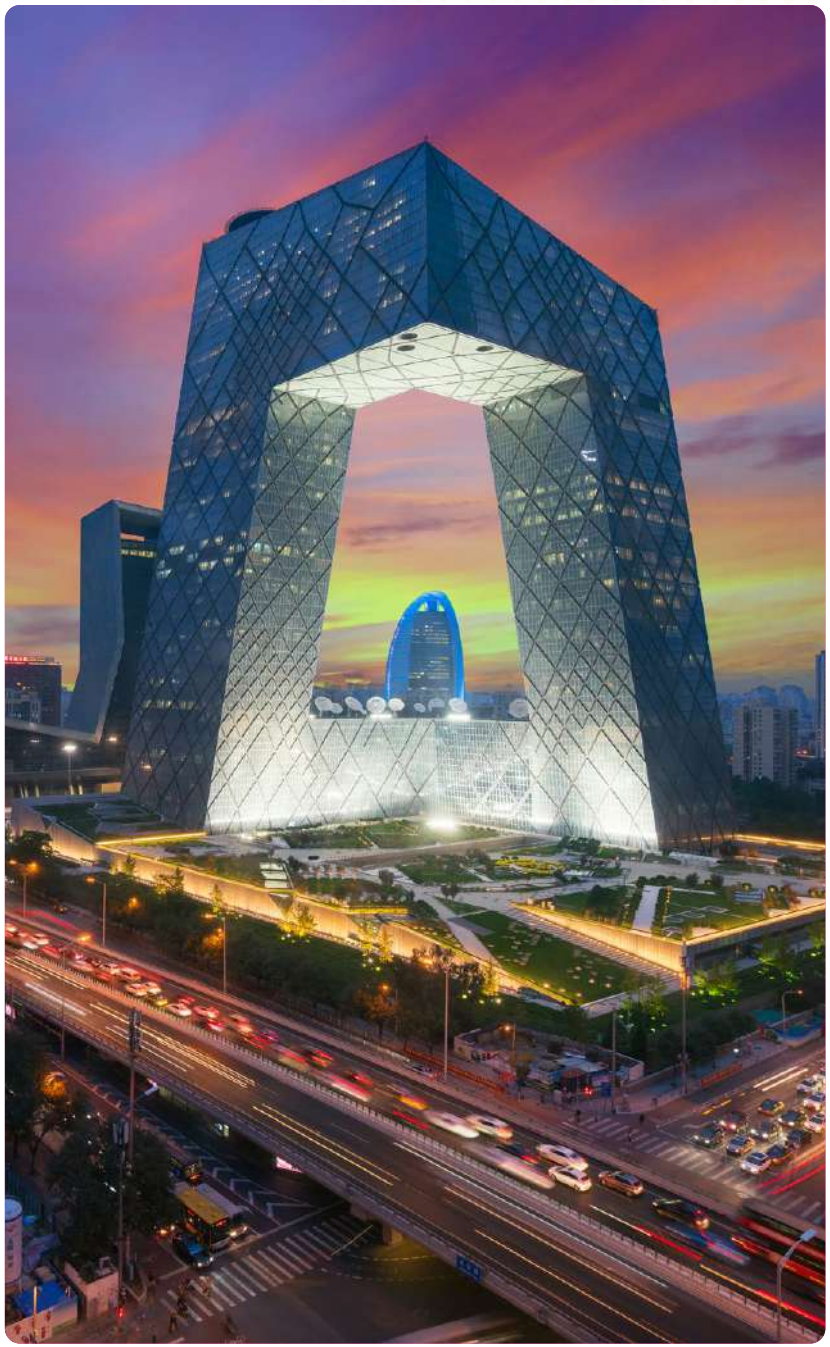
The Inside Track

What was the most interesting case you worked on recently?

We have worked on virtually all the recent significant cartel cases in Brazil, including *Operation Car Wash* and its spin-offs, onshore and offshore forex investigations, and most of the investigations involving information exchange. Among those, *Operation Car Wash* has drawn attention on a worldwide scale. This is the most significant corruption and cartel probe in Brazilian history and possibly the most complex, as it combines violations of different natures (including corruption, money laundering and bid rigging) and involves a number of government bodies. The investigation requires a high level of interaction and alignment between and with several different authorities. More recently, we have been involved in the first investigation launched in Brazil in the labour market, concerning alleged wage-fixing practices and information exchange about employees' benefits.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

We believe that a one-stop-shop solution – whereby the negotiation of a single settlement agreement is enough to address investigations on several fronts – would be very welcome. It has often been the case that different authorities investigate the same facts under different laws or regulations (eg, cartels, corruption and other white-collar crimes). There is already a good level of communication and cooperation between those authorities at the moment, for the purpose of sharing evidence in particular. Settlement programmes could also benefit from this cooperation between authorities.



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China

Frank Jiang is a partner at Zhong Lun. Frank specialises in antitrust, national security reviews and M&A, and has worked on 120+ antitrust, corporate and commercial matters in a variety of industries for many multibillion-dollar corporations and household names. Frank acted as a lead competition counsel in a number of high-profile investigations, cases and projects and has authored dozens of antitrust and competition articles and publications, and actively participated in the legislation process. He was rated as the 'Next Generation Partners' for antitrust and competition law by *The Legal 500* from 2020-2023.

Scott Yu of Zhong Lun has over 20 years' experience of working with leading law firms and serving Chinese and international clients on complex transactions. His practice focuses on antitrust compliance and investigations and cross-border M&A transactions. He has strong antitrust expertise and the skill of working with parties from different cultural backgrounds. He has acted as the lead antitrust counsel in a number of high-profile mergers and antitrust investigations and was recommended by Chambers Asia 2021, 2022 and 2023 in the antitrust/competition area.

John Jiang of Zhong Lun was one of the early practitioners of antitrust law in China. He was appointed by the All China Lawyers' Association as a chief lecturer for its national training series (2003–2012), covering legal drafting, M&A, commercial dispute resolution and law department management. He is a frequent speaker on M&A and antitrust matters at international conferences and the co-author of the book The *Art of Legal Drafting* (China Law Press). He was appointed as lead contributor to Practical Law Company and LexisNexis China's antitrust/competition law database.

QUESTIONS

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

Antitrust remains at the top of the Chinese policy makers' agenda in their enforcement planning and implementation in recent years, and the year of 2022 was no exception. Throughout 2022, we observed that the Chinese antitrust authorities, the State Administration for Market Regulation (SAMR) and its local counterparts, have been prioritising their limited enforcement resources to tackle price-related monopolistic behaviours including price collusion, resale price maintenance (RPM) and abuse of dominance, such as excessive pricing. The vast majority of antitrust sanctions decisions published in 2022 (excluding administrative monopoly and failure-to-notify cases) concern price cartels, RPM and pricing abuses, with the total sanctioned amount exceeding 665 million yuan. For example, on 26 December 2022, CNKI.net, a state-owned and largest academic database platform service provider in China, was sanctioned for committing unfair pricing and exclusive dealing and received with the largest antitrust fine (87.6 million yuan) in 2022; on 20 February 2023, the SAMR published another sanction against Northeast Pharmaceutical Group for committing unfair pricing and imposed a 133 million yuan fine, the largest antitrust fine so far in 2023.

For industry sectors, those concerning people's livelihoods such as pharmaceuticals, building materials and public utilities have drawn heightened regulatory attention at both a central and local level. Our statistics indicate that such cases account for over 60 per cent of the total antitrust cases in 2022. For example, On 28 June 2022, Shaanxi Cement Association and 13 member enterprises were fined a total of 450 million yuan, setting a new record in the Chinese building materials sector. On 9 June 2022, the SAMR's Zhejiang counterpart announced two sanctions involving the public utilities sector: two


Frank Jiang


Scott Yu


John Jiang

"Antitrust remains at the top of the Chinese policy makers' agenda."

"If a Chinese antitrust authority has reasonable grounds to suspect a violation of the AML, it may also use a more amicable and cost-efficient approach such as prior warnings and information request letters."

water supply companies located in Shangyu and Keqiao were fined 10.96 million yuan and 22.46 million yuan respectively for abusing their dominant market position. On 27 July 2022, the SAMR's Beijing counterpart fined a Beijing education service provider for RPM on English classes offered by its franchisees, being the first RPM case involving franchise model.

With the implementation of the amended Anti-monopoly Law (AML) starting from August 2022, we believe the above trends will continue.

2 What do recent investigations in your jurisdiction teach us?

In practice, compared with their foreign counterparts in established jurisdictions, Chinese antitrust authorities (in particular the SAMR) are currently facing personnel resource constraint. Accordingly, in addition to the typical investigative approach of dawn raids, if a Chinese antitrust authority has reasonable grounds to suspect a violation of the AML, it may also use a more amicable and cost-efficient approach such as prior warnings and information request letters (sometimes through a trade association). Clues or other information triggering an antitrust investigation may come to the authority's attention through a variety of channels, including: (1) one of the parties concerned apply for leniency, or one of their employees or ex-employees may 'blow the whistle'; (2) third parties (eg, competitors, customers or suppliers) may lodge a complaint; (3) referral from another authority; (4) reported investigations in other jurisdictions; and (5) antitrust authority's own initiative. An interesting observation based on our recent experience is that the pre-IPO companies should particularly bear in mind their antitrust exposure as the relevant stakeholders such as their distributors or competitors may lodge an antitrust suit or complaint to create roadblocks for the planned IPO. Also, with the introduction of e-government system and to cope with covid-19, the SAMR and its local counterparts have increasingly utilised big-data, such as keyword search, to identify clues.

During the investigation, the Chinese antitrust authorities may make information requests and organise interview sessions with the investigated company's employees. They may solicit comments from relevant industry players, trade associations and other stakeholders, often supported by forensic techniques (eg, recovery of deleted emails or forensics from WeChat history) and assistance from legal, economic and industry experts. For high-profile cases under a global probe, the SAMR may also communicate and coordinate with its foreign counterparts, although this international cooperation is still on an ad hoc basis, and in-depth investigatory assistance and collaboration has yet to become common practice.

The investigated company is obligated to cooperate with the antitrust authority, but may also take legitimate measures to mitigate the exposure in connection with possible or pending investigations. In

practice, we observe that most companies have managed to strike a balance with the assistance from internal or external counsels in cooperation with the authorities while safeguarding their procedural rights; nevertheless, in exceptional cases staff of the target companies could become confrontational, leading to legal sanctions. For example, in an API cartel case in Shandong, the investigated company's legal representative was reported to organise its staff and certain outsiders to violently seize, forcibly conceal and transfer the evidentiary materials during an on-site investigation. This API supplier was ultimately fined 10 per cent of its annual sales, totalling 143.8 million yuan. Hence, these non-cooperative behaviours were considered as aggravating circumstances in assessing sanctions, and the responsible personnel had administrative penalties imposed for unlawfully refusing or obstructing investigation.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

The amended AML provides for leniency system in article 56:

> *[w]here an undertaking voluntarily reports to the Anti-Monopoly Law Enforcement Authorities the relevant circumstances of the conclusion of a monopoly agreement and offers important evidence, the Anti-Monopoly Law Enforcement Authorities can, at their discretion, mitigate or waive the penalties imposed on the undertaking.*

More details, such as the application time and content of application materials for the leniency programme, can be found from the Interim Rules on Prohibition Against Monopoly Agreements 2019 (the 2019 Rules) and the Guidelines for the Application of the Leniency Programme to Cases Involving Horizontal Monopoly Agreements 2020 (the Leniency Guidelines).

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While the Leniency Guidelines only apply to horizontal monopoly agreement cases, the AML does not expressly exclude participants in vertical restraints from applying for leniency. There have been such successful precedents – for example, Wyeth and Meiji were exempted from penalties for voluntarily reporting key evidence to the antitrust authority in the series of RPM cases concerning baby formula in 2013. Also, a firm that organises or coerces other firms to participate in concluding or implementing monopoly agreements or impedes others from ceasing such illegal acts cannot be exempted from penalties, but may be given a mitigated penalty under the leniency programme.

To apply for leniency, the applicant needs to: (1) apply before the case is docketed or the formal investigation is triggered; (2) voluntarily report the existence of a monopoly agreement; and (3) provide important evidence that is crucial to launch an investigation. It can be seen that timing is of the essence in a successful leniency application, since a reduced fine by 80 to 100 per cent can be applied to the first applicant, and a reduction of 30 to 50 per cent and 20 to 30 per cent can be granted to the second and third one respectively.

"The authority may seek comments from relevant stakeholders and even the public in evaluating the commitments, and will monitor the implementation of the commitments to decide whether to close the case."

In practice, it is not uncommon to grant leniency in China's antitrust enforcement cases. Our statistics suggest that around 20 to 25 per cent cartel cases involved the leniency programme. The odds could be higher for a case involving a multinational company or an international cartel, as a parallel enforcement and similar leniency programme may exist in another jurisdiction that could motivate the same infringer to make the first move in China.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

The AML provides for a commitment mechanism whereby a target commits to rectifying its anticompetitive behaviour within the prescribed time period, with the antitrust authorities suspending and eventually terminating the investigation. (See, eg, article 53 of the amended AML.) Moreover, the SAMR also published the Guidelines for the Undertakings' Commitments in Anti-Monopoly Cases (the Commitments Guidelines) to provide more operative guidance in streamlining its decision-making process.

Based on the AML and Commitments Guidelines, there are certain 'hardcore' cartels and special situations where commitment mechanism cannot apply. These are: (1) price-fixing; (2) restriction of production or sales quantity; (3) market allocation; (4) commitment retreated by the undertaking; and (5) the authority had already determined or sanctioned the undertaking for its monopolistic behaviour. Also, firms may decide to withdraw their offered commitments, but will no longer be entitled to offer commitments in the same proceeding.

It can be seen that if undertakings tend to utilise the commitment mechanism, timing is of the essence where the initiative shall be

taken at least no later than the issuance of advance notice of sanction, which indicates the authority has already put in sufficient resources to reach a preliminary decision. In some cartels, the firms concerned were reported to offer commitments within just a few days to suspend the investigation process (and eventually close the case).

The authority may seek comments from relevant stakeholders and even the public in evaluating the commitments, and will monitor the implementation of the commitments to decide whether to close the case. If the firm concerned fails to fulfil the relevant commitments, factual basis for the suspension has substantially changed or the firm concerned provided incomplete or false information in applying the suspension, the investigation could be reopened. This did happen in some prior cases.

5 Tell us about the authority's most important decisions over the year. What made them so significant?

2022 witnessed China's continued efforts to promote antitrust and competitive legislative and enforcement activities. Among them, the most important decision made over the year is the National People's Congress (NPC)'s approval of the amendment to the AML in June, the first of its kind amid the 14th anniversary of AML's promulgation since 2008; this was followed by issuance of a set of draft implementing rules by the SAMR seeking public comments. Against the backdrop of China's strengthening antitrust enforcement and developing national unified and large market, these initiatives are likely to have significant implications for multinationals doing business in China in the coming years. Some quick highlights of the amended AML (for more detail, see our client note, 'China Amends Its Anti-Monopoly Law For the First Time') are as follows:

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- a significant hike in fines on enterprises and individuals for various violations such as failure-to-notify, refusal-to-cooperate;
- infringers incurring liability for potential reputational damages where violation is evidenced in credit records);
- digital platform sector under stricter scrutiny, for instance, improper use of data, algorithms, technology or platform rules may be deemed as abusive conducts, and 'killer acquisition' may be probed;
- the capture of 'hub-and-spoke' cartels, targeting infringers beyond trade associations;
- the addition of "safe harbour" rules for vertical restraints but not applicable to hardcore cartels;
- the introduction of a streamlined merger control regime, such as the introduction of a 'stop-the-clock' mechanism;
- harmonisation between administrative enforcement and judicial practice including introduction of the antitrust public interest lawsuit; and

- the establishment of the Competition policy's fundamental position aiming to discipline administrative monopolistic behaviour.

On 27 June 2022, three days following adoption of the amended AML, the SAMR released six drafts of the AML implementing rules for public comment. Four of these were issued on 24 March 2023 and will come into force on 15 April 2023, namely the Provisions on Stopping the Abuse of Administrative Power to Eliminate and Restrict Competition, the Provisions on Prohibiting Monopoly Agreements, the Provisions on Prohibiting Abuse of Dominant Market Position and the Provisions on the Review of Concentration of Business Operators. These rules are designed to streamline and harmonise the existing operational rules with respect to: merger review rules (eg, clarifying the 'stop-the-clock' mechanism and raising the failure to-notify sanction obligations); joint conduct rules (eg, introduction of safe harbour rules); and unilateral conduct rules (eg, clarifying situations applicable to platform players). In short, the regulations optimise oversight and law enforcement procedures, refine relevant provisions of the amended AML and strengthen the legal liability of relevant subjects.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The Chinese antitrust authorities can investigate infringements and issue decisions without a separate proceeding before courts. The Chinese courts have been playing an increasingly important role in resolving various key antitrust issues such as whether: (1) an arbitration agreement can preclude court's exclusive jurisdiction over antitrust dispute (eg, *Longsheng Xingye v Honeywell*); (2) a pharmaceutical patent 'reverse payment' agreement can be

"The Chinese antitrust authorities can investigate infringements and issue decisions without a separate proceeding before courts. The Chinese courts have been playing an increasingly important role in resolving various key antitrust issues."

subject to antitrust scrutiny (eg, *AstraZeneca v Jiangsu Aosaikang*); (3) an exclusive IP arrangement in sports event activities has an anticompetitive effect (eg, *Osports Beijing v Chinese Super League and Shanghai Imagine*); (4) damages in private actions following antitrust investigations can be supported (eg, *Miao Chong v Shanghai GM*); and (5) whether antitrust authority's sanction decision can be reversed (*Shandong API suppliers - Shandong Kanghui Medicine*, *Weifang Puyunhui Pharmaceutical and Weifang Taiyangshen Pharmaceutical v SAMR*).

In addition to the previously mentioned leniency programme and commitment mechanism, investigated firms have certain additional procedural rights to safeguard their legitimate interests. These include: (1) submission of opinion or defence, or request for hearing upon receipt of advance notice of sanction; (2) appealing the decision through administrative review within the governmental system; and (3) challenging antitrust authority's decisions before the competent courts. These attempts were generally anecdotal in the past, but we observe that Chinese courts are becoming more willing to adjudicate antitrust disputes.

7 How is private cartel enforcement developing in your jurisdiction?

For monopoly behaviour such as cartels, a private party may file a stand-alone action or an action following an infringement finding and sanction by the enforcement authority, often involving a request for injunction, invalidation of contract terms or claim for damages.

On 18 November 2022, the Supreme People's Court (SPC) published an exposure draft of the *Provisions of the Supreme People's Court on Issues Concerning the Application of Law in Adjudicating Monopoly-Related Civil Cases* for public comments (the Draft SPC Provisions).

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The Draft SPC Provisions are designed to align with the amended AML and will supersede the SPC's existing provisions in adjudicating antitrust litigations issued in 2012 (amended and repromulgated in 2020). Among other things, the Draft SPC Provisions provide detailed guidance on finding of specific monopoly instances, drawing upon the courts' experiences in adjudicating numerous antitrust cases in the past decade. Some highlights of Draft Provisions include: more clarity on various procedural issues, specific approaches to defining the relevant market, more elaborated considerations for finding joint conduct, more detailed rules for determining abuse of dominance and enhanced clarity on civil liability. (For more detail, see our note '**China SPC Seeking Comments to Revise Antitrust Litigation Rules**'.)

Also, our observation and experience suggest that private parties are increasingly utilising the lawsuits (and interaction with antitrust enforcement authorities) as an effective tool to press their counterparties to gain advantage in commercial dealings. For example, in a dispute between Alibaba and Galanz, Galanz filed an antitrust lawsuit against Alibaba for e-commerce platform abuse

"We recommend that multinationals make an early evaluation on cybersecurity and national security in China in assessing regulatory issues related to a global deal and embed relevant queries in due diligence process where appropriate."

of dominance, followed with a complaint to the Chinese antitrust authority. Amid the docketing of investigation, the parties settled and the relevant court proceeding was dropped.

8 What developments do you see in antitrust compliance?

As mentioned earlier, digital and platform economy sectors have continued to be a focal point in China's antitrust enforcement, and there is an increasing intersection between antitrust and data compliance/security review.

Based on our experiences and observations, a digital platform player is more likely to be exposed to various regulatory scrutiny for its operation in China, including antitrust and cybersecurity, in particular where data and algorithms constitute the core element of the operator's business. Antitrust and cybersecurity investigations were concurrently carried out against the same platform operator in 2022. Further, for an international transaction having a China nexus, in addition to the merger filing, which is a common checkpoint for deal planning, other regulatory requirements such as foreign investment security review and data export security assessment have also become more frequently caught by the Chinese regulators' radar. Accordingly, we recommend that multinationals make an early evaluation on cybersecurity and national security in China in assessing regulatory issues related to a global deal and embed relevant queries in due diligence process where appropriate.

However, China has yet to adopt express rules providing that maintaining an effective compliance programme can serve as an alleviating or exempting factor in connection with assessment of antitrust sanctions. Rather, it guides enterprises to conduct compliance through various antitrust guidelines at the central and local levels. Hence, in the face of increasingly heightened regulatory

requirements, it is increasingly advisable for multinational companies to undertake the challenging task of localising their global antitrust compliance handbook and protocols in a more China-specific context.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

With the amended AML becoming operative in August 2022 and the four implementing rules coming into force in April 2023, we anticipate that the Rules on Anti-Monopoly Filing Thresholds for Concentration of Undertakings and the Rules on Prohibition of Abusing Intellectual Property Right to Eliminate or Restrict Competition will soon be adapted in the coming year to provide more guidance and clarity to the merger filing threshold and strengthen the scrutiny of certain IP abusive behaviours.

Also, since the SAMR piloted a decentralised merger review system in 2022 and delegated a portion of simple merger filing cases to five provincial counterparts (ie, Beijing, Shanghai, Guangdong, Chongqing and Shaanxi) on a pilot basis, we anticipate that this arrangement will be normalized in 2023, or even entrust more provincial AMRs to handle certain simple cases to lighten the SAMR's workload and speed up the review process.

Moreover, as mentioned, the SPC is in the process of revising its antitrust trial rules based on past experience and recent developments, and also published a number of landmark antitrust rulings, such as the first case involving reverse payment issue in China (*AstraZenecaAB v Jiangsu Aosaikang*), the first antitrust dispute involving sports events and IP exclusive dealing (*Osports Beijing v Chinese Super League and Shanghai Imagine*). Hence, we anticipate

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that the courts are likely to play an increasingly important role in antitrust disputes in the future.

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

Starting from the outbreak of covid-19 pandemic in 2020, the SAMR issued the *Notice on Antitrust Enforcement to Support the Pandemic Prevention and Control and the Resumption of Work and Production*. Relevant changes include: (1) adopting an online system for antitrust filing and review; (2) accelerating the antitrust review process for transactions involving epidemic prevention and control as well as resumption of work and production in certain industries such as pharmaceutical manufacturing, catering, tourism and transportation; (3) exempting certain cooperative agreements that are conducive to technical progress, efficiency improvement, realisation of public interests and protection of consumer welfare; (4) stepping up

enforcement against antitrust violations hampering pandemic control and work resumption, such as coordinated price-hiking, output limitation, market allocation, boycotts and other cartel activities; and (5) establishing special channels to respond to and facilitate anti-monopoly consulting and reporting. While some measures specifically relating to covid-19 control have been dropped, we observe others, such as the online filing system, will be retained and further developed.

Also, we observe that on-site investigations such as dawn raids, have been impacted by the covid-19 control measures throughout the country in 2022. Nevertheless, with China substantially lifting pandemic control measures by year end, we expect that the SAMR is likely to resume using its enforcement tools against cartels in China in the coming year.

The partners acknowledge and thank MingZhen Wan for her assistance throughout the preparation of this chapter.

> "With China substantially lifting pandemic control measures by year end, we expect that the SAMR is likely to resume using its enforcement tools against cartels in China in the coming year."

Frank Jiang
jianghuikuang@zhonglun.com

Zhong Lun Law Firm
Beijing
www.zhonglun.com

Scott Yu
scottyu@zhonglun.com

John Jiang
johnjiang@zhonglun.com

Read more from this firm on Lexology

QUESTIONS

The Inside Track

What was the most interesting case you worked on recently?

In early 2022, we assisted a central SOE in a merger filing for a restructuring transaction with a local SOE. When the case was expected to secure the final clearance in the summer, we were informed that the two companies were both subject to antitrust investigations of price cartels during a nationwide campaign organized by the SAMR. Should these proceedings advance, the underlying transaction would be in peril. Through rounds of proactive communications and active defence, our team managed to obtain the unconditional merger clearance from the SAMR, as well as the green light from the securities authority, while the two local cartel investigations were still ongoing.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

Last year we hoped that the safe harbour mechanism would become operative with the promulgation of certain antitrust guidelines, which has came true through being partially provided for in the amended AML, where companies with limited market share engaging in vertical restraints have the chance to avoid an infringement finding. It would be very helpful to many of our clients if the Chinese authorities can further clarify the operational mechanism (for example, what market share thresholds and what else is required) through other guidelines to help streamline cartel enforcement and improve the prospect of firms' compliance management in China.

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European Union

Helen Gornall of De Brauw Blackstone Westbroek has extensive experience in all aspects of competition law, including merger control, cartels, dominance and vertical restraints. Her in-house and private practice expertise allows her to understand business drivers and offer clear and practical advice, even in the most complex of matters. She regularly advises international companies on their European and international M&A and competition law matters. She is dual-qualified as both a solicitor (England and Wales) and Dutch advocaat.

Anna Lyle-Smythe is a partner in Slaughter and May's Brussels office. She has a broad competition practice, including advising on mergers, cartels, state aid and market investigations. She has dealt extensively with the European Commission and the UK Competition and Markets Authority, as well as other regulators around the world. Her highlights include advising DuPont on the EU investigation of the chloroprene rubber cartel, and in the subsequent appeals to the EU General Court and European Court of Justice. She is a member of the Brussels Bar (A list), as well as being qualified as a solicitor (England and Wales).

Markus Röhrig is a partner of Hengeler Mueller's antitrust practice and based in the firm's Brussels office. He advises clients on European and German competition law, including in merger reviews, cartel investigations and unilateral conduct cases both before the regulators and in court. He also offers antitrust compliance advice and counsels clients conducting internal antitrust investigations. Markus acts for a diverse client base from a broad range of industries, including the insurance sector.

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

Markus Röhrig: The Commission continues to break new ground by looking into less traditional cartels, such as buyers' cartels, information exchange, collusion to restrict competition on technical development or coordination on products characteristics. Over the past years, the Commission has fined a number of buyer cartels across various industries, most recently in the styrene monomer space. The *Car Emissions* case was the first cartel decision on collusion to limit technical development under article 101 TFEU. In its *Metal Packaging* cartel decision, the Commission looked not only into price coordination, but also into collusion around minimum durability recommendations, the quality of packaging and, more generally, arrangements to avoid innovation competition.

Helen Gornall: The Commission's enforcement against cartels was at a relatively lower level in 2022 than in past years, with metal packaging, transport and financial markets being on its enforcement radar. Although the Commission confirmed some dawn raids, it adopted only a few fining decisions or statements of objections. That said, the Commission continued to align its investigations with its focus on the transition to a greener EU economy – as seen by its dawn raids into the vehicle recycling market and fashion industry.

2 What do recent investigations in your jurisdiction teach us?

Anna Lyle-Smythe: The leniency regime remains key in the Commission's enforcement toolkit. The Commission is also expanding the use of its whistle-blower tool, which was first introduced in 2017


Helen Gornall


Anna Lyle-Smythe


Markus Röhrig

"The quality of the leads provided through the whistle-blower tool also appears to have improved."

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> "The Commission continued to align its investigations with its focus on the transition to a greener EU economy."

and has resulted in around 100 messages per year sent via the tool since its launch. That said, the Commission and other agencies are talking more and more about 'own initiative' investigations and exploring tools they can use or develop to detect potentially anticompetitive activity even in the absence of a whistle-blower. The return of dawn raids in the past couple of years is also a noteworthy development, particularly as dawn raids started picking up again when travel and teleworking restrictions as a result of the covid-19 pandemic were still in place to some extent in the relevant jurisdictions. It will be interesting to see how those experiences continue to shape the Commission's dawn raid policy in the years to come, particularly in terms of being able to access information held in home offices and to use their interview powers for staff who are not located on-site. Some of those questions may be answered when we see the outcome of the Commission's consultation on Regulation 1/2003.

MR: The Commission's whistle-blower tool indeed appears to develop into an important complementary tool for detecting cartel behaviour. We understand that leads provided via the whistle-blower tool have resulted in several inspections by the Commission and the NCAs. It also appears that the tool is gaining traction in the business world and that businesses are learning how to effectively use it, as suggested by the fact that only 5 per cent of the messages received by the Commission are irrelevant from an EU competition law perspective, and that share continues to decrease. The quality of the leads provided through the whistle-blower tool also appears to have significantly improved throughout the years.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

ALS: In the past year, the Commission has made some practical changes to its leniency programme to provide greater transparency, predictability and accessibility to potential leniency applicants and encourage leniency applications. In October 2022, it published a new leniency FAQ document that clarifies the Commission's current practices concerning to the 2006 leniency notice. The Commission has also announced an upgrade to its eLeniency tool, to make it easier for companies and their representatives to submit and access leniency and settlements documents online. The Commission is clearly hoping to reverse the very clear drop in leniency cases since 2015, which has been seen both at the EU and member state level.

MR: The Commission has indeed recorded an increase in leniency applications in 2022 – reportedly twice more than in 2021 and three times as many as in 2020. The Commission credits this surge in applications to stepping up its own *ex officio* programme and the increase in dawn raids, including in private homes. The Commission's investments in its technology and expertise in the past few years likely also contributed to boosting cartel detection. It remains to be seen whether the Commission will be able to revive its leniency tool

on a lasting basis without offering additional protection to immunity applicants, including potential immunity not only from fines but also from private damages.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

HG: While the possibility for parties to offer commitments to speed up investigations exists, the settlement procedure remains the most common mechanism used by the Commission to expedite the adoption of a cartel decision. The settlement procedure exclusively applies to cartel cases and cannot be relied upon in other antitrust investigations. Last year, both metal packaging producers and participants in the *Styrene* cartel benefited from a fine reduction because they agreed to settle. In the *Biofuel Benchmarking* cartel case, one undertaking settled while the remaining companies are being investigated under the Commission's standard cartel procedure. In contrast, in the alleged *Euro-Dominated Bonds* trading cartel case, the Commission initially agreed to explore a settlement with the parties only to later continue against all of them under the standard procedure. These examples show that though the decision to settle is voluntary, it is neither an enforceable right of the parties nor an obligation imposed on them. This is why we are witnessing hybrid settlement cases that see some parties settling and others subject to the standard procedure. The staggered approach to investigations in a hybrid case can also raise questions about the non-settling parties' rights of defence, their presumption of innocence and the Commission's duty of impartiality.

ALS: On that note, the Commission will have been pleased by the General Court's endorsement of hybrid settlements in 2021, when it rejected Scania's appeal against the Commission's cartel decision.

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Scania had argued that the Commission's hybrid approach infringed its rights of defence, the principle of good administration and the presumption of innocence. The Court found that the Commission had not prejudged Scania's liability, that the settlement decision against the other cartel participants could not be read as a premature expression of Scania's liability and that when examining evidence submitted by Scania, the Commission was not bound by the findings it adopted in the settlement decision. Scania has appealed the GC's judgment, so it will be interesting to see where the Court of Justice comes out on this point. In a recent judgment in relation to the *Euribor* cartel case, the ECJ dismissed HSBC's arguments that the use of a hybrid procedure had led the Commission to infringe its rights of defence and presumption of innocence.

MR: Despite its success in Luxembourg, the Commission has recently voiced some concerns about the benefits of hybrid settlements, and settlement more generally. One concern raised by the Commission is that companies are not 'locked into' the settlement once they have opted to pursue one, leading to significant disruptions in

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> "The principle of *ne bis in idem* is enshrined in the EU Charter of Fundamental rights and provides that no one can be tried or punished for an offence for which they have been acquitted or convicted. Until fairly recently, to invoke the protection against double jeopardy in antitrust cases, the second proceedings needed to concern the same person, facts and legal interest."

the Commission's case management and limiting one of the key potential benefits of settlements, namely their capacity to streamline the Commission's decision-making process. The Commission's willingness to enter into settlement discussions is also impacted by the fact that settlement decisions are appealed before the General Court. The General Court, in turn, has expressed some concerns about how the Commission in practice conducts the settlement procedure. In particular, there are suggestions that the key benefit is not the 10 per cent settlement bonus but the fact that the settlement procedure turns into somewhat of a full negotiation on level of fines, particularly when the Commission seemingly 'agrees' to the more limited factual basis as a starting point for the calculation of the fines imposed. The Commission is looking into additional ways to streamline its proceedings and shortening their duration, although some of these may be more feasible in certain investigations (such as, eg, article 102 cases) than in others where the conduct under investigation has already been brought to an end (such as in cartel cases).

5 Tell us about the authority's most important decisions over the year. What made them so significant?

MR: 2022 has been quite a calm year in terms of the number of decisions that the Commission adopted – only two, in cases involving styrene purchasers and metal packaging producers. However, each of these two decisions qualifies as a 'landmark' in its own right. Both cases have in common that they are not "traditional" cartels, but are based on more innovative theories of harm. On one hand, the *Styrene* cartel qualifies as a buyers' cartel, where the parties coordinated their negotiation strategy before and during bilateral negotiations with suppliers to push the monthly contract price of input down. On the other hand, the *Metal Packaging* cartel qualifies as a cartel on

product characteristics – the parties coordinated the pass-on of the additional costs (surcharge) of the healthier (BPA-free) coating of cans and closures to their customers (price coordination). Therefore, the coordination was not only about pricing and costs (the surcharge) but also about product characteristics and the quality of packaging.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

ALS: We have mentioned a few cases already, including on the topic of hybrid settlements. Another interesting development last year was the GC's partial annulment of the Commission's 2017 decision to sanction certain airlines in the *Air Cargo* case, as it found that either not all of the alleged infringements were proven or that some of the relevant conduct was time-barred. There is also a developing line of cases, including the ECJ's judgment in *Printeos* and the GC's judgment in *Deutsche Telekom*, that concerns the level of interest payment the Commission needs to pay to companies who have paid their fines in cases that are then later overturned in the courts. This has implications both for cartel and antitrust cases but, given the duration of the court proceedings in both types of cases, has potentially significant financial implications for the Commission.

HG: The principle of *ne bis in idem* is enshrined in the EU Charter of Fundamental rights and provides that no one can be tried or punished for an offence for which they have been acquitted or convicted. Until fairly recently, to invoke the protection against double jeopardy in antitrust cases, the second proceedings needed to concern the same person, facts and legal interest. In a welcomed departure, the ECJ confirmed in its response to the *Bpost* and *Nordzucker* preliminary references last year that, in principle, a company can now claim protection against double jeopardy if it has been previously subject to

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proceedings for the same conduct regardless of whether the earlier action concerned a different legal interest. The ECJ also clarified that while duplicate proceedings would amount to a limitation of the fundamental right against double jeopardy, depending on the facts, this may be justified. As per the ECJ, in the *Nordzucker* case, even if parallel proceedings by the German and Austrian competition authorities satisfied the *ne bis in idem* test, they could still not be justified as they pursued the same objectives.

7 How is private cartel enforcement developing in your jurisdiction?

HG: Private cartel enforcement actions typically are follow-on damage claims litigated before national courts of the EU member states. To harmonise national rules for damage claims, we have the EU Damages Directive, but this covers only some aspects of private enforcement. As for the rest, the ECJ has provided answers on a

piecemeal basis to disparate questions. Many preliminary references are still pending at the ECJ, including on the Damages Directive. Recent times have seen follow-on damage claims surge, and this has led to undertakings thinking twice before making leniency applications due to the fear of subsequent litigation exposure. The Commission and national competition authorities are thus considering ways in which leniency can remain attractive, including possibilities to mitigate the consequences for applicants. This balancing of public and private enforcement is rather critical as, until now, many competition infringements and related follow-on-damages claims have stemmed from leniency applications. In the absence of leniency applications, private claimants might not know about some infringements and would be deprived of the possibility to even make a follow-on-claim.

MR: In past years, we have continued to observe an increase in private litigation across the EU. Obviously, the EU's conscious choice to make it easier to claim damages, by adopting the Damages Directive, has helped to facilitate the rise of private litigation. Damages claims have also been incentivised by the European Court of Justice which, over time, has developed a very broad reading of the right for compensation enshrined in article 101 TFEU. One of the particularly notable judgments was *Sumal*, which held that the concept of undertaking also applied to the private litigation space. However, a recent judgment of the Court in the *Tráficos Manuel Ferrer v Daimler* case might signal a departure from that trend. There, the Court held, in a preliminary ruling focusing on the issue of quantification of harm, that cartel victims seeking compensation are not shielded by EU law from bearing their own costs in legal proceedings if their claim is only partly upheld. It appears that the Court is effectively setting limits to its generous *effet utile* reading of article 101 TFEU. In reaching this conclusion, the Court considers that the Damages Directive already gives parties who have suffered harm the 'means intended to correct

"The EU's conscious choice to make it easier to claim damages, by adopting the Damages Directive, has helped to facilitate the rise of private litigation."

in his or her favour the balance of power between himself or herself and the party which has infringed competition law'.

8 What developments do you see in antitrust compliance?

ALS: The return of dawn raids has prompted many companies to make sure their own policies on inspections are up-to-date and fit for purpose in a hybrid working world. As the competition authorities expand their areas of enforcement focus – including on buy-side and personnel-related infringements like 'no poach' agreements – companies are also expanding the list of personnel within their organisations who are given targeted compliance training.

MR: In a hybrid working environment, as personal devices are increasingly used for work, they are likely to attract the Commission's attention in dawn raids. Companies also need to (and have already started to) update their compliance programmes in order to take

into consideration the increase in Commission dawn raids at private homes, including the specific procedural provisions on the basis of which these dawn raids are conducted. Having a separate and dedicated dos and don'ts list to hand at home may prove useful to employees in the event of a dawn raid.

HG: Companies are eager to keep up with the Commission's focus on the 'twin' digital and green transition, largely because the Commission is prioritising some of its enforcement in line with these policy goals. We also see a lot of interest generated by the chapter on sustainability agreements in the Commission's draft guidelines on horizontal agreements in addition to the Digital Markets Act, Digital Services Act and, for that matter, the Draft Data Act. As the possibility of digital infringements now means much more to companies than traditional anticompetitive or abuse of dominance cases, we frequently provide training from multiple regulatory angles in order to incorporate data protection and consumer law considerations.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

ALS: We are already seeing more enforcement on less traditional cartel structures such as buy-side cartels and 'no poach' agreements. I also think we will see more and more enforcement of anticompetitive information exchange, as the authorities grapple more with the question of where to draw the line on that topic. Of course, were a price-fixing, market-sharing or bid rigging case to come to light, the Commission would not hesitate to enforce that very strictly. As we already mentioned, it will also be interesting to see the extent to which the Commission is willing to incorporate sustainability and environmental objectives into its enforcement policy.

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HG: We understand that beyond traditional cartel conduct involving price-fixing and market sharing, the Commission is considering providing separate guidance on 'grey area' cartel behaviour. This could cover buyer cartels, benchmark fixing and information sharing, including technical exchanges. On the topic of sustainability and article 101 TFEU more generally, the final version of the Commission's draft chapter on sustainability agreements is also expected to be finalised, particularly on the delicate issue of the extent to which wider benefits to society are relevant under the individual exemption analysis of article 101(3) TFEU. The Dutch competition authority has been very vocal in the ability to include these benefits to offset anticompetitive harm, but it seems likely that the Commission will fall short of this rally cry.

QUESTIONS

> "Some of the measures adopted during the pandemic have become standardised and are here to stay despite businesses and the Commission having returned to the office."

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

MR: It appears that the Commission has developed a significant backlog during the pandemic, resulting in a lower number of decisions adopted in 2022. We do expect, however, an upswing in activity towards mid-2023.

HG: The Commission has withdrawn its temporary assessment framework for antitrust issues related to cooperation in situations of urgency caused by covid-19. Sector-wide initiatives that were justified in view of the pandemic, such as those adopted by supermarkets and pharmaceutical companies, are a thing of the past. In these sectors, we expect the Commission and national authorities to once again be vigilant in identifying anticompetitive behaviour capable of resulting in price hikes.

ALS: On a practical note, the pandemic changed some of the Commission's practices, for example, on how to conduct oral hearings and access to file. And no doubt the Commission was relieved to have introduced the e-leniency system well ahead of the pandemic so such applications could still be made notwithstanding their offices being closed. I think some of the measures adopted during the pandemic have become standardised and are here to stay despite businesses and the Commission having returned to the office.

Helen Gornall
helen.gornall@debrauw.com

Anna Lyle-Smythe
anna.lyle-smythe@slaughterandmay.com

Markus Röhrig
markus.roehrig@hengeler.com

De Brauw Blackstone Westbroek
Amsterdam
www.debrauw.com

Slaughter and May
Brussels
www.slaughterandmay.com

Hengeler Mueller
Brussels
www.hengeler.com/en

QUESTIONS

The Inside Track

What was the most interesting case you worked on recently?

HG: Confidentiality requirements hold me from disclosing the interesting cases that I worked on last year. I do continue to represent PACCAR/DAF in connection with follow-on litigation proceedings stemming from the Commission's settlement decision in the *Trucks* case. In 2022, the trucks litigation entered a new phase as we had to deal with numerous first instance and Court of Appeal decisions and some Supreme Court judgments. The thousands of claims in the trucks cases are tangible evidence as to why follow-on litigation is making applications for leniency unattractive. The Commission's recent FAQs on Leniency do not offer obvious solutions to this problem, so more radical ideas will be needed if a change in incentives is to be realised.

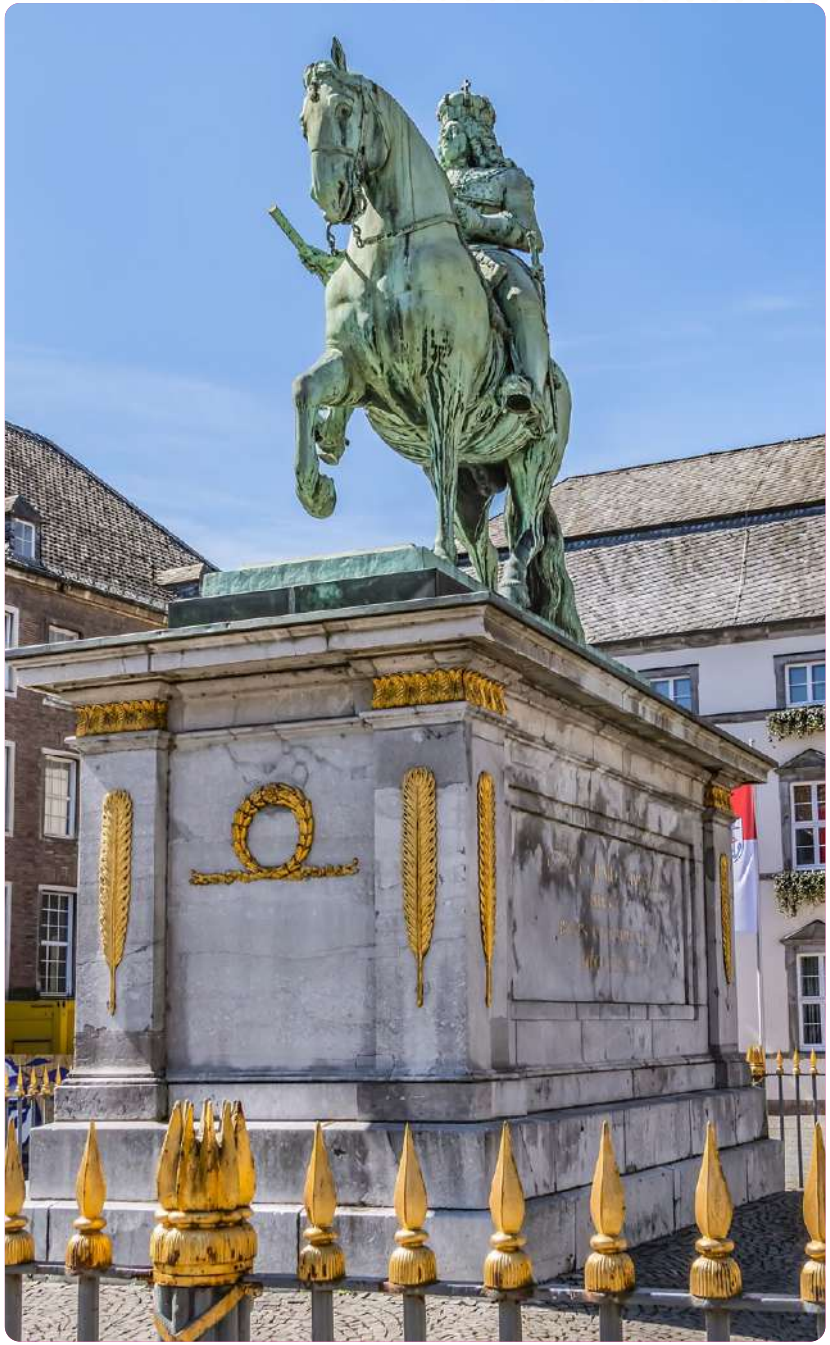
ALS: Without going into specifics given the confidential nature of the work, I think some really interesting questions are coming up on the approach to fines in less traditional cartel cases. As they become more commonplace, the 'sell-side price-fixing' focus of the fining guidelines might benefit from refinement. I am also watching out for any impact the Court's judgments (both those already delivered and ones still under appeal) on interest payments have on how the Commission's practice develops in this area.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

ALS: I would be keen to see a 'one stop shop' for leniency in the EU. I think this would serve both the enforcers and the business community much better than the current system. The introduction of ECN+ is a positive step, but does not go far enough. The Commission has recently announced that it is commissioning a survey to gather views from practitioners on the effectiveness of its enforcement practices.

MR: I would like to see the Commission adopt something like an ECN++ Directive, that would lay down robust and uniform rules regarding legal privilege and the right against self-incrimination in cartel cases. The European Court of Justice's December judgment in the Orde van Vlaamse Balies case broadens the scope of legal professional privilege to all communications between independent lawyers admitted in the EU and their clients and clarifies that legal privilege covers the content of the communication and its existence. However, substantial uncertainty remains with respect to the scope of legal professional privilege, and rules in member states can differ significantly.

HG: It is disappointing that the leniency system still requires the admission of being in a cartel. This seems to create a black and white environment where either parties were in a cartel or they were not, whereas reality can be much more complex. For example, commercial managers may exchange information because they do not understand their obligations, infringing competition law without there being a cartel-type risk of impact.



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Germany

Philipp Otto Neideck at Hengeler Mueller advises clients on antitrust and merger control and assists companies on antitrust investigations of the European Commission as well as the German Federal Cartel Office. He also advises companies on antitrust compliance, internal investigations and on settlements of antitrust proceedings, in particular in abuse of dominance cases.

QUESTIONS

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

The Federal Cartel Office (FCO) imposed fines of around €24 million in 2022, primarily on companies in the sector for expansion joints for bridges and in the industrial construction sector. The past year saw the lowest amount of fines since 2006. For comparison, the FCO imposed fines of around €349 million in 2020 and of around €105 million in 2021. This may, of course, be partly attributable to the covid-19 pandemic, which arguably limited the activities of the FCO and the undertakings concerned in the proceedings. Some cases just moved more slowly during that time.

The FCO has, however, been far from idle. Rather, the regulator remained focused on the digital economy. As a brief reminder, the FCO gained a powerful new tool with the 2021 amendments to the GWB, the German Act against Restraints of Competition. Section 19a GWB empowers the FCO to designate undertakings as having paramount significance for competition across markets, which then allows the FCO to prohibit certain types of allegedly abusive practices under less stringent requirements, at least compared to traditional abuse of dominance standards. According to the German legislator, this provision exclusively aims to regulate large digital companies.

The regulator designated Amazon as an undertaking with paramount significance for competition across markets in July 2022. Amazon has, however, challenged this finding. The case will be heard by the German Federal Court of Justice, potentially still in 2023. The German Federal Court of Justice, which is Germany's highest court for civil matters, is traditionally only an appeals court. However, it has a special first instance jurisdiction for challenges to section 19a GWB findings, which requires the court to take factual evidence into consideration as well. Beyond that, the FCO in parallel continued the investigations into Amazon's brandgating and price control mechanisms late into 2022.


Philipp Otto Neideck

With respect to Apple, the FCO initiated proceedings in June 2022. They concern alleged self-preferencing allegations regarding Apple's data tracking policy that applies to third-party apps.

Alphabet (Google) also saw enforcement action. Alphabet had already been designated as an undertaking with paramount significance for competition across markets in January 2022. Just before Christmas, the FCO closed the proceedings that concerned Google News Showcase without issuing a formal decision. Google News Showcase is a programme for journalistic content, which may be used by publishers to build a closer relationship with their audience. Remaining competition concerns following the FCO's examination

"The FCO published an extensive discussion report with interim results of the sector inquiry into digital advertising in autumn, which is almost 300 pages long! The sector inquiry started in 2018."

were addressed by clarifications and certain proposed measures from Alphabet. Beyond that, the FCO initiated proceedings to examine possible anticompetitive restrictions imposed by the Google Maps platform, in particular concerning the possibility to combine Google's map services with third-party maps.

Meta (Facebook) had been designated as an undertaking with paramount significance for competition across markets in May 2022. Much like Google (Alphabet), it decided not to challenge the designation decision. Rather, it focused on the substantive concerns of the regulator. Meta partially settled the prohibition proceedings by addressing the competitive concerns regarding its virtual reality glasses. The FCO had requested that the use of the virtual reality glasses, which formally went by the name Oculus, must not be tied to the user having a Facebook or Instagram account. However, the FCO has not dropped all allegations as to the combination of data collected by the different Meta services. Rather, they remain subject to ongoing proceedings.

But of course, there was more than cartel fines and section 19a GWB in the year 2022. One milestone is in particular noteworthy. The FCO published an extensive discussion report with interim results of the sector inquiry into digital advertising in autumn, which is almost 300 pages long! The sector inquiry started in 2018. The report primarily deals with Alphabet's alleged strong position in the sector for non-search advertising in Germany and elsewhere and contemplates potential remedies for the entire industry, and not only for the Google service. The discussion report is an indication that there is more to come from the FCO in this sector.

2 What do recent investigations in your jurisdiction teach us?

Different events can trigger an investigation by the FCO. The FCO can either initiate proceedings on its own initiative or upon application by receipt of complaints from third parties. For the protection of third parties, the FCO has implemented a standardised whistle-blowing system. More information is available on the FCO's homepage. Additionally, anonymous hints can be submitted by post, email or telephone. Whistle-blowers can be companies or employees, and both can benefit from the FCO's leniency programme. This, of course, requires a formal application.

The FCO conducted 12 dawn raids in 2022. In six additional cases, it concluded dawn raids by way of administrative assistance for foreign competition authorities. Some 13 companies provided the FCO with new information on infringements in their sector via leniency applications, and the FCO also received further information from other sources. It will be interesting to see what comes out of this in 2023.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

Overall, the number of leniency applications remains low. After having only received nine in 2021, the number increased slightly to 13 in 2022. The risk of subsequent private damages claims still seems to decrease companies' willingness to submit leniency applications.

The leniency system itself was subject to major changes in 2021. While guidance issued by the FCO applied previously, the legislator has now chosen to enshrine the programme in the GWB, namely in sections 81h to 81n GWB. As before, the leniency programme only applies to horizontal infringements. In addition to companies and

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associations of companies, natural persons can also make use of it. The leniency programme applies exclusively to proceedings before the cartel authorities, but not to (potentially later ensuing) court proceedings, and it still offers no protection for individuals against criminal prosecution. The latter is important as bid rigging constitutes a violation of both antitrust and criminal law in Germany.

The general conditions for a successful leniency application, now enshrined in section 81j GWB, remain the same as before 2021. Most importantly, only the first applicant can get full immunity. Leniency applicants have to disclose all relevant facts pertaining to the infringement, including their own participation therein. Further, they have to terminate their participation in the infringement immediately, unless the FCO asks the applicant to keep up appearances for the other infringers. Additionally, the applicants must now also cooperate effectively and comprehensively. If these conditions are fulfilled, the FCO can grant immunity to the first cooperating applicant according to section 81k GWB. This makes the timely submission of a marker

"Parties that do not achieve immunity, for example because someone else submitted the marker earlier, may still obtain a significant reduction of the fine if they fulfil the conditions described above and submit evidence that provides significant 'added value' compared to the information and evidence already in the FCO's possession."

paramount. After submitting the marker, the FCO usually grants an extended period of eight weeks to submit a fully fledged leniency application. Before applying for the marker, one must consider whether sufficient information and evidence has already been gathered or will be gathered in the additional period. When engaging (former) employees to participate in the process, certain labour and corporate law provisions must also be considered, particularly when indemnifying individuals that may have been involved in the alleged misconduct. Leniency applicants are strongly advised to resolve these issues with their external and internal counsel.

Parties that do not achieve immunity, for example because someone else submitted the marker earlier, may still obtain a significant reduction of the fine if they fulfil the conditions described above and submit evidence that provides significant 'added value' compared to the information and evidence already in the FCO's possession. In this context, it is noteworthy that in contrast to the previous leniency programme, section 81l(2) GWB does not contain any specification of the maximum reduction. The reduction will be based on the value of the evidence as well as on the timing of the application. This gives the FCO significant discretion. According to guidelines published by the FCO, the reduction usually does not surpass 50 per cent of the initial fine.

A leniency applicant who does not qualify for a full reduction may qualify for a partial immunity from a fine under section 81l(3) GWB if the applicant is the first company to submit substantial evidence, which the FCO uses to establish additional facts that lead to higher fines being imposed on other cartel members. These additional facts will be disregarded when determining the fine that will be imposed on the applicant that submitted these facts.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

It is imperative to stay responsive and cooperative if one wants to streamline the process. The fastest way to conclude an investigation is usually a settlement. The requirements for the settlement procedure are not regulated by statute, but the FCO has published corresponding guidance. A settlement is based on a declaration in which the person concerned declares that the facts alleged against them are accepted as true, and that the fine is accepted up to the prospective amount.

Of course, one must reflect on many considerations when determining whether a settlement is indeed the right way forward. It all depends on the facts of the case at hand. The advantage for a client under investigation is that the fine can be reduced by (another) 10 per cent. Also, the FCO will only draft a decision with basic reasoning as opposed to a fully fledged decision with numerous details of the case. This may be helpful in subsequent private damages claims. However, there are of course also benefits for the regulator. Reaching a settlement may significantly reduce the case team's workload. Furthermore, there is limited risk that the fining decisions will be appealed. Since the cartel participants have to acknowledge the facts established by the FCO as true, including their role in the misconduct, one can only think of atypical cases where the existence and scope of the infringement could still be successfully challenged in court. In principle, though, it remains possible to appeal the FCO's settlement decision since the cartel participants do not waive their right of appeal.

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5 Tell us about the authority's most important decisions over the year. What made them so significant?

Compared to previous years, the total amount of fines was limited. In total, they amounted to €24 million. One case concerned companies in the sector for expansion joints for bridges. The FCO found that the infringing companies had agreed on market quotas and on a common calculation formula for the pricing. They also held meetings to confirm whether the pre-agreed market quotas were met and also considered potential compensatory measures. The infringement covered a timespan from 2004 to 2019.

Another case concerned companies in the industrial construction sector. Here, the FCO found that the companies had engaged in both vertical and horizontal bid rigging. A company, which has in the meantime been liquidated, had concluded agreements with a potential client as well as with a main competitor. The client orchestrated the bidding process in a favourable way for the company

and the main competitor shared its pricing information with the company, which gave the company an additional advantage in the competition.

Several important decisions concerned section 19a GWB, as already mentioned. Beyond that, the FCO concluded its 'grey spot' investigation into the practices of two large telecommunications providers in Germany without a formal decision. The two telecommunications providers had agreed to give each other mutual access to parts of their respective mobile networks in areas where one of them was not able to provide coverage to its customers (the 'grey spots'). Upon intervention of the FCO, the telecommunications providers abandoned the exclusive nature of the cooperation, so that other providers could enter into similar arrangements as well.

The FCO furthermore decided not to open formal proceedings in respect to the encryption of DNS services. The FCO conducted a broader preliminary investigation, which also looked at default settings in browsers and operating systems, but found no evidence that antitrust law might have been violated in the process of introducing encrypted DNS services. It did, however, mention that it will continue to monitor the sector, where Alphabet allegedly is also a relevant player. The area fits in the FCO's overall digital agenda.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The FCO both investigates infringements and adopts the decisions once the investigations have been concluded. It needs to obtain court approvals for certain investigation measures, such as dawn raids. In this respect, proceedings before the FCO are very similar to the European Commission.

"The Düsseldorf Higher Regional Court has often increased the fines imposed by the FCO. Many companies thus refrain from appealing the fining decision of the FCO. On points of law, a further appeal to the Federal Court of Justice is possible."

QUESTIONS

Fining decisions of the FCO can be appealed before the Düsseldorf Higher Regional Court, which can decrease or increase a fine as the court is not bound by the FCO's internal Fining Guidelines. In practice, the Düsseldorf Higher Regional Court has often increased the fines imposed by the FCO. Many companies thus refrain from appealing the fining decision of the FCO. On points of law, a further appeal to the Federal Court of Justice is possible.

This general appeal track is different for section 19a GWB. When it comes to the designation of undertakings with paramount significance across markets and subsequent prohibition decisions, the Federal Court of Justice, Germany's highest civil court, is the first and only appeal court. The legislator opted for a short appeal track in an effort to expedite proceedings.

Since cartel enforcement arguably abated during the covid-19 pandemic, we have seen relatively few court cases dealing with challenges against cartel findings or abuse of dominance proceedings in 2022. This will likely change in the near future as operations at the FCO are back to normal again. One notable exception in the past year concerned the Facebook abuse of dominance case. The developments, however, did not happen before a German court. As a brief reminder, the FCO prohibited Facebook from combining user data compiled from different sources without obtaining the users' consent in 2019. The case has quite an acclaimed history in respect to the preliminary injunction that Facebook sought, but this chapter has now been closed. In the main proceedings, the Düsseldorf Higher Regional Court ruled that the question of whether a breach of the General Data Protection Regulation constitutes an abuse of a dominant position requires interpretation of European law. Therefore, it suspended the proceedings and referred several questions to the European Court of Justice. In 2022, the Advocate General presented his opinion. In a nutshell, the Advocate General held that the FCO was not precluded from taking into account and, incidentally, assessing,

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compliance with the General Data Protection Regulation. He further provided guidance on the interpretation of some of the potentially relevant provisions in the case. The opinion also suggests that a dominant market position may indeed be a relevant factor in the case-by-case assessment of whether user consent has been given freely. However, a dominant market position will not automatically invalidate users' consent. It remains to be seen what the European Court of Justice will make of this.

7 How is private cartel enforcement developing in your jurisdiction?

The number of private damages claims also remained high in 2022. The legal environment in Germany has become more and more claimant-friendly, even before the implementation of the EU Directive on cartel damage claims. As in other jurisdictions, stand-alone claims also remain the exception in Germany. Most cases concern follow-on

"In the view of the FCO, an infringement with management involvement shows a general negligence towards antitrust law by the undertaking, disqualifying it from a compliance discount."

litigation. This means that civil damages litigation is initiated subsequent to a decision by the FCO or the European Commission.

In its press releases and case reports, the FCO explicitly mentions the possibility for parties that believe they have suffered damage to initiate proceedings against the infringer before civil courts. This clearly shows that for the FCO, as is the case for the European Commission, private damages claims are part of the broader toolbox of anti-cartel enforcement.

However, the FCO does not have a formal role in civil proceedings between the alleged victim and the infringing party. However, courts have a legal obligation to inform the FCO about all private damages claims that have been initiated. At the time of writing, the largest private damage complex in Germany remains the litigation following fines imposed by the European Commission against certain European truck producers in 2016. Cases are pending before almost all regional courts in Germany, and some have reached the higher regional courts and the Federal Court of Justice as well. This litigation complex is shaping the private enforcement landscape in Germany for years to come.

8 What developments do you see in antitrust compliance?

For a long time, antitrust compliance did not play a significant role when it came to the setting of fines. For the FCO, the fact that the antitrust infringement took place was proof that the compliance system of the infringing undertaking was not effective. This has somewhat changed with the 10th amendment to the GWB in 2021. Section 81d(1) GWB foresees the possibility of reducing fines for preventive and subsequently implemented compliance measures. In addition, the FCO published new guidelines on the setting of fines in cartel proceedings in October 2021. They further explain in which

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situations compliance systems can reduce potential fines. Most notably, preventive compliance cannot be taken into account if the infringement involved a person responsible for the management of the company. In the view of the FCO, an infringement with management involvement shows a general negligence towards antitrust law by the undertaking, disqualifying it from a compliance discount. Since the change in law is relatively new, we are still waiting for the first decisions of the FCO and the competent courts that provide further guidance on the application of these rules.

Of course, in order to avoid infringements of antitrust law from the outset or detect misconduct at an early stage, effective compliance measures have always been and remain of paramount importance. As a starting point, any company should live a compliance-focused atmosphere and have a compliance-focused business policy that is promoted by senior management. Supporting measures that one should consider go far beyond regular compliance training. They may include whistle-blowing systems and comprehensive internal audits. Still, companies may be advised to prepare for scenarios in which prompt reactions are required. This can be done, for example, by conducting mock dawn raids and providing clear and tailor-made guidelines for inspections by competition authorities.

In this respect, it is worth noting that the FCO launched its Competition Register for Public Procurement in March 2021. This is a nationwide register that provides public authorities and concession-awarding authorities with information on whether a company is to be or can be excluded from tenders due to relevant economic offences, including cartel infringements. Public authorities as well as concession-awarding authorities in specific economic sectors are legally required – subject to certain value thresholds – to consult with the FCO on whether there are entries in the register concerning the bidder to which they intend to award the contract. Beyond that, voluntary requests are also possible. Being excluded from tenders can have significant consequences in some industries. The register thus increases the importance of effective compliance systems for companies even further.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

Even though the 10th amendment to the GWB only recently came into effect in January 2021, the legislator is already working on another significant modification to the law. The 11th amendment to the GWB – called the Competition Enforcement Act – is currently being discussed in Parliament and is supposed to take effect early in 2023. And it may bring very substantial changes to the law.

Primarily, it would provide the FCO with significantly enhanced powers after it has concluded a market investigation. If enacted as proposed,

the amendment would, for example, empower the FCO to take measures with a view to deconcentrating certain economic sectors in the aftermath of a market investigation, provided its previous findings showed general signs of disruption of competition in the market. Similar rules already exist today in the UK, albeit in an entirely different legal environment. The FCO could take its enforcement actions irrespective of a violation of antitrust law by the individual companies. The FCO may even, as a last resort, require divestitures where appropriate and proportionate. Beyond that, the FCO may also order companies to notify any future concentrations that meet specific turnover thresholds that are considerably lower than those set out in the current merger control rules. Some of these proposed changes would mean a paradigm shift for German law as it paves the way for an *ex ante* control of entire sectors. The draft has thus been rightfully criticised by many legal scholars. It remains to be seen how the legislative process will be concluded.

To give the complete picture, the Competition Enforcement Act would also include a simplified disgorgement provision with an effectively non-rebuttable presumption that the company obtained a benefit amounting to 1 per cent of its domestic turnover from the previous antitrust infringement. Furthermore, it would contain the provisions that will allow the FCO to investigate potential infringements of the Digital Market Acts by gatekeepers previously designated by the European Commission. The FCO may of course only investigate, as the actual administrative enforcement of the entire Digital Markets Act remains with the European Commission. The Competition Enforcement Act would, however, also include provisions for the private enforcement of violations of the Digital Markets Acts (ie, for civil claims of undertakings that may have suffered damages due to violations of the Digital Markets Act by designated gatekeepers).

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

In Germany, cartel enforcement has returned to normal operations again. There are no special rules in place anymore. We all hope that this chapter has been closed now for good. Of course, you never know and should circumstances require the FCO or the German legislator to take emergency measures again, they will surely be willing to do so.

Philipp Otto Neideck
philipp.neideck@hengeler.com

Hengeler Mueller
Düsseldorf
www.hengeler.com/en

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QUESTIONS

The Inside Track

What was the most interesting case you worked on recently?

Our firm is involved in several of the ongoing high profile cases in the digital sector, which also includes section 19a GWB proceedings. These cases will shape the landscape and the enforcement practices of the FCO for years to come. One of our teams, for example, represented Alphabet in the recent proceedings concerning Google Showcase. We also continue to be heavily involved in defending undertakings in follow-on damages proceedings, including in German litigation following the European Commissions's decision in the *Trucks* case. However, we have also represented clients in more brick-and-mortar focused industries after dawn raids in 2022.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

The Higher Regional Court of Düsseldorf as an appeal court is tasked not only with reviewing the legality of the FCO's decisions; it can also carry out its own assessment of the fines imposed on the undertaking. As the appeal court applies an entirely different calculation method, fines will almost always be adjusted upwards in court proceedings. Neither the FCO nor the appeal court have shown a tendency to align their approaches, and the practice of the appeal court discourages undertakings from challenging decisions of the FCO in the first place.

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Hong Kong

Natalie Yeung is Head of Slaughter and May's competition practice in Asia. She has worked on a wide range of antitrust, merger control and regulatory matters involving Hong Kong, EU and UK competition law.

Natalie regularly coordinates merger notifications across APAC on complex global transactions. Natalie also advises extensively on the Hong Kong competition legislation. She has worked on a number of the 'firsts', including representing the liner shipping industry and the banking industry on their respective applications to the Competition Commission or exemption from the Competition Ordinance, Booking.com in the first voluntary commitments process and one of the parties in the first case to be fully resolved under the Commission's cooperation policy.

Natalie speaks Chinese and English and is referred as 'one of the standout lawyers in Hong Kong' and 'one of the world's foremost experts on Hong Kong's competition legislation'. She is repeatedly recognised as a Band 1 lawyer by Chambers Asia-Pacific for Competition/Antitrust (International Firms), China and is also recommended in *The Legal 500 Asia Pacific* 2022 for Antitrust and Competition.

Natalie was reappointed in 2022 as a non-governmental adviser to the Hong Kong Competition Commission in the ICN, having served as an adviser previously from 2015 to 2020 for two terms.

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

In practice, the Hong Kong Competition Commission (the Commission) does not target a particular type of conduct or sector, as case selection is driven primarily by complaints received from the public and leniency applications. Having said that, in December 2021, the Commission announced that it will focus on three key areas: (1) issues concerning people's livelihood or affecting the underprivileged; (2) exploitation of public funding and subsidies; and (3) cases involving digital markets. Historically, 10 of the 12 cases brought by the Commission before the Competition Tribunal (the Tribunal) involved cartels, and cartels are expected to remain the Commission's key focus.

To date, the Commission's cases span across six different types of infringement:

- bid rigging (eg, the *Nutanix* case (*Commission v Nutanix and others*) and the *Air-conditioning Works* case (*Commission v ATAL Building Services Engineering Limited and others*);
- price-fixing (eg, the *Tourist Attraction Tickets* case (*Commission v Gray Line Tours of Hong Kong Limited and others*)), the *Cleaning* case (*Commission v Hong Kong Commercial Cleaning Services Limited and others*));
- market sharing (eg, the *Textbooks* case (*Commission v T H Lee Book Company Limited and others*));
- exchanging competitively sensitive information (eg, the *Quantr* case (*Commission v Quantr Limited and another*));
- abuse of substantial market power (the *Medical Gases* case (*Commission v Linde HKO Limited and others*) concerning an alleged abuse of substantial market power by refusing to supply medical gas products to a medical gas pipeline system maintenance service provider); and
- resale price maintenance (eg, the *MSG* case (*Commission v The Tien Chu (Hong Kong) Company Limited*)).


Natalie Yeung

Some cases concern allegations of more than one type of infringement. For instance, the three *Decorators* cases (*Commission v W Hing Construction Company Limited and others*, *Commission v Kam Kwong Engineering Company Limited and others* and *Commission v Fungs E&M Engineering Company Limited and others*) concerned both price-fixing and market sharing, the *Inserter* case (*Commission v Quadient Technologies Hong Kong Limited and others*) concerned bid rigging, price-fixing, exchanging competitively sensitive information and market sharing, and last, in the *Air-conditioning Works* case, the Commission alleges price-fixing, market sharing and bid rigging (*Commission v ATAL Building Services Engineering Limited and others*).

> "The Commission) does not target a particular type of conduct or sector, as case selection is driven primarily by complaints received from the public and leniency applications."

Aside from enforcement proceedings, last year, the Commission accepted commitments offered by seven major car distributors covering a total of 17 passenger car brands in relation to various warranty restrictions imposed on car owners. This followed after the Commission's investigation found that these restrictions might deter passenger car owners from using independent car repair workshops during the warranty period, which could the reduce choice of services for consumers and lead to higher prices for maintenance and repair services.

2 What do recent investigations in your jurisdiction teach us?

While most investigations are triggered by complaints and leniency applications, the Commission's recent activity shows that it is becoming more proactive in case selection.

For example, the Commission recently issued a press release inviting members of the public for information after a news report alleged that several real estate agencies had directed their respective agents to observe a minimum net commission for first-hand property transactions.

The Commission has also started investigations with the cooperation of other governmental or law enforcement bodies. The Commission collaborated with the Organized Crime and Triad Bureau of the police in conducting a search of office premises of a property management company suspected of anticompetitive conduct in a building maintenance project tender exercise. Another joint operation took place recently at a wholesale fish market with multiple government bodies, including the Hong Kong Police, the Agriculture, Fisheries and Conservation Department, the Food and Environmental Hygiene Department, the Fire Services Department, the Immigration Department and the Marine Department. A further raid assisted by the police was conducted at the same fish market a month later. The Commission has indicated that it will continue to collaborate with the law enforcement agencies in the future.

The Commission continues to pursue a strategy of maximising deterrence through attributing antitrust liability to parent entities. Similarly, the Commission has not shied away from pursuing cases against natural persons who are alleged to have been involved in a contravention. Examples of cases where the Commission has pursued both strategies include the *Tourist Attraction Tickets* case, *Textbooks* case, *Medical Gases* case, and most recently in the *Air-conditioning Works* case.

The Commission also continues to charter into new territory by diversifying the nature and complexity of its investigations. Last year, it brought its first case concerning resale price maintenance to the Tribunal, which also incidentally was the Commission's first case involving vertical agreements between a supplier and its distributor

or reseller. It involved a wholesale supplier allegedly contracting with two main local distributors to set minimum resale prices for a certain type of monosodium glutamate, better known as MSG, widely used as a flavour enhancer in restaurants across Hong Kong. Interestingly, the Commission did not intend to bring Tribunal proceedings initially. Instead, the Commission attempted to resolve the matter by way of an infringement notice with specific requirements to be fulfilled by the MSG supplier. Enforcement proceedings were only brought to the Tribunal after the MSG supplier refused to agree to offer a commitment to comply with those requirements. This demonstrates that even when the Commission is willing to 'settle' a case early (by issuing an infringement notice), it will generally be confident enough in the merits of the case to be willing to take it all the way through the Tribunal process.

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3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

In September 2022, the Commission revised its Cartel Leniency Policy for Individuals, first introduced in 2020. The revised policy retains the distinction between cartels reported before the Commission opens an initial assessment or investigation (Type 1) and cartels reported after the Commission commences an assessment or investigation (Type 2). The key revision is the creation of a new queue for individuals that report their involvement in cartel conduct, where previously individuals and companies competed in the same queue for leniency. This means that leniency is now available to individuals who first report a cartel to the Commission, even if leniency has already been granted to an undertaking in the same case. Individuals are now no longer under pressure to take action before an undertaking.

The change is intended to incentivise more individuals to come forward, particularly employees of undertakings that have not applied for leniency (employees of undertakings that have been granted leniency are generally already covered in the relevant undertaking's leniency agreement). The Commission will benefit from the increased potential sources of evidence and be able to strengthen its cartel investigations.

The 'Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct', published in April 2019, provides for a 'Leniency Plus' programme, under which companies that cooperate with the Commission in a cartel investigation and come forward first to disclose the existence of another separate cartel can receive an additional discount of up to 10 per cent off the recommended pecuniary penalty for the first cartel. The level of discount will depend on a number of factors including the significance of the separate cartel.

"The ultimate goal of the Cooperation Policy is for the cooperating undertaking and the Commission to apply jointly to the Tribunal for an order made by consent that the undertaking has contravened or been involved in the contravention of the First Conduct Rule."

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

The Commission is open to settlements with parties as a way of achieving quick enforcement outcomes. For example, the *Inserter* case is the first case in which all cartel members cooperated and agreed to fully settle before the commencement of Tribunal proceedings. The cooperation offered by a defendant in the *Air-conditioning Works* case led to the largest recommended fine to date (approximately US$19.3 million) and covers two separate but related cases, one of which is yet to be made public.

The Commission has the discretion to issue an 'infringement notice' instead of bringing Tribunal proceedings for cartel activity, provided the undertaking makes a commitment to comply with the requirements of the notice. The Commission has issued an infringement notice (which included certain commitments) in two cases to date: (1) on Nintex Proprietary Limited, which was another party in the *Quantr* case; and (2) in the *Tourist Attraction Tickets* case, which concerned six hotel groups and a tour counter operator facilitating a price-fixing agreement between two competing travel service providers.

Under section 60 of the Competition Ordinance (the Ordinance), the Commission may accept a voluntary commitment in exchange for discontinuing its investigation. The Commission has accepted such commitments in three cases thus far: (1) the *Car Warranties* case, which concerned restrictive warranty conditions of several car distributors that required maintenance or repair services to be performed at authorised repair centres, even for items not covered by the warranty; (2) the *Online Travel Agents* case, which concerned the use of wide parity clauses (also known as most-favoured nation

or MFN clauses) in agreements between online travel agents and accommodation providers; and (3) the *Seaport Alliance* case, which concerned an operational agreement between several container terminal operators. The Commission issued a Policy on Section 60 Commitments in November 2021. The Policy clarifies how investigated parties or the Commission may initiate the process of offering commitments to resolve the Commission's concerns, what factors the Commission would consider (eg, seriousness of the conduct) and the particulars of the commitments process. Matters following the acceptance of commitments are also outlined, including failure to comply with a commitment. The Policy reflects the Commission's recent enforcement experience involving commitments and is a welcomed addition to the Commission's suite of enforcement policy documents.

The 'Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct' sets out a framework in which undertakings engaged in cartels that do not benefit from the Leniency Policy may choose to cooperate with the Commission in its investigation. The ultimate goal of the Cooperation Policy is for the cooperating undertaking and the Commission to apply jointly to the Tribunal for an order made by consent that the undertaking has contravened or been involved in the contravention of the First Conduct Rule. For example, one of the respondents in the *Air-conditioning Works* case admitted liability and jointly applied with the Commission to the Tribunal for settlement (see question 5).

The Policy sets out three 'bands' of recommended discounts: Band 1 receives a recommended discount of between 35 per cent and 50 per cent; Band 2 receives a recommended discount of between 20 per cent and 40 per cent; and Band 3 receives a recommended discount of up to 25 per cent. The Commission will determine the actual cooperation discount within the applicable band, having regard

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to the timing, nature, value and extent of cooperation provided by the undertaking.

However, businesses should note that the cooperation discounts mentioned above are recommendations only and the final determination of the fines are made by the Tribunal, as illustrated in the third *Decorators* case (*Commission v Fungs E&M Engineering Company Limited and others*) where the Tribunal did not fully adopt the Commission's recommendation. That said, in other pecuniary penalty decisions thus far (and the remaining respondents in the third *Decorators* case), the Tribunal has endorsed the Commission's recommended penalty. It remains to be seen whether this trend will continue, particularly given the *Air-conditioning Works* case where the recommended fine is so significant.

5 Tell us about the authority's most important decisions over the year. What made them so significant?

The Commission's case on alleged resale price maintenance is notable as the first of its kind in Hong Kong. If the case goes all the way to trial, the Tribunal's assessment of resale price maintenance, and perhaps vertical agreements more generally, particularly in relation to whether they can constitute serious anticompetitive conduct, may have important implications on all supplier–distributor relationships in Hong Kong. The Commission has made it clear that enforcement may also be brought against distributors to be assessed on a case-by-case basis, depending on the specific circumstances (for example, if the supplier implements the resale price maintenance at the request of competing distributors as an indirect price-fixing arrangement).

While the outcome of this is still pending before the Tribunal, the Commission recommended a record-breaking fine in the *Air-conditioning Works* case. The alleged cartel conduct lasted for four years and affected over 50 tenders for works in buildings all over Hong Kong. One of the two firms, ATAL Building Services Engineering Limited (the subsidiary entity), admitted liability and jointly applied (with the Commission) to the Tribunal for settlement, with the Commission making a recommendation for a record pecuniary penalty in the sum of approximately US$19.3 million covering this case and an additional case that is yet to be brought before the Tribunal regarding a related subject.

If the recommended pecuniary penalty is endorsed by the Tribunal, this will be the biggest pecuniary penalty for anticompetitive conduct to date. It may also make the case against the remaining firm (and its employee) much more difficult to defend. This case demonstrates

"The Commission's acceptance of commitments offered by seven major car distributors in relation to various warranty restrictions imposed on car owners is also significant, and demonstrates the Commission's interest in non-cartel enforcement."

the Commission's preparedness to take on bigger cases, and to bring cases with more impact to competition and consumers in Hong Kong.

The Commission's acceptance of commitments offered by seven major car distributors in relation to various warranty restrictions imposed on car owners is also significant, and demonstrates the Commission's interest in non-cartel enforcement. The Commission also ensured that the views of the wider public were addressed by engaging in a round of public consultation on the commitments.

On 7 July 2022, the Commission decided to renew the Block Exemption Order for Vessel Sharing Agreements between liner shipping companies for a further four years, following a public consultation conducted in August 2021. The renewed Block Exemption Order is subject to the same substantive terms of the Commission's original Block Exemption Order issued in 2017. In essence, the Block Exemption Order exempts certain operational arrangements between shipping lines from the prohibition against anticompetitive agreements. The decision to renew the Block Exemption Order keeps Hong Kong in line with similar exemptions available in major maritime jurisdictions, including Australia, Canada, China, the European Union, Israel, Japan, Malaysia, New Zealand, Singapore, South Korea and the United States.

In terms of advisory work, the Commission published an advisory bulletin on joint negotiations between groups of employers and employees, recognising certain circumstances in which joint negotiations may have a positive impact, leading to improved compensation and conditions for employees. Provided that certain conditions are satisfied, the Commission noted that it had no intention of pursuing a case against employers participating in these joint negotiations, particularly in relation to two types of conduct, namely compensation recommendations that incorporate the results of joint negotiation with employee bodies (but do not fix the levels of salaries),

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and where necessary, employers sharing expectations regarding future compensation during, or to prepare for, joint negotiations.

Separately, the Commission published a revised set of model non-collusion clauses for procurers to incorporate in their invitation to bid documents and contracts, following the first set of model clauses released in 2017. In the new clauses, bidders are required to disclose their beneficial owners, which will give procurers the ability to determine the actual relationship between bidders that appear to be submitting independent and competitive bids, and to identify potential anticompetitive conduct.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The Hong Kong Competition law regime adopts a prosecutorial model, in which the competition authority (ie, the Commission and

QUESTIONS

"The Tribunal has confirmed that stand-alone actions are not permitted in Hong Kong: private claims can only follow from the court's determination of a contravention of a conduct rule or through an admission in a commitment by a contravening party."

to a limited extent the Communications Authority) investigates alleged contraventions and brings enforcement proceedings before the Tribunal, allowing the Tribunal to decide whether a contravention is made out on the facts and, if so, to impose sanctions. Tribunal decisions can be appealed to the Court of Appeal and the Court of Final Appeal, while decisions by the Commission and the Communications Authority are subject to judicial review (under common law) and review by the Tribunal as reviewable determinations.

No judicial review cases have been lodged in respect of any Commission or Communications Authority decisions made under the Ordinance so far.

7 How is private cartel enforcement developing in your jurisdiction?

We are probably some time away from seeing the first private cartel enforcement in Hong Kong. The Tribunal has confirmed that stand-alone actions are not permitted in Hong Kong: private claims can only follow from the court's determination of a contravention of a conduct rule or through an admission in a commitment by a contravening party. Although we have substantive decisions by the Tribunal in the first and second enforcement cases, whether any claimant will lodge follow-on actions remains an open question.

Nonetheless, the Commission's Leniency Policy does provide some support for follow-on private actions, in that successful leniency applicants may be required to make an admission of contravention of the First Conduct Rule where victims of the cartel have initiated a follow-on action against other undertakings found to have contravened the First Conduct Rule by participating in the cartel. It should be noted that this does not apply to Type 1 applicants that are

not subject to follow-on liability as they do not need to admit a breach of competition rules in relation to a cartel.

Aside from leniency, the Commission's use of infringement notices can also open the door to follow-on actions, as recipients of an infringement notice must admit to a contravention in its commitments to the Commission, and this admission would form the basis for third-party follow-on actions.

However, the Commission is also committed to protecting confidential materials provided by the leniency applicant. This includes firmly resisting requests for disclosure of such confidential material on public interest or other applicable grounds. In this regard, the Tribunal decided in the *Nutanix* case that communications between the Commission and parties who unsuccessfully seek leniency are privileged and cannot be disclosed or used against the unsuccessful applicant in enforcement proceedings. In addition, the development of follow-on actions is undermined by the fact that class actions are not available in Hong Kong, and there has been no end to the government's consideration of legal reform for class actions since 2012.

Taching Petroleum Co Ltd v Meyer Aluminium Ltd is a notable exception to the general prohibition against private actions. Although the Competition Ordinance prohibits claimants from bringing private actions, the Court held that this prohibition does not extend to private litigants raising allegations of contraventions of the conduct rules as a defence in civil proceedings. This first and only stand-alone private action in Hong Kong started in 2017 with industrial diesel reseller Taching Petroleum Company's application for Meyer Aluminium Limited to be ordered to make payment for industrial diesel oil it had purchased from Taching. An equivalent action was brought by Shell Hong Kong Limited in 2018. Meyer raised a common defence in both actions, claiming that Taching and Shell had colluded to fix their prices, in breach of the First Conduct Rule. The competition

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law element of both cases was transferred from the Court of First Instance to the Tribunal to be heard together. After seven days of trial in 2021, the Tribunal found that Meyer had 'failed to show even a prima facie case of agreement or concertation' between two petrol suppliers. Meyer's sole illegality defence in the civil claim for non-payment of goods accordingly fell apart. A High Court judgment was entered into on the same day in October 2021, and Meyer was ordered to pay the petrol suppliers for diesel delivered in 2017, with interest and costs.

While the lack of stand-alone private actions is a well-known 'feature' of the local competition law regime, the case demonstrates how a stand-alone action can be brought before the Tribunal through the clever use of litigation procedures available in the statute. However, it also shows that, even if the statutory mechanism can be successfully invoked, the party invoking the procedure may ultimately find it difficult to substantiate its claim.

QUESTIONS

> "As recipients of an infringement notice must admit to a contravention in its commitments to the Commission, this admission would form the basis for third-party follow-on actions."

8 What developments do you see in antitrust compliance?

A common feature of the commitments accepted by the Commission (whether pursuant to section 60 of the Ordinance or as part of the infringement notice) is that they include steps to improve the existing compliance programme. For example, in the *Inserter* case, all cooperating parties committed to enhance their respective corporate competition compliance programmes. As such, these commitments can shed light as to the Commission's views on what constitutes an effective competition compliance programme.

In the *Quantr* case, the Commission required Nintex Proprietary Limited to carry out measures such as adopting a Commission-approved compliance policy that is signed by company directors. In the *Tourist Attraction Tickets* case, the Commission required the undertakings to appoint an independent compliance advisor (the ICA). The ICA is responsible for conducting a compliance review over the undertaking, and to provide the undertaking with advice and rectifying measure to minimise the risk repeating the same or similar conduct in issue. The ICA is also required submit a written report to the Commission setting out its review findings.

As part of the Commission's strategy of maximising deterrence through attributing antitrust liability to parent entities, in the *Air-conditioning Works* case, it also extended the scope of its compliance commitments to include the parent company of the relevant subsidiary involved in the alleged anticompetitive conduct. The Commission required both the parent and subsidiary to enhance the competition compliance measures to the satisfaction of the Commission across the group, in exchange for the Commission dropping the proceedings against the parent company entirely.

We may see more Hong Kong businesses aligning their compliance and risk assessment systems with the Commission's policies, as more companies recognise the importance of competition compliance following the Tribunal's past decisions and enforcement outcomes.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

In 2022, we have seen the Commission bring various enforcement actions and outcomes in line with its enforcement strategy and the priority areas announced in 2021, namely: (1) issues concerning people's livelihood or affecting the underprivileged; (2) potential exploitation of public funding and subsidies; and (3) cases involving digital markets. The Commission has also demonstrated that it is flexible in its approach to achieve enforcement outcomes efficiently via contested and non-contested means.

The Commission's work remains driven by complaints, and thus companies need to remain vigilant regarding their business

practices and interactions with other competitors, as well as the perception it may create on the general public. This also ties into the interesting development of the Commission's increased interaction with the public, through issuing press releases on current ongoing investigations and soliciting public information and views to aid its fact-finding process. These were not a common practices in the past, and we expect this to continue going forward. Furthermore, as the Commission has indicated, it will continue to carry out joint search operations with other governmental and law enforcement agencies, which will improve the Commission's investigative capabilities.

In line with historical trends, we expect the Commission to bring more cases before the Tribunal. Cartels will continue to be an enforcement priority in Hong Kong, and the Commission is likely to maintain its policy to maximise personal deterrence by bringing more actions against individuals. The revised Cartel Leniency Policy for Individuals will likely trigger an increase in the number of leniency applications and help the Commission obtain vital evidence in its investigations.

2022 also marked the Commission's first case involving resale price maintenance and 'vertical agreements' between a supplier and its distributor or reseller. The Commission may further focus on resale price maintenance in future. Therefore, businesses should evaluate any relevant agreements (whether concluded before or after the Competition Ordinance went into effect) for potential resale price maintenance arrangements.

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

In March 2020, the Commission issued a statement on the application of the Competition Ordinance amidst the covid-19 pandemic. The Commission made it clear in the statement that the Competition Ordinance remains effective, but acknowledged that 'additional cooperation' between competitors may be required in certain industries on a temporary basis in the following areas: (1) joint buying; (2) joint production agreements; (3) sales-related joint ventures; and (4) exchange of information. In addition, the Commission specifically advised businesses to keep track of what was discussed and the objective reasons for needing to exchange such information during the covid-19 pandemic.

The Commission has also reminded participants in the Hong Kong government's anti-epidemic subsidy programmes the importance of complying with the Competition Ordinance (in May and August 2020). In the Commission's reminders, it encouraged public bodies that were tasked to administer these subsidy programmes to take into account competition concerns, and to be vigilant against collusive conduct.

Natalie Yeung
natalie.yeung@slaughterandmay.com

Slaughter and May
Hong Kong and Beijing
www.slaughterandmay.com

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QUESTIONS

The Inside Track

What was the most interesting case you worked on recently?

We have worked on a number of cases that involved novel theories of harm. It was really interesting to engage with the Commission on these theories, understand its approach towards cross-border issues and debate market definition. It is heartening in a way to see that the Commission does not see itself constrained by traditional theories of harm, as it certainly kept me and my team on our toes.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

The Competition Ordinance does not provide for private enforcement actions, unlike other jurisdictions. As a result, the Commission has to open an inquiry before the contravening activity can be stopped. Also, when there has been no determination by the Tribunal or an admission of liability by the entity or individual under investigation, the victims of anticompetitive behaviour are not entitled to damages, as they are unable to bring follow-on actions. The introduction of a private action regime would be welcomed, particularly where the Commission has not yet discovered the relevant behaviour or where the Commission is hampered by resource constraints.

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Japan

Shigeyoshi Ezaki is a partner at Anderson Mōri & Tomotsune with a general corporate practice, which includes advising and assisting Japanese and foreign clients on Japanese competition law, trade regulation, intellectual property law and corporate law. He represents many clients in regulatory investigations with respect to price-fixing and similar serious alleged violations before the Japan Fair Trade Commission as well as overseas regulatory authorities.

Vassili Moussis is a partner at Anderson Mōri & Tomotsune who is listed as a leading individual for competition law in Japan by various directories and rankings. He has practised competition law for over 20 years in London, Brussels and Tokyo (where he has been based since 2009). Vassili has also worked at the European Commission's Directorate General for Competition in Brussels. At Anderson Mōri & Tomotsune, his practice focuses on all aspects of competition law, including merger control and complex international cartel matters.

Takeshi Ishida is a partner at Anderson Mōri & Tomotsune. He specialises in a wide range of competition law matters. He previously served as a deputy director in the investigation bureau at the JFTC. During his three-year tenure at the JFTC, he was a lead case-handler in a variety of infringement cases involving cartels, bid rigging, and unfair unilateral conduct.

Read this article on Lexology

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

In recent times, the Japan Fair Trade Commission (JFTC) has turned its attention to enforcement against international cartels, imposing very high surcharge payments on contravening companies. For example, in the 2016 international cartel case involving manufacturers of aluminium and tantalum electrolytic capacitor products (the *Capacitors* case), the JFTC issued administrative fines amounting to approximately ¥6.7 billion. This follows another international cartel case in 2014 involving international ocean shipping companies, where the JFTC issued administrative fines totalling approximately ¥22.7 billion. Its success in international cartel enforcement has been the product of parallel investigations conducted in close cooperation with foreign antitrust authorities, including the European Commission and the US Department of Justice.

In addition to international matters, the JFTC has aggressively pursued domestic enforcement in recent years. In July 2019, in the biggest Japanese antitrust penalty on record, the JFTC issued surcharge orders for a total amount of ¥39.9 billion against eight road building companies relating to price-fixing cartels for asphalt mixtures. Subsequently, in September 2019, the JFTC levied another surcharge order for a total amount of ¥25.7 billion against beverage can makers relating to price-fixing cartels.

Additionally, the JFTC has recently been focusing on enforcement in the digital economy sector due to a recent surge of economic activity in this area. In particular, it has published a series of reports including the Report Regarding Trade Practices on Digital Platforms in 2019, and a reports in 2021 and 2023 focusing on e-commerce, mobile applications and operating systems and digital advertisements.


Shigeyoshi Ezaki


Vassili Moussis


Takeshi Ishida

"The JFTC has recently been focusing on enforcement in the digital economy sector."

QUESTIONS

> "Literally a few seconds can make the difference between complete immunity from the administrative surcharge and criminal indictment or a partial reduction only."

These reports do not particularly focus on cartels, but they clarify the preferable approaches towards competition policy in the digital economy.

2 What do recent investigations in your jurisdiction teach us?

Since its introduction in January 2006, the leniency programme has become a key driver of cartel enforcement in Japan. In the majority of instances, investigations are initiated by a leniency application. In recent years, almost all cartel or bid rigging cases in which administrative formal orders were issued by the JFTC were initiated this way. Despite initial doubts, few can now contest the importance of the programme as a key investigative tool for cartel enforcement in Japan.

While there continues to be a strong uptake of the leniency programme with a total number of 1,395 applications since 2006 (as at March 2022), the leniency system has been praised as a huge success. The covid-19 pandemic significantly reduced the number of leniency applications, but they have since slightly recovered. For the past fiscal year, JFTC statistics indicate that the number of leniency applications was 52 compared to 33 the previous fiscal year.

A unique aspect of the leniency programme in Japan is that once the initial application for leniency is lodged, there is a very high level of predictability as to the final outcome of the leniency order. In comparison with other major jurisdictions with effective leniency regimes, the striking difference in Japan is that there is no 'leniency race' to secure or even improve on the original leniency rank provisionally allocated by the investigating authority. In that sense, the timing of the initial application for leniency is absolutely critical in Japan, as literally a few seconds can make the difference between complete immunity from the administrative surcharge and criminal indictment or a partial reduction only.

In this regard, it is important to note that the leniency policy was amended at the end of 2020. Under the new policy, there is no limitation to the number of leniency applicants. While the first applicant is granted full immunity under the new policy as before, the second applicant can only obtain a reduction in surcharge between 20 to 60 percent, depending on the extent of cooperation with the JFTC, instead of the fixed 50 per cent in the previous system. The third, fourth and fifth applicants are also eligible for a reduction in surcharge, but the reduction will vary from 10 to 50 per cent according to the extent of cooperation with the JFTC. The sixth or later applicants will be also eligible for a reduction, depending on the extent of their cooperation with the JFTC. Such changes would further align the Japanese leniency regime with the ones of other major competition authorities such as the European Commission's leniency programme. Under the new policy, regulators and leniency applicants are expected to interact more closely than before in order to facilitate the investigation. As at January 2023,

there has been no publicly announced case where the JFTC applied the new leniency programme.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

Under the current leniency system, potential applicants should be attentive to the timing of the leniency applications, as this will determine the immunity or the amount of percentage reduction granted for cooperation. A recent trend we have observed is that potential applicants have become quicker at deciding whether to cooperate with a JFTC investigation, including through applying for leniency. A key reason for this accelerated decision-making is that applying for leniency is now considered to be part of a company's culture of corporate compliance in Japan so that once a potential infringement has been identified, not reporting it promptly to the investigating authority is often no longer an option.

It is also important to note that, in contrast to many common law jurisdictions, there is no concept of attorney–client privilege in Japan. This means that during a JFTC investigation, documents held by a client containing attorney–client communications or any documents (including the results of internal investigations) held by in-house legal staff can be obtained by the JFTC dawn raid and used for the purpose of the investigation except when the JFTC decides that these documents meet certain requirements under the Determination Procedure (described below) that was introduced at the end of 2020. Moreover, while the internal leniency programme (whereby employees who disclose cartel activities within a certain number of days receive immunity from punishment at company level) proves to be effective, the report of this internal disclosure can also be seized. Accordingly, as a practical matter, we usually encourage clients to maintain any records of attorney–client communications, legal memoranda and

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results of investigations with the outside legal counsel firm rather than the in-house legal department, wherever possible.

Furthermore, clients should be aware that attorneys are not usually allowed to be present during interviews conducted by the JFTC. In December 2015, the JFTC issued guidelines recognising the right for external counsel to be present during interviews under very limited circumstances, such as during interviews with foreign nationals.

However, as mentioned above, the JFTC's leniency policy came into effect at the end of 2020. Following the passage of the amendment bill, the JFTC announced that it was also preparing regulations and guidelines to introduce a new system called the 'Determination Procedure'. This system enables certain documents to be protected in administrative investigations regarding unreasonable restraints of trade (such as cartels and bid rigging) pursuant to article 76 of the Antimonopoly Act (AMA). In August 2022, the JFTC revealed the details of the procedures for the introduction of a limited type of protection from disclosure for certain types of documents. When an alleged

"If an officer or employee presents evidence and testimony against other offenders in a cartel case, prosecutors may agree not to indict the officer or employee, provided that such persons agree with the conditions made by the prosecutor and their attorney's consent is given."

company receives a submission order for certain documents from the JFTC officers during dawn raids, the company will be entitled to claim that the documents should not be subject to the order because the documents contain attorney–client communications. In that case, the JFTC officers will order the submission of the documents, seal the documents and place the documents under the control of the Determination Officers at the Secretariat of the JFTC, which are independent from the Investigation Bureau. The determination officers will then determine whether the documents at issue satisfy the conditions provided under the new regulations and guidelines. If the conditions are satisfied, the documents will be promptly returned to the company. The rationale behind the introduction of this limited form of protection from disclosure is to protect communications between companies and outside attorneys in connection with investigations against unreasonable restraints of trade, resulting in a more efficient surcharge system. It is worth noting, however, that this protection under the Determination Procedure is severely limited and does not amount to the introduction of a form of attorney-client privilege as found in certain common law jurisdictions. For those reasons, it is fair to say that there is no concept of attorney–client privilege in Japan as at February 2023.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

The JFTC is expected to complete its investigations within a reasonable time period. Nevertheless, we have recently seen a trend of investigations lasting longer than one year, with more complex cases being investigated for 18 months or more.

Moreover, a plea bargaining and a commitment system were introduced in 2018. As regards plea bargaining, the Criminal Procedure Law was amended in 2016, and a plea bargaining for certain types of crimes,

including cartels, came into force on 1 June 2018. According to the amendment to the Criminal Procedure Law, if an officer or employee presents evidence and testimony against other offenders in a cartel case, prosecutors may agree not to indict the officer or employee, provided that such persons agree with the conditions made by the prosecutor and their attorney's consent is given. With respect to the introduction of a commitment system, the amendment to the AMA came into effect on 30 December 2018 when the modified version of the Trans-Pacific Partnership Agreement (TPP) known as "TPP 11" came into effect. Ten months after the introduction of a commitment system in the Japanese antitrust law, the JFTC first applied a commitment system to Rakuten Travel. Rakuten Inc, which operates an online travel agency known as Rakuten Travel, allegedly unfairly restricted the businesses of accommodation operators by including most-favoured-nation clauses relating to the prices and number of rooms into contracts between Rakuten Inc and the accommodation operators seeking to place their information on the Rakuten Travel website. The JFTC approved a commitment plan presented by Rakuten, Inc and completed its investigation against the company without finding a violation. There have been more than a dozen cases resolved under the commitment procedures as at January 2023. The swift resolution of cases through such procedures ultimately benefits both the alleged parties and the JFTC, as it saves time and effort that should otherwise be invested into investigations. The parties are inevitably required to admit the alleged facts through a board decision and to notify stakeholders of this decision. From our experience, these requirements could be a potential downside of using the commitment procedures and also an important factor to be considered when deciding whether to use these procedures.

The former chairman of the JFTC, Kazuyuki Sugimoto, said that he considers that the commitment procedure would enable the swift resolution of cases and serve as an effective enforcement tool. This commitment system, nevertheless, does not apply to cases relating to

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certain types of unreasonable restraint of trade (eg, hardcore cartels), and there is currently no similar commitment system applying to cartels in Japan. There may be scope to argue that a similar commitment system, granting effectively more discretion to the JFTC, should be introduced for cartels.

5 Tell us about the authority's most important decisions over the year. What made them so significant?

In December 2020, the JFTC issued cease-and-desist orders and surcharge orders against four companies: Obayashi Corporation, Kajima Corporation, Taisei Corporation and Shimizu Corporation, all of which are leading general constructors in Japan and most of which are affiliate companies of the violators in the price cartel case above. The orders against these four general constructors followed the filing of a criminal complaint by the JFTC with the Japan public prosecutor in March 2018. It was alleged that these companies were involved in

bid rigging in connection with the construction of the new terminal stations for the Chuo Shinkansen (maglev train) ordered by Central Japan Railway Company.

In December 2020, the JFTC filed a criminal complaint with the Japan public prosecutor against three major domestic pharmaceutical wholesalers, namely Alfresa, Toho and Suzuken, and seven individuals employed by these wholesale companies. On the same day, the public prosecutor indicted these three companies and seven individuals before the Tokyo District Court. The criminal accusation is that, in relation to public tenders in 2016 and 2018 conducted by the Japan Community Health care Organization (JCHO) to order certain pharmaceutical drugs to be used at 57 hospitals and long-term care facilities run by it nationwide, the seven individuals employed by these wholesale companies were suspected of having conspired with each other in connection with bidding and price negotiations on drug supply contracts ordered by the JCHO and repeatedly colluded to pre-determine the winning bidders. On 30 June 2021, the Tokyo District Court found all the accused parties guilty and imposed a ¥250 million fine on each company. It also sentenced two former officials of those companies to a two-year prison term (suspended for three years) and five former officials to 18-month prison terms (suspended for three years). It should be noted that there was another major domestic pharmaceutical wholesaler who also engaged in the bid rigging, but that wholesaler was immune from the criminal complaint by the JFTC because it was reportedly the first leniency applicant in this case. Following a criminal judgment, the JFTC also launched administrative investigations against the said major pharmaceutical wholesalers on 30 March 2023 and issued a cease-and-desist order and administrative surcharge order (for a total of more than ¥400 million) to the wholesalers but excluding the first leniency applicant.

"The new appellate system aims to address the main criticism of the old administrative hearing procedure as being a rubber stamping process."

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

With the implementation of a new appellate system in April 2015, we expect to see a rise in the level of judicial review of JFTC decisions in Japan. The new appellate system aims to address the main criticism of the old administrative hearing procedure as being a rubber stamping process, where the JFTC tribunal heard challenges to orders issued by the JFTC. Following sustained criticism of this internal review system, legislative reform abolished the administrative hearing procedure and replaced it with a system where challenges to the JFTC's cease-and-desist orders and surcharge payment orders are to be heard by the commercial affairs division of the Tokyo District Court. Additionally, the legislative reform provided for a new procedure for hearings prior to the issuing of the JFTC's order, with a greater emphasis on due process.

Notably, As of the end of the 2020 fiscal year, there were 10 pending cases under the new appellate system by the Tokyo District Court.

During the past year, there was a notable increase in the number of challenges to the JFTC's decisions in the courts, although this activity relates mainly to unilateral conduct. In 2011, the JFTC issued a cease-and-desist order and imposed a fine of ¥222 million against Sanyo Marunaka, a supermarket chain based in western Japan, for alleged abuse of superior bargaining position in its dealing with suppliers. The company has appealed to the higher courts, seeking to cancel the order after the JFTC upheld its decision at the administrative hearing requested by the company. In December 2021, the Tokyo High Court overturned the JFTC decision by ruling that the JFTC had made a procedural error by not including the list of suppliers who were subjected to the supermarket chain's alleged abuse of superior bargaining position in its original orders. Following the court ruling, the JFTC cancelled the cease-and-desist order and the payment order.

7 How is private cartel enforcement developing in your jurisdiction?

Private cartel enforcement remains relatively rare in Japan, partly owing to Japanese companies' historic aversion to using the court system for damages claims. Private mediation or arbitration is likewise uncommon, and there are no class actions in Japan.

However, it is relevant to note that the large number of cartel enforcement cases is concentrated in the construction industry for the procurement of public works (typically for local government) where, generally, there is a stipulation in the contract providing that 10 to 20 per cent of the contract price is recoverable if the company is involved in illegal activities. Accordingly, given the existence of contractual protection and out-of-court settlement in the vast majority

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of cartel cases as well as the historically low levels of damages claims, we expect that private cartel enforcement will continue to remain relatively limited in Japan.

8 What developments do you see in antitrust compliance?

We have certainly seen a strengthening of antitrust compliance in Japan. Driven by recent shareholder derivative actions, there has been an increased uptake of the leniency system based on the recent focus on corporate compliance. The JFTC has also continued to play an active role in international cartel enforcement.

In addition, regulators seem to have a growing interest in information exchange. Although information exchange does not, in itself, constitute a violation of the competition rules in Japan, the act of exchanging competitively sensitive information raises concerns as it may lead to pricing cartels or bid rigging. The JFTC is generally only concerned with

“Given the comparatively high frequency of interaction between competitors in Japan, there is increased potential for the regulator to draw inferences of agreed price increases from extraneous outside events.”

competitively sensitive information for the purpose of finding breaches of the competition rules. However, the exchange of non-competitively sensitive information (eg, environmental and safety issues) may also be relevant where the information exchange was intended to monitor price restrictions or gives a common indication of current or future prices.

Based on our experience, one of the greatest challenges for clients in antitrust compliance is the social aspects of the Japanese business environment. In Japan, social gatherings and greetings between key industry players are commonplace and traditionally considered to be an indispensable part of the business culture. Business associations also provide opportunities for competing businesses to engage in discussion. Given the comparatively high frequency of interaction between competitors in Japan, there is increased potential for the regulator to draw inferences of agreed price increases from extraneous outside events. This is especially the case where the conduct in question potentially affects competition in territories outside Japan and in particular in jurisdictions that take a much stricter view as to exchange of information between competitors (eg, the EU).

The traditional lack of dedicated antitrust specialists in legal in-house teams in Japan could also pose potential challenges to antitrust compliance. At the moment, it is too early to say whether the introduction of the Determination Procedure, which is a limited form of protection from disclosure for certain types of documents, in Japan could make the antitrust compliance work more effectively.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

Although the JFTC’s enforcement is currently rather passive due to the covid-19 pandemic, we anticipate the introduction of a new system will

bring significant implications for clients. According to the amended AMA, for example, the duration of the violation for which the amount of the surcharge is calculated based on the relevant party's sales figures in respect of the product or service in question will be up to a maximum of 10 years (ie, up to seven years longer than currently), and the duration could even be longer than 10 years if the infringements continue after the JFTC's dawn raids. The difference in the surcharge calculation rate depending on the type of the relevant party's business (eg, for a retailer or a wholesaler) will be abolished, and the rate will be fixed at 10 per cent of the sales figures in respect of the product or service in question. The reduction in surcharge due to early withdrawal from the conduct in question will also be abolished.

In addition, the introduction of a level of discretion would enable the JFTC to take into account various factors in determining the amount of the surcharges and the level of reduction to be granted to leniency applicants, including, for example, the degree of cooperation and additional value of evidence provided by a leniency application. As a result, we expect clients to compete increasingly harder for evidence, particularly for value-adding evidence (which is a requirement in some jurisdictions such as the EU). The JFTC is also likely to impose higher surcharges for cartel conduct, which in turn is likely to have a greater deterrent effect for cartel activities in the future. Should the JFTC further align the basic tenets of its leniency system with that of other major jurisdictions with antitrust enforcement such as the EU and the US, it would also mean that the current discrepancy between the test applied by enforcers in Japan and other jurisdictions would make it easier and more cost-effective for leniency applicants in international cartel cases to obtain leniency in multiple jurisdictions by essentially relying on a single set of corporate statements and supporting evidence. Moreover, we also expect to see more appeals in the coming year as a result of the new appellate system and dedicated courts for judicial review.

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

Cartel enforcement by the JFTC has been apparently affected by the covid-19 pandemic since April 2020 when the Japanese government declared a state of emergency in response to the rapid increase of covid-19 infections in Japan. While the JFTC usually conducts a dawn raid every one to two months, it did not undertake any new investigations by dawn raids during the state of emergency. Other ongoing investigations also seem stagnant due to the difficulties of interviewing people involved in cartel activities. As at February 2023, it seems that the JFTC's enforcement has become relatively more active as compared to the past fiscal year, although such enforcement has not yet recovered to the pre-covid-19 pandemic levels.

Shigeyoshi Ezaki
shigeyoshi.ezaki@amt-law.com

Vassili Moussis
vassili.moussis@amt-law.com

Takeshi Ishida
takeshi.ishida@amt-law.com

Anderson Mōri & Tomotsune
Tokyo
www.amt-law.com

QUESTIONS

The Inside Track

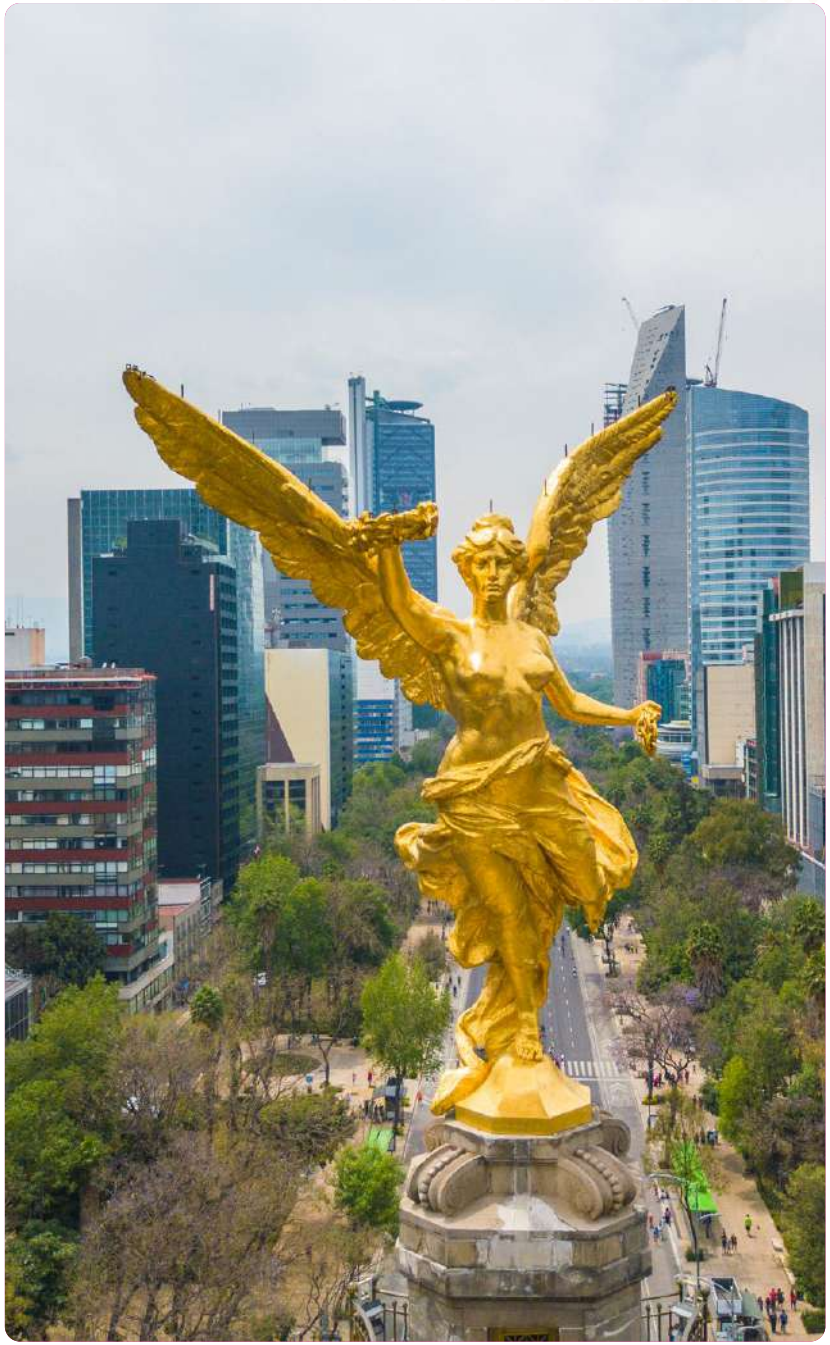
What was the most interesting case you worked on recently?

When it comes to cartel investigations, we were recently involved in the *Capacitors* case, involving several manufacturers of aluminium and tantalum electrolytic capacitor products. The JFTC found that the participants in the cartel communicated their intention to raise the prices of the capacitor products through regular meetings and consequently issued cease-and-desist orders and administrative fines amounting to approximately ¥6.7 billion. Parallel investigations in other jurisdictions are ongoing.

This case is of particular significance as it was the only decision delivered by the JFTC involving an international cartel in 2016–2017.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

The amended AMA gives the JFTC some degree of discretion in the surcharge payment system. We expect that with this discretion, the JFTC will have more flexibility to create incentives for companies to cooperate with the JFTC, which should ultimately culminate in more sophisticated cartel enforcement in Japan as well as a more harmonised environment for international cartel enforcement. However, whereas the Determination Procedure, which is a limited protection from disclosure for certain types of documents, is also newly introduced into the AMA, the degree and scope of attorney-client communications that are protected from disclosure is still severely limited compared to other jurisdictions, which may hinder cartel enforcement in Japan and is not in line with international best practices. It is therefore hoped that the JFTC will further strengthen due process rules in its investigations, including by allowing for an increased role to be played by outside counsel during the all important interview process.



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Mexico

Luis Alberto Aziz Checa, a founding partner at Aziz & Kaye Abogados, AC, holds a law degree with honours from the National Autonomous University of Mexico (UNAM), and a master's degree in international law and European Community law from Georgetown University and the College of Europe. Luis Alberto has a significant track record that has allowed him to collaborate in different projects: he was part of the legal team during the negotiation of the North American Free Trade Agreement. He founded the Mexican Arbitration Center (CAM) and Aklara (design and execution of auctions and competitive bids).

Ismael Henestrosa Pérez is a partner at Aziz & Kaye Abogados, AC with extensive experience in competition and antitrust, data privacy, and administrative law. His practice focuses mainly on competition law, working with domestic and international clients. Ismael has worked as an independent consultant and occupied various positions in public bodies and private practice. He is a member of two of the Mexican Bar Associations and has been a professor of economic competition and antitrust law (bachelor's, graduate and master's degrees) at several of the most relevant Mexican universities.

Agustín Aguilar López, a senior associate at Aziz & Kaye Abogados, AC, obtained his degree from National Autonomous University of Mexico (UNAM) and undertook postgraduate studies in procedural and constitutional law. His practice focuses mainly on the defence of economic agents involved in cartel conduct, dominance abuse and illegal concentrations before both Mexican competition authorities and the federal courts. He has been ranked as Rising Star (The Legal 500) and as Leading Lawyer (Best Lawyers).

QUESTIONS

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

In Mexico, there are two authorities responsible of the enforcement of antitrust law. The Federal Economic Competition Commission (the Commission), which, in matters of cartels or, as they are called in the Federal Economic Competition Law, absolute monopolistic practices, has powers with respect to all sectors of the economy, except for telecommunications and broadcasting, which are under the jurisdiction of the Federal Telecommunications Institute. However, the Institute has initiated few investigations related to cartels, for which reason we will focus on the activity of the Commission, although it should be clarified that the Federal Antitrust Law is applicable to both authorities and each is empowered to issue provisions regulating certain procedural situations.

In Mexico, absolute monopolistic practices consist of agreements between competitors that may have as their object or effect: (1) price-fixing; (2) reduction of supply; (3) division of markets; (4) bid rigging; and (5) exchange of information with any of the aforementioned objects or effects.

Likewise, the Commission's investigations may be initiated *ex officio* or as a result of complaints that may be filed by any person, so there is no market or sector in which the Commission has focused its investigations in relation to cartels. Thus, in recent years, the Commission's investigations for absolute monopolistic practices in various markets, such as: medicines, fuels (both for ground and maritime use), passenger transportation, tortillas (a basic food product in Mexico), waterproofing, bids carried out by the government in various markets and the financial and banking sector (administration of retirement funds, government bonds and, currently,


Luis Alberto Aziz Checa


Ismael Henestrosa Pérez


Agustín Aguilar López

"The Commission may open an investigation *ex officio* or by complaint."

transactions made with credit cards in the form of deferred payments at interest-free months).

2 What do recent investigations in your jurisdiction teach us?

As mentioned, the Commission may open an investigation *ex officio* or by complaint. In the first case, the Commission will initiate its investigations based on the information that the economic agents have provided in other files, derived from the analysis (including studies) of the market information it carries out (ie, price monitoring and association communications, among others) or due to an application to the leniency programme. In the second case, the decision to open an investigation derives from whether the complainant provides the necessary elements to presume the existence of facts that could constitute an absolute monopolistic practice (ie, the existence of an objective cause).

The antitrust regulations grant the Commission several investigative tools, such as the issuance of requests for information, the ability to subpoena any person and the practice of dawn raids.

From our point of view, the dawn raids have been the most important investigative tool for the Commission. During their development, the Commission has obtained valuable evidence to support the probable existence of absolute monopolistic practices in several investigations. In the past several years, email evidence has proven to be the most useful to detect the existence of cartels and to determine how the cartel operates and who are the main participants.

However, in the exercise of dawn raids, the Commission has obtained documents that are protected by attorney–client privilege and, as noted last year, the federal courts determined that the Commission does not have the authority to obtain these communications. In

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order to prevent its investigations from being tainted by this type of situation, the Commission issued regulatory provisions establishing the procedure to determine whether a document is protected by this privilege or not.

Considering all the powers that the Commission has, our firm recommends having constant communication with the authority, in order to ensure that the investigative procedures generate the least inconvenience in the sphere of rights of economic agents.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

The leniency programme, together with the dawn raids, has been the main investigative tool that has allowed the Commission to gather evidence of the existence of cartels and to sanction the participants.

The conditions for the Commission to accept an economic agent in the leniency program are twofold: (1) confess the applicant's participation in the cartel, describe how it operated and point out the other participants; and (2) provide elements of conviction that allow the Commission to initiate an investigation, or to presume the existence of an absolute monopolistic practice. Although joining the leniency programme grants a reduction in the fine, as well as immunity in relation to the disqualification of individuals and in criminal matters, it is true that other factors must be taken into account at the time of application.

Among these factors, it should be considered that joining the leniency programme does not grant benefits before authorities other than the Commission, for example, before those in charge of sanctioning infractions in procurement or contracting of services. In this sense, it is important to point out that these authorities may use the evidence in the Commission's file to support the liability, which implies that it will be difficult to contradict the evidence used to sanction the cartel.

Another point to highlight is the effect that may be generated in the commercial relations of competitors that participate in a trade association. The above, since, as mentioned, entering the leniency programme implies pointing out the other participants of the cartel, which could include, for example, the association and other participants in it, affecting their interaction in the market in question.

Additionally, it should be taken into account that the decision of the Commission demonstrates the unlawful act in terms of damage, paving the way for the consumers of the good or service in question, to exercise the action to claim damages for the damage caused by the absolute monopolistic practice.

Finally, in our experience, we have not found any legal obstacles that make it difficult to carry out internal investigations aimed at determining the relevance of joining the leniency programme. In this

"Although joining the leniency programme grants a reduction in the fine, as well as immunity in relation to the disqualification of individuals and in criminal matters, it is true that other factors must be taken into account at the time of application."

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regard, we consider it important that this internal investigation be carried out with the support of the legal department of the economic agent, with several legal points of view.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

The investigation stage may contain up to four phases, which, in total, represent about two and a half years. The Commission may exhaust this entire period, or it may conclude the investigation earlier. Subsequently, if there are elements to presume probable liability, the Commission initiates proceedings in the form of a trial, which may last between approximately three and 12 months.

In the competition legislation, there are no means to accelerate the issuance of the final decision by the Commission or a settlement procedure. Thus, if the Commission considers it necessary to exhaust all the periods of the investigation, the procedure, including both stages, may last around three and a half years.

5 Tell us about the authority's most important decisions over the year. What made them so significant?

There are two decisions that can be considered as the most relevant during the last year. The first one relates to the federal passenger transportation market in Mexican territory, and the second one relates to the liquefied petroleum gas distribution market.

The importance of the decision related to the passenger market lies in the fact that, according to the Commission, the different conduct for which they were sanctioned began to be carried out more than 10 years ago, which could be detected as a result of an application to join the immunity programme. In other words, this decision demonstrates the importance of the immunity programme as an effective tool for detecting and sanctioning cartels.

On the other hand, thanks to a complaint filed by an authority active in the energy sector, the Commission was able to detect that several companies involved in the distribution of liquefied petroleum gas may have adopted agreements, in different parts of the country, on the price at which such product is sold to the final consumer. In order to sanction this cartel, the cooperation between the Commission and a regulatory authority of the sector was crucial, as well as the practice of dawn raids, through which the Commission obtained evidence that allowed it to know the way in which the cartel operated, and the methodology used to monitor the compliance with the anticompetitive agreements.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The Commission has sufficient powers to issue its decisions, without the need to resort to any other authority. The Commission's decisions may be challenged through an *amparo* trial before specialised federal courts.

The most important challenges that the Commission is facing in *amparo* trials before federal courts concern the delimitation of its powers during the investigation of absolute monopolistic practices and the application of certain criminal principles to the proceedings. These seek to rule out the administrative liability of economic agents and, in certain cases, the reduction of fines. For example, these concern whether the emails extracted during dawn raids violate the fundamental right of inviolability of private communications, whether the rule per se constitutes a valid way of analysing absolute monopolistic practices or whether the Commission has the powers to investigate and sanction conduct that took place prior to its creation.

"The Commission has sufficient powers to issue its decisions, without the need to resort to any other authority. The Commission's decisions may be challenged through an *amparo* trial before specialised federal courts."

7 How is private cartel enforcement developing in your jurisdiction?

Mexican law does not provide for private enforcement against cartels. However, any person may report to the Commission facts that may be considered as absolute monopolistic practices, for it to initiate an investigation and, if applicable, sanction the economic agents that have participated in the commission of absolute monopolistic practices.

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However, once the Commission has sanctioned an absolute monopolistic practice, the persons who consider themselves affected may resort to the federal courts in order to claim damages for losses generated by these practices.

8 What developments do you see in antitrust compliance?

Almost 10 years after the current Federal Antitrust Law came into force, we have noticed that a greater number of companies are training their personnel in antitrust matters, so that they are aware of the risks incurred in the event of engaging in absolute monopolistic practices. We have also noticed that it is becoming increasingly important for companies to have the constant advice of antitrust law firms to evaluate, for example, the content of contracts or commercial practices, and to have compliance programmes that establish minimum guidelines for action, monitoring and even internal sanctions in the event of non-compliance with these programmes.

Furthermore, in accordance with compliance programme best practices, it is recommended to undertake regular audits of internal and commercial practices, to undertake evaluations on company employees as part of training on antitrust matters and even to conduct internal investigations based on the risk assessment carried out at the time of the designing of these programmes, in order to evaluate their effectiveness.

This development, we believe, was triggered by several factors, inter alia: (1) the criminal sanctions that can reach up to 10 years in prison and fines that can be imposed on cartel members, which can amount to up to 10 per cent of their income; (2) the Commission's powers of investigation; (3) the limitation on the applicability of *amparo* trial and the lack of suspension of the Commission's decisions; (4) in the case of companies belonging to multinational groups, the compliance obligations imposed by the holding; and (5) the possibility of sanction reduction taking into account the existence of compliance programmes.

The challenges that may be encountered when implementing and monitoring compliance programmes may be, inter alia: (1) resistance to change, due to the way in which the company has performed over the years in the market in which it participates; (2) lack of knowledge of the benefits of compliance or the damage of non-compliance with antitrust laws.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

We believe that there will be no changes in antitrust enforcement or legislation. However, it is desirable that the Commission and the

federal courts modify their approach that all absolute monopolistic practices should be sanctioned per se.

We believe that, at present, the necessary conditions exist so that, in certain cases (ie, when the conduct is not considered as a hardcore cartel) the Commission may apply the rule of reason when determining the unlawfulness of a conduct. However, it appears that neither the Commission nor the federal courts have considered changing the status quo.

However, it is interesting to observe that the Commission has approved joint ventures between direct competitors (like ATIs authorisations in the USA). After rule-off reason analysis, the Commission has authorised price-fixing of sale or purchase; restricting the production or purchase of goods; allocating customers or markets; and exchanging information with the object or effect of carrying out any of the above conduct. In this regard, there is a very important task to attend to.

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

As mentioned last year, the covid-19 pandemic prompted the competition authorities to issue regulations for the use of electronic media in various procedures, including those pertaining to investigative tools.

In addition, the Commission issued two statements that announced certain measures, which were unclear and confusing, and concerned allowing competitors to participate in collaboration agreements that, in the context of the sanitary contingency, were necessary to maintain or increase supply, satisfy demand, protect supply chains, avoid shortages or hoarding of goods. To date, the Commission has not published the results or benefits generated by the announced measures.

Likewise, the restrictions derived from the pandemic may have motivated the Commission to carry out fewer dawn raids and to focus on priority objectives for its investigations. Notwithstanding the foregoing, we do not believe that enforcement has been seriously affected.

Luis Alberto Aziz Checa
laa@azizkaye.com

Ismael Henestrosa Pérez
ihp@azizkaye.com

Agustín Aguilar López
aal@azizkaye.com

Aziz & Kaye Abogados, AC
Mexico City
www.azizkaye.com

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QUESTIONS

The Inside Track

What was the most interesting case you worked on recently?

The firm has participated and continues to participate in cartel investigations concerning various sectors of the national economy, such as the financial and banking sectors, air and land transportation, health, sports, highways and shopping malls, among others. Taking into account this circumstance, each case becomes interesting, since we must consider not only the legal aspects, but also the specific characteristics of each market.

Likewise, it is important to point out that one of the most interesting investigations in which we are currently participating concerns the banking sector. We hope that, due to the specific characteristics of the market and the conduct under investigation, changes will be made in the way of evaluating the lawfulness or unlawfulness of conduct that could be considered absolute monopolistic practices.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

We believe that, as mentioned above, the application of the per se rule in all cases should be modified and, instead, begin to analyse certain conduct that the Commission considers could constitute absolute monopolistic practices based on the rule of reason, which could avoid penalising conduct that may be beneficial to the final consumer.

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Portugal

Leyre Prieto became a TELLES partner in 2018, and is the executive partner of the European and competition law team in parallel with activity in the field entrepreneurship and technology, competition restrictive practices, abuse of dominant position, abuse of economic dependency, horizontal and vertical agreements and merger control proceedings between undertakings.

Leyre has a law degree from the Faculty of Law of UNED/Oviedo and in International & European Licence from the Université Paris 1, Panthéon-Sorbonne. She is a member of the Madrid Bar Association and the Portuguese Bar Association as well as a member of the ICC Competition Commission and another Competition Law organisations as Woman@Competition. Recently she was recognised as 'Lawyer of the Year – EU and Competition' in the 2022 *Iberian Lawyer* – Forty under 40 Award.

Joana Whyte is an associate at the European and competition law department of TELLES where she has been actively working with national and international clients on vertical and horizontal agreements.

Joana has a law degree from the Faculty of Law of the University of Coimbra, a master's degree in European Union Law from Minho University Law School and a post-graduation degree in contract and consumer law from the Faculty of Law of the University of Coimbra. Joana was a researcher at the Centre of Studies in European Union Law of Minho University, where she also lectured. Joana has been a speaker at several conferences and authored several articles in national and international publications on European law.

QUESTIONS

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

First of all, it should be noted that the Portuguese Competition Authority (PCA) has been very active in the investigation and prosecution of antitrust infringements in Portugal. In 2022, the PCA adopted five statements of objections, convicted 12 companies (fines in the total amount of €490 million), conducted six dawn raids and received eight leniency applications (the highest number in the history of the PCA).

Furthermore, the PCA is at the forefront of antitrust investigations particularly in areas that are not yet very developed in Europe, such as gun-jumping, hub-and-spoke and no poach agreements. In 2022, the PCA adopted a sanctioning decision regarding no poach agreements in the labour market, sanctioning 31 sports companies for participating in the 2019/2020 edition of the First and Second Football Leagues and the Portuguese Professional Football League for entering into a competition restrictive agreement preventing the recruitment by First and Second League Football Clubs of players who unilaterally terminated their employment contract invoking issues caused by the covid-19 pandemic.

The PCA has investigated companies in many different sectors of the economy, but the supply and food industry (major food retailers and their common suppliers) and the health and pharmaceutical Industries (medical devices, food supplements, clinical analysis, teleradiology services) have been under deep scrutiny for at least the past five years.

It should also be stressed that the PCA has been strengthening its toolbox to promote competition and facilitate the detection of

anticompetitive behaviour in digital markets. Investigating evidence of abuse in the digital environment is one of the PCA's priorities for 2023.

2 What do recent investigations in your jurisdiction teach us?

The most important lessons we learned from the latest PCA investigations are that: (1) the PCA keeps a watchful eye on all sectors of the economy; and (2) it is not focused in only one type of infringement.

Investigations can be opened by the PCA *ex officio* (eg, following a supervisory and monitoring procedure into the financial sector, in particular, an inquiry made to a number of digital technology-based companies in the financial sector, the PCA initiated *ex officio*

"The Portuguese Competition Act establishes a duty of collaboration that falls upon companies during investigations. The relationship between the PCA and the investigated companies during dawn raids is usually very cordial since both parties comprehend that collaborating is of their interest."

proceedings against the SIBS Group), or following a complaint, or the submission of a leniency application. As in the rest of Europe, in Portugal, new shareholders of a company or new members of the board of directors usually trigger an internal analysis process regarding compliance and when the results of the analysis present anticompetitive aspects, it is usual to resort to leniency applications regarding horizontal antitrust matters.

Two of the recently most relevant investigations started *ex officio*. One was against the SIBS Group, following a supervisory and monitoring procedure into the financial sector, in particular, an inquiry made to a number of digital technology-based companies in the financial sector. The other concerned the investigation regarding anticompetitive practices in the labour market, which started following two press releases of the Portuguese Professional Football League.

Usually, after opening an investigation, the PCA carries out unannounced inspections at the premises of the targeted companies. In 2022, the PCA carried out dawn raids in: (1) two entities in the health and pharmaceutical sector; (2) six entities in the health sector; (3) 14 entities in the project management software sector; and (4) one entity in the wood chips sector (October 2022, in cooperation with the CNMC).

The Portuguese Competition Act was amended in 2022. Broadly, the PCA's investigative powers have been strengthened. The powers of inquiry began being regulated autonomously. House searches have also become admissible when there is a well-founded suspicion of the existence of evidence of abuse of economic dependency.

However, the much discussed issue of the admissibility of seizing email messages remains open. The new regime only enshrines the possibility for the PCA to inspect any records relating to the company, 'regardless of the medium on which they are stored' and to 'access

any information accessible to the inspected entity'. Moreover, the PCA is now able to continue the search in its own facilities.

The Portuguese Competition Act establishes a duty of collaboration that falls upon companies during investigations. The relationship between the PCA and the investigated companies during dawn raids is usually very cordial since both parties comprehend that collaborating is of their interest.

The parties must cooperate with the PCA in the investigation of a cartel under the leniency programme. In that case, the companies benefit from immunity or reduction of the fine in administrative proceedings for infringement of competition rules, which can reach up to 10 per cent of the turnover. Companies' managers and directors involved (who can be sentenced up to 10 per cent of their annual remuneration) may benefit from this immunity or reduction of the fine as well.

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The parties must also collaborate with the PCA under the settlement procedure. Normally, when a company agrees to settle the case, it acknowledges its liability in the practice in question, puts an end on it and waives litigating in court on the facts.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

In 2022, the PCA received eight leniency applications, the highest number in its history. This shows that companies are looking at this tool as a resource that can be very important and beneficial for them.

The first challenge for companies is to take the risk of being the first (or not) to apply to the leniency program. Also, before applying they must consider what the consequences will be for them in the market and what the reputational costs among competitors, suppliers and clients can be. This is a very important point in the Portuguese jurisdiction considering that the PCA frequently communicates its investigations and its outcome on its website. In general, the Portuguese public is increasingly aware to the PCA's activity.

Additionally, clients must bear in mind that, after submitting the leniency application (and in order to benefit from immunity), they must cooperate fully and continuously with the investigation.

The leniency programme enables the PCA to detect and dismantle cartels that would otherwise not be identified. It is an efficient incentive to the detection of forbidden competitive practices by the companies involved. In particular, it provides a special regime for the immunity from (or reduction of) the fine in cartel cases investigated by the PCA.

The first company to report a cartel in which it is involved, putting an immediate end to its participation, may benefit from immunity from

"To benefit from the leniency programme, clients can simply contact the PCA by email or by phone using the Leniency Line. All the information and documentation provided is confidential."

the fine. Apart from exposing it, this company cannot be responsible for coercing other companies to participate in the cartel and must cooperate with the PCA throughout the investigation.

Subsequent companies may benefit from a progressively smaller reduction of the fine, provided that their involvement also ceases. In addition, they must provide the PCA with all the information and evidence that proves the existence of a cartel, thus contributing to a faster investigation.

To benefit from the leniency programme, clients can simply contact the PCA by email or by phone using the Leniency Line. All the information and documentation provided is confidential.

In 2022, leniency applications reached a record number of eight in Portugal.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

The use of the settlement procedure is an effective tool to simplify and speed up proceedings while sanctioning the companies that commit competition infringements.

Companies should consider that, under the settlement procedure, they acknowledge their responsibility in the infringements (putting an end on it) and, therefore, benefit from a reduction in the total fine imposed.

Also, this option is relevant in terms of private enforcement against the companies.

The main challenge is to find the amount that is comfortable for all parties.

5 Tell us about the authority's most important decisions over the year. What made them so significant?

The most significant decision adopted by the PCA in 2022 was the sanctioning decision of 31 sports companies and the Portuguese Professional Football League for entering into no poach agreements during the covid-19 pandemic.

This was not the most significant fine, but it was the first time the PCA adopted a decision regarding anticompetitive behaviours in the labour market. Furthermore, this is a relatively recent subject in Europe; only a very limited number of European Union countries adopted sanctioning decisions regarding these anticompetitive practices. The PCA has also published an Issues Paper and a Best Practices Guide in Preventing Anticompetitive Agreements in the Labour Market.

The PCA has put this subject in its priorities for 2023, thus it is highly likely that investigations in the labour market will increase in 2023. Therefore, the human resources departments of companies of all sectors of the economy should be alert to this type of practice and refrain from adopting hiring or wage setting policies that involve agreements with other companies.

The supply and food industry (major food retailers and their common suppliers) and the health and pharmaceutical industries (medical devices, food supplements, clinical analysis, teleradiology services) must be referred as having been under deep scrutiny and were the target of the most important decisions over the year in terms of the amount of the fines, not only in absolute terms for the sector but also for the Portuguese economy (the liquid margin of the sector was around 5 per cent).

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6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The PCA is the independent administrative body that is in charge of competition enforcement in Portugal, therefore it has both investigative and sanctioning powers. The decisions handed down by the PCA are subject to appeal to the Competition, Regulation and Supervision Court (the Competition Court), which has full jurisdiction in competition matters.

The Lisbon Court of Appeal is the competent court to hear the appeals filed against rulings handed down by the Competition Court. The last instance of appeal is the Supreme Court of Justice; however, this Court can only assess issues of law.

There are currently several appeals pending before both the Competition Court and the Lisbon Court of Appeal.

7 How is private cartel enforcement developing in your jurisdiction?

Currently, in Portugal, there is only one ongoing private enforcement case following the sanctioning of a company by the PCA that allegedly participated in a cartel. This case is still being discussed in court which is why it is still not possible to ascertain how this law will be applied by the Portuguese courts.

However, it is highly likely that other private enforcement cases will appear in the near future for two reasons: (1) the high number of relevant sanctions imposed by the PCA; and (2) the existence of an association that has filed several class actions demanding very high levels of compensation.

8 What developments do you see in antitrust compliance?

According to a Eurobarometer study from 2022, Portuguese citizens are the EU citizens who are most aware of the importance of competition. This can probably be justified by the wide publicity that has been given to the PCA's investigations and sanctioning decisions. The fines applied by the PCA are usually extremely high for Portuguese standards, especially when compared to the decisions adopted by other independent administrative authorities.

Although there is no statutory requirement to adopt compliance measures, Clients are increasingly aware of the importance of adopting compliance programmes and providing training to their teams.

Companies are aware that the adoption of compliance programmes is the most effective preventive measure they can adopt. It is the

"The fines applied by the PCA are usually extremely high for Portuguese standards, especially when compared to the decisions adopted by other independent administrative authorities."

most effective way for a company to guarantee that its teams are adopting compliant attitudes towards the market, and also, it is a very important tool to detect antitrust violations and act accordingly.

Most of our clients conduct regular internal investigations and audits, have already adopted compliance programmes and provide regular compliance training to their workers. A few years ago, the greatest difficulty was to demonstrate that the adoption of compliance programmes and compliant behaviours did not prevent the normal and efficient functioning of companies; on the contrary, they are cost-effective, and they proactively protect the company from both financial and reputational harm.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

In its policy priorities for 2023 the PCA stated that it wants to contribute to inclusive and sustainable economic growth. Cartel enforcement is still one of the PCA's priorities; the PCA states that 'cartels are still the most serious infringement of competition, causing harm to consumers'.

After the entry into force of Law 17/2022, from 17 August 2022, which transposed 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, the PCA had its enforcement powers strengthened.

In our opinion, cartel enforcement is most likely to have a particular focus in the digital environment since this is one of the PCA's top priorities for 2023.

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10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

The covid-19 pandemic did not decelerate the PCA's enforcement activity. On the contrary, the PCA not only continued its 'business as usual' activity, but also launched investigations and sanctioned companies for engaging in anticompetitive conduct during and because of the pandemic.

In 2020, the PCA issued guidance aimed at three business associations in the pharmaceutical and financial sectors (the National Association of Pharmacies, Portuguese Banking Association and Association of Specialized Credit Institutions), in the context of the covid-19 pandemic, reaffirming the need to apply competition rules to the benefit of companies, consumers and the economy.

Also in 2020, the PCA began an *ex officio* investigation into anticompetitive practices by 31 sports companies and the Portuguese

Professional Football League for entering into a competition-restrictive agreement preventing the recruitment by First and Second League Football Clubs of players who unilaterally terminated their employment contract invoking issues caused by the covid-19 pandemic (ie, a no poach agreement). The sanctioning decision, which was adopted in 2022, resulted in a total fine of circa €11.3 million.

In December 2022, the PCA issued a statement of objections against a business association and seven of the main laboratory groups operating in Portugal for their involvement in a cartel in the provision of clinical analyses and covid-19 tests.

The pandemic accentuated and accelerated the digitalisation of the economy. In this context, in 2020 the PCA created its digital team, pooling expertise from different departments and achieving significant results. The investigation of evidence of abuse and collusion in the digital environment, in close cooperation with other European authorities, is one of the PCA's priorities for 2023.

A curiosity regarding covid-19 and the PCA's activity is that this entity has levelled price-fixing, market-sharing, and no poach accusations at seven of the country's largest medical laboratories and a national lab association over the provision of covid-19 tests.

"The pandemic accentuated and accelerated the digitalisation of the economy. In this context, in 2020 the PCA created its digital team, pooling expertise from different departments and achieving significant results."

Leyre Prieto
l.prieto@telles.pt

Joana Whyte
j.whyte@telles.pt

TELLES Advogados
Oporto and Lisbon
www.telles.pt/en

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QUESTIONS

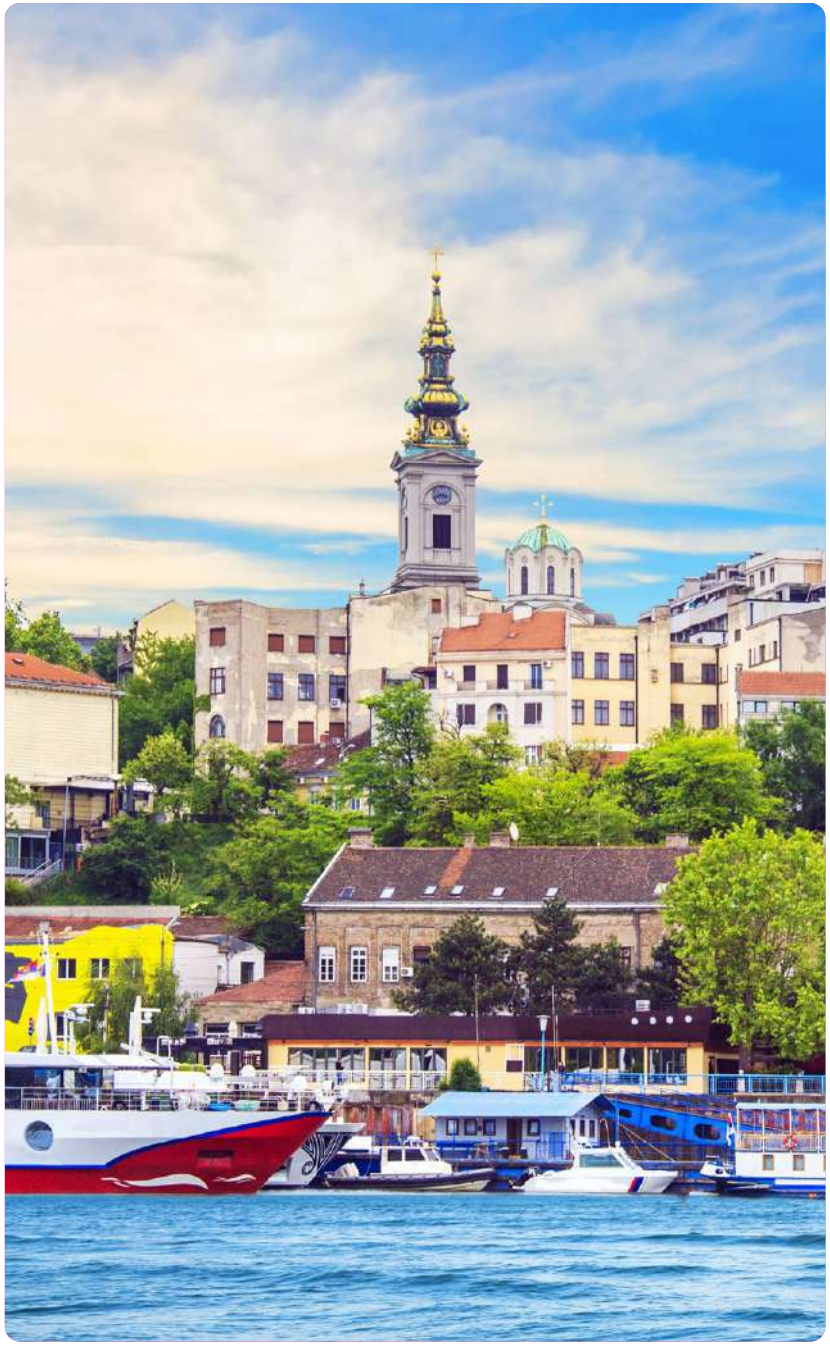
The Inside Track

What was the most interesting case you worked on recently?

It is very difficult to choose only one! From all the interesting cases we worked on, we can highlight four: (1) a case regarding the supply and food industry related to an investigation of a supplier who allegedly interfered in pricing and other commercial conditions practised by its independent distributors who purchased their products for resale in the HORECA channel (we followed this case from its very beginning (dawn raids) to the ongoing appeal that is under discussion at the Lisbon Court of Appeal (a preliminary ruling is also pending before the European Court of Justice)); (2) a hub-and-spoke case also in this sector; (3) a unique private enforcement action (both still under discussion); and (4) a leniency case under investigation involving players from various jurisdictions.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

The appeal regime must be reviewed and updated, much has changed in Portugal and Europe in the public enforcement of competition law in recent years and the current appeal regime remained bureaucratic and outdated. Furthermore, it is of paramount importance to recognise that, regarding competition law, the fair application of the law does not rely only in legal professionals, but also economists. The current legal regime does not provide for the assistance of experienced economists who can advise the judges in the economic analysis of the cases in the courts.



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SEE Overview

Srđana Petronijević heads Schoenherr's competition and corporate investigations and crisis management practices. She has been involved in numerous high-profile multi-jurisdictional merger control proceedings before the competition authorities particularly in the former republics of Yugoslavia. In addition, she advises clients on all aspects of antitrust law, including infringement proceedings with respect to alleged anticompetitive practices providing full coverage in Serbia, Bosnia and Herzegovina, Montenegro, North Macedonia, Croatia and Albania. She has designed a number of compliance programmes for the firm's larger corporate clients, tailor-made to their individual needs. Her long-standing clients include world-renowned companies.

Zoran Šoljaga is focused on competition and anti-trust matters in Serbia and the wider region. Before joining Schoenherr, Zoran worked for seven years as a senior legal adviser at the Serbian Commission for the Protection of Competition. During his time in the Competition Authority in Serbia, he worked on competition cases involving companies in energy, food production and retail, telecommunications, transport, pharmaceutical, public services and other relevant industries, with respect to restrictive agreements, bid rigging, abuse of dominant position and merger control proceedings. At Schoenherr, he has represented clients in proceedings before Serbian and other competition authorities in the region and advised clients on various complex competition, antitrust and state aid matters.

QUESTIONS

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

Similar to previous years, 2022 showed no major increase in the number of decisions on cartels and other restrictive agreements in the Southeast Europe (SEE) Region (the Region). According to the enforcement record, the Serbian competition authority remains the most active one, whereas the authorities in Montenegro, Croatia, North Macedonia and Albania rendered a few decisions and conducted a few investigations over the past year as well.

To begin with, a significant investigation took place in Serbia, ending up with a fine of €450,000 being imposed on companies in the hazardous waste management market for forming a consortium to participate in a public procurement procedure.

The Serbian Commission has also issued a decision in the *SF1 Coffee* case, which was initiated in 2020, imposing a fine of €53,000 for resale price maintenance regarding Nespresso coffee machines. The Commission found that, during regular and promotional sales, the company, which operates as a wholesaler and retailer, was contracting and enforcing a business strategy maintaining resale prices of coffee machines that were equal to its own retail prices. The fine makes up 2 per cent of the company's annual turnover in Serbia.

As for the new proceedings, the focus, the same as in previous years, has stayed on RPM. In September, the Commission initiated proceedings against Apcom CE from Hungary and Apcom Distribution Belgrade, distributors of Apple products in Serbia. The Commission analysed the market for Apple products in Serbia and found that the retail prices of these products in Serbia are the same regardless of whether the retailers are certified Apple resellers or not, as well as regardless of whether the products are sold online or in brick-and-mortar stores. Therefore, according to the Commission's preliminary views, the prices of these products (including watches, computers and mobile phones) were unified on the market in Serbia, and notably higher than the prices of the same products in certain neighbouring countries – Slovenia, Bulgaria, Croatia, Hungary, Romania and Macedonia. According to the Commission, these conclusions led to a reasonable belief that Apcom had performed competition violation practices by fixing resale prices for Apple products. Proceedings were also initiated against Polet keramika, an undertaking active in the wholesale market for ceramic tiles, upon finding that certain provisions of its sales contracts – regarding recommended sales prices and certain rebates that incentivise the buyers to comply with those recommended prices – might constitute RPM.

> "According to the enforcement record, the Serbian competition authority remains the most active one, whereas the authorities in Montenegro, Croatia, North Macedonia and Albania rendered a few decisions."

The Croatian authority was traditionally not very active in detecting cartels and other types of restrictive agreements in 2022, but did render one decision, detecting a bid rigging cartel. The cartel involved several undertakings who colluded in a public procurement procedure carried out by an institution providing soup kitchen services in Zagreb.

In Montenegro, the Agency for Protection of Competition opened two antitrust cases in 2022. First, the Agency instituted proceedings in order to determine whether two companies active on the Montenegrin petrol market colluded regarding liquefied natural gas prices. The proceedings are still ongoing. In the second case, which was initiated in April and decided in December, the Agency found that the Montenegrin Chamber of Veterinarians conducted RPM on the relevant market by passing a price list of minimum prices of veterinary services in 2014.

The competition authority in North Macedonia rendered only one antitrust decision, where it found that a franchise agreement represented a restrictive agreement in the sense of antitrust law, as the franchisor conditioned the conclusion of the agreement with acceptance of multiple provisions that were not related to the subject of the agreement. However, the Commission decided not to impose any fines on the franchisor, since it did not generate any turnover in the relevant financial year.

As for the Bosnian Competition Council, it has rendered several decisions and conclusions regarding antitrust, most of them being on the basis of a private complaint rather than *ex officio*. In one quite peculiar case, the Council found that Raiffeisen bank violated antitrust provisions by blocking an account of a company involved in cryptocurrency trading. While the bank noted that it acted within its powers to block a transaction that it found suspicious, the Council found that termination of the contract agreement, and the consequential disabling of the client's account, represents a restrictive agreement in the sense of antitrust provisions. The decision is ambiguous, to say the least, as it remains unclear how a one-sided decision of a party to terminate a contract for provision of services can represent a prohibited restrictive agreement, with it being arguable whether this factual situation even falls within the scope of competition law.

The Albanian Competition Commission opened several investigations in 2022, into the market for diesel and gasoline and the retail, wholesale and production market for cement and concrete. The authority has also initiated proceedings against multiple undertakings in the market for production, import and wholesale of vegetable oil, which resulted in recommendations of certain market behaviour. Finally, the Commission imposed fines on three undertakings for RPM and creation of competitive disadvantage between trading parties, as well as ordered monitoring of the market for certain chemical fertilisers.

As for the competition authorities in Kosovo, it had no significant activity in this field in the past year.

2 What do recent investigations in your jurisdiction teach us?

Whereas leniency programmes have not taken off in the countries in the Region, the antitrust authorities use different ways to find out about potential illegal arrangements between undertakings, primarily through sectoral inquiries. The Serbian antitrust authority continues to initiate proceedings based on market research, especially online research of the parties' websites. Along with the last year's *Roaming Electronics* and *Comtrade* cases, the *Apcom* case initiated in 2022 as well as *Vaillant* case, which was opened in the first months of 2023, were all based on the same method – researching of the product prices available on the parties' websites and online platforms. Sectoral inquiries also remain a useful tool in initiating proceedings; a sectoral inquiry of the market for ceramic tiles and sanitary ware preceded the above-mentioned initiated proceedings against Polet keramika, as well as an investigation of alleged abuse of dominance by Glovo in the market for food delivery apps. Moreover, the Serbian Commission concluded four new sectoral inquiries over the course of 2022, which might be an indicator of upcoming antitrust investigations. It is noteworthy that the Croatian authority had a similar point of interest, as it concluded a sectoral inquiry in the market for food delivery apps as well in 2022.

In contrast, the Bosnian Competition Council mostly acts on the basis of private complaints, and rarely initiates proceedings *ex officio*. As mentioned, this was the case in 2022 as well.

The Montenegrin Agency for Protection of Competition appears to be more active than in the previous period. Similar to the Serbian authority, the Agency in Montenegro also frequently uses market inquires in determining potential issues.

As for collecting evidence, the Serbian authority regularly implements dawn raids. In almost all cases, the Commission makes forensic

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copies of computers and reviews and seizes a large amount of electronic documentation. In other countries, dawn raids are not used as much, and the proceedings are triggered most often by complaints. Earlier in 2022, the Bosnian Competition Council published an official Dawn Raid Guidance, which might indicate an eagerness to utilise this method more in the future. Also, the Croatian authority has performed dawn raids in order to collect evidence in its bid rigging cartel case.

In the Region, communication between antitrust authorities and parties in the proceedings is mostly written and formal, with the exception of certain submissions that can be done via email. There are rarely any direct meetings or discussions with the parties or their representatives. The parties in reality have limited opportunities to exchange opinions with case handlers and gain a better understanding of investigation and its aim, as well as concerns of the competition authority. More accessibility remains a desire in this regard, as it would greatly improve legal certainty, effective and efficient cooperation and the overall transparency of the process.

"All of the countries in the Region have included leniency systems based on the EU model in their legislation. However, there have been no significant developments or practical results in this regard since the initial introduction of the system."

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

All of the countries in the Region have included leniency systems based on the EU model in their legislation. However, there have been no significant developments or practical results in this regard since the initial introduction of the system. In 2022, there were no legislative revisions or other activities that could influence the development and application of leniency.

To date, there are almost no cases whatsoever that have been initiated via a leniency application and finalised with an infringement decision. Moreover, the one case that has been opened and decided by the Serbian Commission on the basis of a leniency application, which concerned bid rigging in the market for printing equipment (*Konica Minolta*) has ultimately been overturned by the Administrative Court of Serbia. The Court found that the Serbian Commission did not substantially prove infringement by Konica Minolta and its distributors.

The Serbian Commission recently organised numerous advocacy activities where a leniency programme, among other topics, was discussed and promoted. We believe that this type of promotion, along with a steady and accurate enforcement record, represents a suitable way to bring parties closer to the idea of reporting competition infringements in exchange for immunity.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

Practically, the only means for a party to speed up the decision-making process (as well as contribute to a reduction of the fine) is to fully cooperate with the respective authority.

As for the settlement procedure in the sense of the EU rules, with the exception of Croatia, it has not been introduced anywhere in the Region.

There is an option for a party to propose commitments that it is ready to voluntarily undertake in order to remedy possible infringements, which, if accepted by the authority, lead to termination of proceedings. However, this mechanism is usually not suitable for cartels and hardcore restrictions such as RPM. In Serbia, this has been voiced in an official opinion issued by the Commission, where it states that proceedings related to restrictive agreements cannot be terminated on the basis of offered commitments.

For the sake of efficiency, we find it necessary for the competition legislation in the Region to introduce formal instruments similar to settlement procedure. Without these tools, proceedings before competition authorities often take years, which has multiple negative effects on the parties, burdens the authorities and could even ultimately defy the purpose of the process.

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5 Tell us about the authority's most important decisions over the year. What made them so significant?

Within the Region, we would opt to highlight the above-mentioned decision of Serbian Commission regarding a consortium formed in a public procurement procedure, as it resulted in a major fine for the involved entities. Namely, in this case, five companies – MITECO Kneževac, Yunirisk, Modekolo, Brem and Kemeko – formed a consortium in order to submit a joint offer in the public procurement procedure announced by the Ministry of the Environment for the disposal of hazardous waste produced by Magnohrom d.o.o. The investigation was launched *ex officio*, and the Commission conducted a dawn raid and seized and copied electronic correspondence and other documentation related to the formation of the consortium.

The Commission found that the consortium restricted competition, because the members could form two, instead of one, groups of bidders. A key piece of evidence showing that a restrictive agreement

"Almost all competition authorities in the region both investigate infringements and issue decisions, as well as impose fines, independently."

existed is that the members divided the profit into five equal parts, even though not all members had the same costs related to the implementation of the public procurement contract. According to the decision, two participants did not incur any expenses and did not participate in the implementation of the public procurement contract, thus, their participation in the consortium was not necessary.

The Commission did not accept the consortium members' claims that they could not submit an offer independently and that it was necessary to form a consortium, nor their arguments that the consortium did not lead to negative effects (eg, consortium members pointed out that the offered price was 17 per cent lower than the planned budget for the service in question). The Commission stated that it did not examine whether each member of the consortium could have participated independently, but whether two competing groups of bidders could have been formed from the existing consortium. The Commission took the position that this consortium represents a cartel agreement and that its effects do not need to be analysed.

Aside from this decision, as already mentioned above, the Serbian Commission initiated two more proceedings and method-wise seems to stay alert for pricing data available online.

Furthermore, public procurement was a topic of interest for the Croatian authority as well, as it has for the first time ever detected a bid rigging cartel. In April 2022, the Agency fined four undertakings a total amount of almost €300,000 for concluding a prohibited horizontal agreement in the public procurement procedure covering 14 groups of food products for the public purchaser – an institution covering soup kitchen services. The agreement in question was a four-year frame agreement that was, according to the Agency's findings, concluded with the objective of fixing and coordinating the prices in the respective bids and colluding on the allocation of individual contracts with the view to create a designated winning bidder in the procedure.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

Almost all competition authorities in the region both investigate infringements and issue decisions, as well as impose fines, independently. There is a peculiarity when it comes to the regime in Montenegro, as the Agency for Protection of Competition only has the jurisdiction to determine a competition infringement. Once it has done so, the Agency refers the case to a misdemeanour court, which conducts the further proceedings and decides on the fine.

Nevertheless, all authorities are entirely independent in decision-making. They are not obliged to coordinate with any other body or gain any approvals before making a first-instance decision. The North Macedonian system is specific, however, for having two bodies within the competition authority, one that conducts administrative procedure and one in charge of misdemeanour matters.

The decisions of all authorities in the Region are subject to judicial review before administrative courts. Administrative courts generally rule in limited jurisdiction, where if the petitioner's request is accepted, the court merely declares the challenged decision invalid and returns the case back to the competent body (in this case, the competition authority). Additionally, administrative courts are also entitled to rule in full jurisdiction (ie, decide on the issue itself and render a judgment that entirely replaces the initial decision of a competition authority). However, according to data available, there were no instances of administrative courts deciding in full jurisdiction on competition authorities' acts.

Due to the complexity of competition law issues, courts usually focus on procedural matters and review whether the parties' rights were ensured and respected during the proceedings before the competition

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authority. As mentioned, if the request is accepted by court, the case will be returned to the competition authority, which will then be obliged to comply with the instructions and position taken in the judgment by the court. Even though useful, this method of judicial review inevitably prolongs the process of finally resolving the matter.

Finally, the decisions of administrative courts can in principle be challenged with an extraordinary legal remedy before the highest courts, in specific situations and for specific reasons.

In 2022, the above-mentioned decision of the Croatian Agency regarding the bid rigging cartel was subject to review before the High Administrative Court of the Republic of Croatia, which rejected the claim for cancellation of the decision, the proposed postponement of the claim and the imposition of an interim measure, making the decision definitely legally valid.

"The area of private cartel enforcement is still a blur in the Region. The only country that has implemented the EU Directive 2014/14 in its legislation is Croatia, as an EU member. Other countries do not regulate private enforcement within their respective competition laws."

7 How is private cartel enforcement developing in your jurisdiction?

The area of private cartel enforcement is still a blur in the Region. The only country that has implemented the EU Directive 2014/14 in its legislation is Croatia, as an EU member. Other countries do not regulate private enforcement within their respective competition laws.

Parties that suffered damage as a result of a cartel (or any competition infringement for that matter) can initiate actions before courts under general regulations on obligations and compensation for damage. However, according to the available information, there have been no successful damages claims so far.

Regulating private enforcement in line with the EU Directive is, of course, the first necessary step for this mechanism to function in the Region; however, what is almost equally important is the authorities' enforcement record. Due to the particularities of the judicial review system, once introduced, private enforcement will probably be off to a slow start when it comes to enabling effective protection of the parties' interests. In addition to time concerns, one of the main challenges that private enforcement could face in the Region is the fact that the courts are not experienced or prepared to deal with complex competition issues, often mostly of an economic nature, especially when it comes to determining amount of damages incurred by competition infringements.

8 What developments do you see in antitrust compliance?

The development of compliance culture keeps a steady pace, especially in Serbia. Even though the global situation is quieting down after the pandemic, clients are increasingly requesting internal audit,

policy analysis and, traditionally, compliance training. In 2022, we provided various training to our clients, which resulted in numerous inquiries and even internal antitrust investigations.

As for the authorities, the Serbian Commission has shown significant activity in this regard. After issuing the Guidelines for Drafting Competition Compliance Programme in 2021, the Commission worked on promoting these Guidelines and additionally published the Model Compliance Programme, envisioned as a starting point for businesses in the process of creating their own programmes and staying compliant with the competition law provisions. Along with the Guidelines, the Model will surely prove useful especially for SMEs with limited capacities to develop original compliance programmes. The approach of the Serbian Commission when it comes to the compliance programme is definitely something other authorities in the Region should aim to follow.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

There are definitely new laws and regulations before us.

Kosovo introduced its new Protection of Competition Act in June 2022, supplementing and aligning its competition regime with several EU acts. The most striking changes in the Act concern merger control thresholds. Other than that, the Act specifies groups of agreements that are excluded from the general prohibition of restrictive agreements as well as agreements of minor importance.

The Bosnian Competition Council has been working on amendments to the Competition Act. These aim to align the country's competition regime with EU rules. There is no precise information as to when the

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amendments will come into force, but a shift forward has definitely occurred in comparison to the year before.

The new Protection of Competition Act in Serbia is still pending, with little to no information on its development and enactment date.

Competition regimes in the Region are mostly based on EU law. In line with the provisions of Stabilisation and Association agreements, the authorities and legislators tend to monitor the changes in EU rules and harmonise local provisions accordingly. Therefore, changes could be expected in line with the new Vertical Block Exemption Regulation, as well as the upcoming revisions of the Horizontal Block Exemption Regulation. If the countries end up not harmonising their competition regimes, it remains to be seen whether the EU rules will be followed in line with the Stabilisation and Association Agreements or not, as well as how undertakings will overcome the challenge of having to adapt their own systems and market behaviour to different local rules in the Region.

QUESTIONS

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

The pandemic has not significantly affected the work of competition authorities in the Region. There was an initial slowdown in operations at the beginning of the covid-19 pandemic, but shortly after the first wave the authorities adapted to the circumstances and continued to function as usual, even conducting dawn raids.

Notably and naturally, the pandemic has affected the development of e-commerce in the Region. This shifted the authorities' focus to these practices, which led them to frequently *ex officio* investigate potential competition infringements in the e-commerce sector, especially RPM.

"The pandemic has not significantly affected the work of competition authorities in the Region. There was an initial slowdown in operations at the beginning of the covid-19 pandemic, but shortly after the first wave the authorities adapted to the circumstances and continued to function as usual, even conducting dawn raids."

Srđana Petronijević
s.petronijevic@schoenherr.rs

Zoran Šoljaga
z.soljaga@schoenherr.rs

Moravčević, Vojnović i partneri AOD Beograd in cooperation with Schoenherr
Belgrade
www.schoenherr.rs

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What was the most interesting case you worked on recently?

We often advise clients on the path to applying for and obtaining individual exemptions to restrictive agreements in Serbia, since the Serbian competition regime still includes this type of exemption system. In 2022, we worked on a complex risk analysis and application for individual exemption of a *bancassurance cooperation* – an agreement on cooperation in insurance. It was the first such agreement to be reviewed by the Serbian Commission. The individual exemption was ultimately granted.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

It is definitely necessary for authorities in the Region to follow EU practice as much as possible, as well as applying the criteria used by the EU institutions. This is not only generally useful, but is also a requirement under the respective Stabilisation and Association agreements with the EU. Also, we would point to the need for authorities to provide further elaborations and analysis in their decisions, in order to allow the undertakings in the market to get acquainted with the authorities' stance on certain business practices, all in the interest of legal certainty. Finally, relevant changes should be introduced in order to strengthen the capacity of the courts in the Region to render decisions in antitrust cases.

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Switzerland

Professor Dr Patrick L Krauskopf is professor for competition law at the Zurich University ZHAW, chair of both AGON Partners Legal AG and Public Affairs AG and member of Switzerland's Communication Commission. He is the chair of the Litigation PR Conference. Previously, the deputy director and then the chief of international affairs with the Swiss Competition Commission (COMCO). He studied at the Universities of Fribourg and Berkeley (master's, 1991; PhD, 1999) and at Harvard Law School (LLM, 2005). He is admitted to all Swiss courts as well as in New York.

Dr Markus Wyssling is managing partner with AGON's Partners Legal AG and CEO at Swiss Legal Tech Solutions. He was deputy head of the construction section and deputy head of the legal section at the Swiss Competition Commission. Markus has extensive experience in conducting investigations. As International Competition Network coordinator, he regularly represented the interests of the authorities at an international level. He studied at the Universities of Fribourg (master's, 2002; PhD, 2020) and at the University of Salamanca (diploma in Hispanic studies). He is admitted to all Swiss courts.

Professor Dr Blaise Carron is professor for contract law and legal methodology at the University of Neuchâtel, of counsel at AGON Partners Legal AG, an independent arbitrator, a member of the Arbitration Court of the Swiss Arbitration Centre and a certified specialist SBA. Previously, he was, inter alia, a lawyer with the Swiss Competition Commission, a senior associate in a commercial law firm and the dean of the University of Neuchâtel Law School (2018–2020). He studied at the Universities of Fribourg and Tübingen (master's, 1999; PhD, 2003) and at Harvard Law School (LLM, 2002).

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1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

The most recent investigations that the Swiss Competition Commission (COMCO) has opened include two possible infringements in the pharmaceutical sector as well as a possible infringement in the banking sector:

In September 2022, COMCO opened an investigation against a Swiss pharmaceutical company. The company allegedly tried to protect its own product for treatment of skin diseases against competing products by initiating legal proceedings based on one of its patents. The investigation is intended to clarify whether the company used blocking patents and by doing so abused an alleged dominant market position.

The other investigation in the pharmaceutical sector, which COMCO opened in August 2022, concerns an alleged abuse of relative market power. A pharmaceutical company refused to supply its products to a Swiss distributor at the more favuorable conditions to other distributors outside Switzerland. If COMCO deems that the company has a relative market power vis-à-vis the distributor, the refusal may constitute a breach of the antitrust law.

The pharmaceutical sector has already been in the focus of COMCO in the past, leading to one of the more prominent federal supreme court decisions (*Pfizer – price recommendations*) in the field of antitrust law in Switzerland in recent times.

In December 2022, COMCO opened a preliminary investigation against several banking institutions. The aim of the procedure is to clarify whether the exchange of information on salaries and


Patrick L Krauskopf


Markus Wyssling


Blaise Carron

"At present, many cartel investigations are triggered by leniency applications."

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"The authorities regularly conduct interviews with the parties and witnesses to achieve a better understanding of the facts in less time."

salary components of various categories of employees breaches antitrust law.

Even though the banking sector has already been in the focus of COMCO in the past (namely regarding the manipulation of reference interest rates in trading with interest rate derivatives), this recent preliminary investigation is the first of its kind as it is the first time that COMCO is investigating possible unlawful agreements on the job market. The exchange of information on the salaries of different categories of employees may fall within the scope of application of the Swiss Cartel Act as they do not represent the result of negotiations between the social partners.

Apart from the pharmaceutical and the banking sectors, the area of public procurement continues to be under scrutiny, COMCO having made yet again a decision in 2022 concerning a cartel in this area.

Finally, it is worth noting that in its 2021 yearly report and at its annual 2022 press conference COMCO has signaled that it will be more active in the digital markets in the future. The COMCO intends to prioritise cases that have a particular domestic connection. However, COMCO intends to closely follow procedures against big tech companies outside Switzerland by their sister agencies in order to ensure the application of the same EU standards in Switzerland if necessary.

2 What do recent investigations in your jurisdiction teach us?

Investigations concerning an alleged abuse of a dominant market position are regularly triggered by a report of the party concerned, while cartel investigations are not only triggered by reports but regularly by a leniency application from a cartel insider.

In cases that lead to a potential sanction, the competition authorities conduct searches of premises as standard procedure. In parallel to

these searches, the authorities regularly conduct interviews with the parties and witnesses to achieve a better understanding of the facts in less time. The authorities have significantly strengthened their know-how in interrogations. In many public procurement cases, the competition authorities also rely on economic evidence. The authorities analyse the data entered in procurement procedures using two analytical tools, the coefficient of variation and the relative distance measure. With these tools, it is possible to determine a sufficient initial suspicion for submission cartels and to initiate investigations.

In cases that may result in sanctions for companies, the approach of the competition authorities has become very similar to the investigations of public prosecutors. Having demonstrated that they are willing and able to take cases all the way to the Federal Supreme Court, the competition authorities have recently shown an increased willingness to conclude such proceedings in a consensual manner. The amicable settlement of cases usually results in a shorter duration of proceedings and relieves the authorities' resources.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

The leniency system is well-established, and, at present, many cartel investigations are triggered by leniency applications.

Before applying for leniency, a company should take into consideration that only the first leniency applicant can profit from full immunity. It is important that a leniency applicant knows that it has to cooperate proactively and continuously throughout the whole investigation and significantly contribute to the successful opening or conclusion of an investigation. The second leniency applicant can profit from a maximum reduction of 50 per cent of the sanction. Paradoxically, a

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second leniency applicant which reports an additional cartel to be investigated in a separate proceeding benefit from a larger reduction of the sanction (up to 80 per cent). In the subsequently opened proceedings, the leniency applicant can again obtain full immunity.

It is worth filing a leniency application at an early stage of a procedure, as it becomes increasingly difficult over time to contribute substantially to the success of the proceedings and therefore to benefit from a reduction in sanctions.

A leniency applicant must be aware that gathering evidence and interviewing staff internally requires a significant amount of work and entails corresponding costs.

Since the authorities must maintain official and professional secrecy and treat leniency applications with the utmost confidentiality, the identity of the leniency applicant will not be revealed. However, from the context of published decisions, often it can be deduced which companies, if any, have submitted a leniency application.

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4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

To speed up decision-making, COMCO creates important incentives to reach a settlement. Usually, COMCO will:

- abstain from carrying out an extensive investigation of the facts and from undertaking a comprehensive legal assessment of the accusations;
- only make a summary description of the facts and the legal assessment;
- consider the signing of an amicable settlement as constituting a mitigating factor when calculating the fines;
- refrain from disclosing the individual sanction calculations; and
- not ask parties to acknowledge the description of the facts or the legal assessment. If they do acknowledge the facts, however, the authorities will usually take this into account in order to reduce the sanction.

COMCO has gained solid experience in conducting settlement procedures. At the very beginning of the settlement procedure, the parties and COMCO itself sign a framework agreement. A template of such an agreement was officially made public in early March 2018 and provides legal certainty both to the parties and COMCO.

The attractiveness of settlements with COMCO continues to increase. COMCO has shown that is also willing to take into account private compensations paid by defendants to victims of an infringement and to deduct part of that compensation payment (up to 50 per cent) from the original amount of the sanction. From a purely legal point of view, the disadvantage of consensual settlements is that no court has passed judgement on the facts. This means that the consensual

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settlement increases legal certainty between the parties involved, but not necessarily for the other market participants.

5 Tell us about the authority's most important decisions over the year. What made them so significant?

COMCO fined BERAG over 1.5 million Swiss francs and 11 shareholders a total of over 400,000 Swiss francs. Some of the parties agreed to an amicable settlement of the proceedings. BERAG's shareholders are mainly road construction companies.

BERAG AG is the largest pavement supply company in the Bern region and, according to COMCO, dominant in the market. It sold the surfacing material to its shareholders at preferential conditions and thus at significantly lower prices than to non-shareholders. The company granted its customers a loyalty bonus with long-term binding effect. According to COMCO, BERAG abused its dominant position in the market in this way.

Some of BERAG's shareholders agreed until 2016 that they would not compete with BERAG in the vicinity of their plant through their own pavement plants or stakes in other pavement plants (non-competition clause). In its decision, COMCO stated that this constitutes an unlawful agreement under the Cartel Act.

Pavement is significant in road construction. Since transport is costly, road construction companies purchase the pavement from a plant close to the construction site if possible.

The decision is remarkable in two respects. First, the Competition Commission had not yet ruled on preferential conditions for shareholders in connection with a market power constellation. Second, preferential prices are, as far as can been seen, common in

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Switzerland which is why the decision is likely to have an important effect on the market.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

COMCO's decisions, including interim injunctions and measures, are subject to judicial review by the Swiss Federal Administrative Court (FAC), where appeals must be filed within 30 days. The FAC has full jurisdiction to review COMCO's findings, including all aspects of facts and law. The FAC's judgment can be appealed to the Federal Supreme Court, which acts as an appellate tribunal and, as a matter of principle, reviews only the legal reasoning.

There has been a substantial increase in the number of cases decided by the courts in recent years, as virtually all sanction orders that are not based on a settlement are challenged.

7 How is private cartel enforcement developing in your jurisdiction?

Private cartel enforcement is rare in Switzerland. Competition law disputes are often not formally decided by the courts, as the parties often settle amicably before the conclusion of the proceedings. There is, therefore, hardly any case law on private cartel enforcement.

However, the introduction of the concept of relative market power in 2022 led to various car dealers who were part of selective distribution systems taking civil actions against general importers or manufacturers. It is to be expected that not only COMCO but also civil courts will have to deal with several more cases relating to relative market power in the future.

8 What developments do you see in antitrust compliance?

When it comes to compliance, there is still an awareness gap between small- and medium-sized enterprises (SMEs) and large companies. Notably, Swiss SMEs are still reluctant to implement adequate antitrust compliance programmes. It might be worthwhile for the lawmaker to consider enhancing compliance incentives – for instance, by allowing the compliance defence. COMCO's case law indicates that the agency is open to accepting the compliance defence under certain conditions. The main challenges facing clients lie in keeping their own IT departments up to date to prevent and monitor possible violations, and – especially in local markets that have a culture of long-standing relationships – changing the patterns of behaviour that, until now, have been traditional when keeping contact with competitors (eg, within trade associations).

"COMCO has already opened its first investigation concerning an alleged abuse of relative market power, which is still pending. It is expected that COMCO may have to deal with several more cases concerning relative market power in the near future."

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9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

At the beginning of 2022, the new regulations on relative market power came into force. COMCO published a fact sheet and a notification form on this. According to this new legislation and the authority's publication, a company is considered to have relative market power if it is dependent on other companies for the supply of or demand for a good or service in such a way that there are no sufficient and reasonable possibilities to switch to alternative sources. Companies can file a complaint with COMCO if they are hindered or disadvantaged in competition in this way.

A company with relative market power can behave abusively, for example, if it refuses to supply a producer with components on which the producer depends. A company with relative market power can also abuse its position if it hinders other companies from purchasing goods offered in Switzerland and abroad at the foreign conditions.

With these new provisions in the Cartel Act, the previous 'traditional' prohibition of abuse under cartel law is extended to companies with relative market power. Companies will not be fined for violations of the new provisions. However, the Competition Commission can impose obligations on them to act and to cease and desist. COMCO has already opened its first investigation concerning an alleged abuse of relative market power, which is still pending. It is expected that COMCO may have to deal with several more cases concerning relative market power in the near future.

Apart from that, COMCO has revised its Notice on the Treatment of Vertical Agreements under Competition Law and the associated Competition Commission Explanatory Notes on the Notice on the Treatment of Vertical Agreements under Competition Law. This was prompted by the revision of the European Verticals Agreements Regulation, which entered into force on 1 June 2022, and the associated EU Verticals Guidelines, as well as the case practice of the Swiss courts and competition authorities. The revision is intended to ensure that, as far as possible, the same rules continue to be applied in Switzerland in the area of vertical competition agreements as in the European Union, that isolation of the Swiss markets is avoided and that legal certainty is created.

It is to be expected that the competition authorities will become more active in this area. On the one hand, the federal government has authorised more jobs, and on the other hand, the authorities have already opened a new case in the pharma industry in the summer.

"Early in the pandemic, COMCO stated that the pandemic would not justify any violations of the Cartel Act and that the authorities would intervene if necessary to protect competition."

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

Cartel enforcement was barely affected. Early in the pandemic, COMCO stated that the pandemic would not justify any violations of the Cartel Act and that the authorities would intervene if necessary to protect competition. Therefore, COMCO started an investigation regarding price collusion for covid-19 tests when indication of collusion was brought to its attention. However, as the collusion did not render into effect COMCO stopped the investigation. COMCO also conducted numerous searches of premises during the pandemic.

Patrick L Krauskopf
patrick.krauskopf@agon-partners.ch

Markus Wyssling
markus.wyssling@agon-partners.ch

Blaise Carron
blaise.carron@agon-partners.ch

AGON Partners Legal AG
Zurich
www.agon-partners.ch

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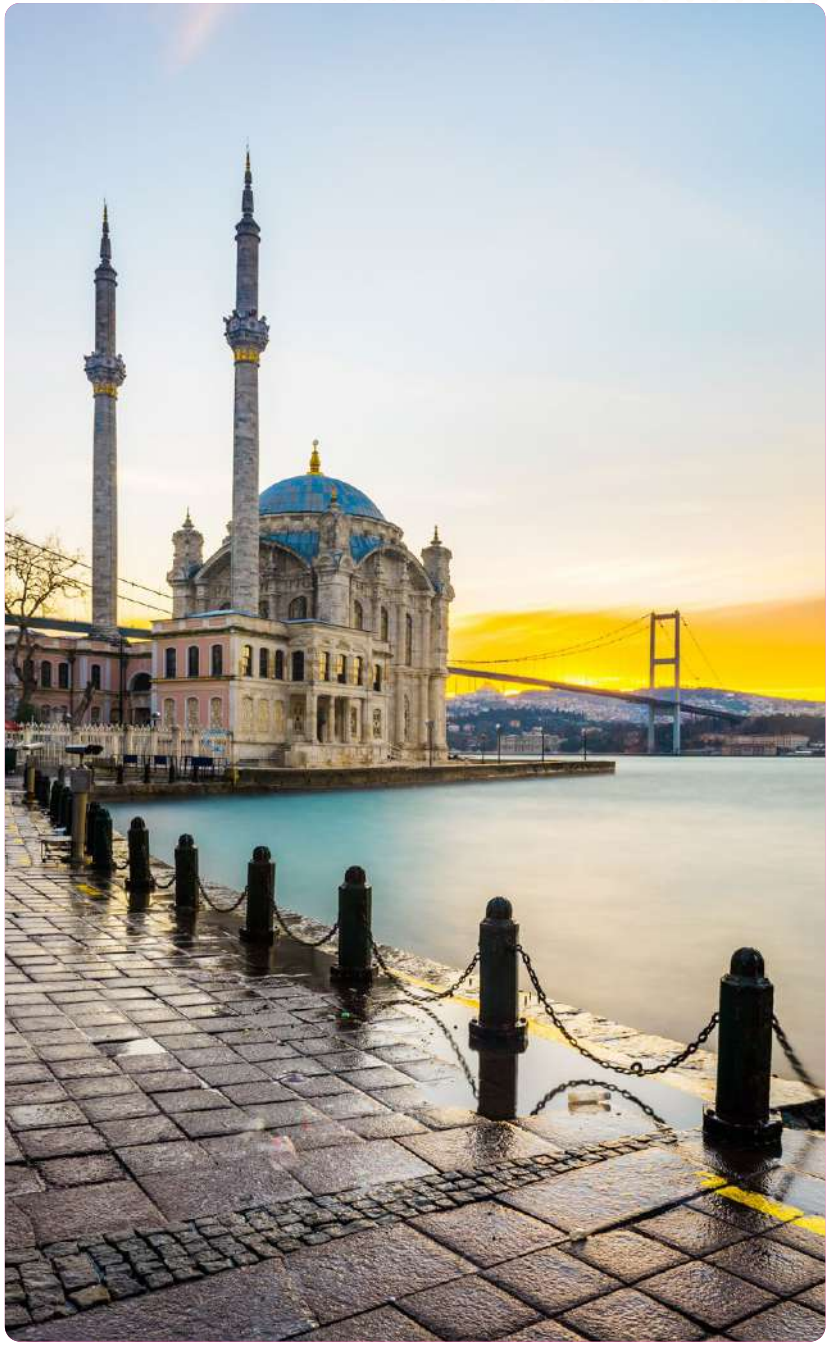
The Inside Track

What was the most interesting case you worked on recently?

We recently filed an appeal with the Federal Supreme Court. The issue is to decide whether participation in a cartel that lasted three days, was not implemented and had no effect, constitutes a petty offence within the meaning of the *Gaba* case law. Should there be a petty offence, the complainant would not have violated the Cartel Act and would not be sanctionable.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

It is unsatisfactory that there is no separation between the deciding authority and the prosecuting authority. The Competition Commission's full-time secretariat instructs sanctionable cases and then submits an application for a decision to the Competition Commission, which is a part-time militia authority. As a result, the secretariat has a very large influence on the Competition Commission's decision, as the latter does not have enough time to look through the files and independently get a picture of the case. The decisions should be made by an independent judicial body.



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Turkey

Gönenç Gürkaynak is the founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 95 lawyers based in Istanbul, Turkey. He graduated from Ankara University Faculty of Law in 1997. Gönenç received his LLM degree from Harvard Law School, and his Bar memberships are as follows: Istanbul Bar, 1997; American Bar Association, 2001; New York Bar, 2001 (currently non-practising; registered); Brussels Bar, 2003–2004 (B List; not maintained); Member of the Law Society of England & Wales, 2004 (currently non-practising; registered).

Gönenç heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 52 lawyers. He has unparalleled experience in Turkish competition law, with more than 25 years of competition law experience. He represents multinational companies and large domestic clients in written and oral defences in Turkish Competition Authority investigations and merger clearances; and in antitrust appeal cases in the country's highest administrative court. He also coordinates worldwide merger notifications, drafts non-complete agreements and clauses and prepares hundreds of legal memoranda on a range of Turkish and EUR competition law topics.

Öznur İnanılır is a partner in ELIG Gürkaynak's regulatory and compliance department. She graduated from Başkent University Faculty of Law in 2005 and obtained her LLM in European law from London Metropolitan University in 2008. Öznur has extensive experience in all areas of competition law, including compliance matters, defences in investigations alleging restrictive agreements, abuse of dominance cases and complex merger control matters.

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1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

The Turkish Competition Authority (the Authority) places equal emphasis on all areas of enforcement. The significance of the cartel enforcement regime under Law No. 4054 on the Protection of Competition of 13 December 1994 (the Competition Law) has nonetheless been repeatedly underlined by the President of the Authority. The applicable provision for cartel-specific cases is article 4 of the Competition Law, which lays down the basic principles of cartel regulation. Article 4 of the Competition Law is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union. It prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Article 4 does not set out a definition of a cartel, but rather prohibits all forms of restrictive agreements, which would include any form of cartel agreement.

There are no industry-specific offences or defences that lead to particular scrutiny. The Competition Law applies to all industries, without exception. Cement or ready-mix concrete producers, fast-moving consumer goods, pharmaceuticals, insurance, information and communication technology, healthcare, medical equipment, cleaning products, building materials, chemical and mining, petroleum, food (eg, production, wholesale, retail), traffic signal operations, gas stations, machines (eg, household appliances, electronics), roll-on/roll-off (ro-ro) transportation, consumer electronics products (including personal computers and games consoles), online booking and retail technology superstores, jewellery, aluminium and PVC technologies, glass and glass products, tobacco


Gönenç Gürkaynak


Öznur İnanılır

and alcoholic beverages, driving schools and bakery industries have all been under investigation for cartel and concerted practice allegations in previous years.

2 What do recent investigations in your jurisdiction teach us?

In 2020, the Competition Law was subject to essential amendments, which were passed by the Grand National Assembly of Turkey (Parliament) on 16 June 2020, and entered into force on 24 June 2020 (the Amendment Law), the day of its publication in Official Gazette No. 31165. The Amendment Law introduces certain significant substantive and procedural changes to the Competition Law, which to a certain extent apply to cartel infringements.

> "The Board is entitled to launch an investigation into alleged cartel activity *ex officio* or in response to a complaint."

The Authority's decision-making body, the Competition Board (the Board), is entitled to launch an investigation into alleged cartel activity *ex officio* or in response to a complaint. In the case of a complaint, the Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Board remains silent on the matter for 60 days. The Board decides to conduct a preliminary investigation if it finds the notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (eg, formal information-request letters) are used during the pre-investigation process. The preliminary report by the Authority's experts will be submitted to the Board within 30 days of the pre-investigation decision being 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, once only, for an additional period of up to six months. Dawn raids and other investigatory tools are also used during the investigation process.

The investigated undertakings have 30 calendar days, as of the formal service of the notice, to prepare and submit their first written defence (the 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, extendible for a further 30 days (the second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence, which is extendible for a further 15 days under the Amendment Law. The defending parties will have another 30-day period to reply to the additional opinion (the third written defence). When the parties' responses to the additional opinion are served on the Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held *ex officio* or upon request by the parties. Oral hearings are held within at least 30 days and at most 60 days of the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings before the Board. The Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal must be filed before the Ankara administrative courts within 60 calendar days of the official service of the reasoned decision. 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 counterparty.

The Board may request any information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within

the period fixed by the Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). In cases where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed.

Overall, the Amendment Law introduces changes to article 15 that expand the scope of the Board's authority during dawn raids, and further details are provided in the newly enacted Guidelines on Examination of Digital Data During On-site Inspections. The amendments match the recent practice of the case handlers, and, currently, the Board is entitled to: (1) examine and make copies of all information and documents in companies' physical records, as well as those in electronic media and information technology systems (including but not limited to any deleted items); (2) request written or verbal explanations on specific topics; and (3) conduct on-site investigations with regard to any asset of an undertaking.

Within this scope, Guidelines on Examination of Digital Data during On-site Inspections enable the Authority to examine mobile devices (such as mobile phones and tablets), unless it is determined that such devices are used solely for personal use of a given employee. Regardless, the Board is authorised to conduct a quick review for any portable electronic device to determine the intended purpose.

Refusal to grant Authority staff access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account).

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The minimum fine to be applied in such cases is 105,688 lira for 2023.

Additionally, the secondary legislation (Communiqué No. 2021/3) which provides details on the process and procedure related to application of the de minimis principle came into force on 16 March 2021. Furthermore the Board enacted secondary legislation through 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 published on 16 March 2021 alongside the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position that was published on 15 July 2021.

Overall the de minimis principle is not applicable to 'clear and hardcore violations'. On this note, Communiqué No. 2021/3 defines 'clear and hardcore violations' as:

"Under the Turkish leniency system, the first firm to file an appropriately prepared application for leniency may benefit from total immunity if the application is made before the investigation report is officially served and the Authority does not possess any evidence to support a charge of cartel infringement."

'agreements and/or concerted practices as well as decisions and practices of associations of undertakings on the following subjects, the goal of which is to directly or indirectly prevent, distort or restrict competition in the market for a good or service, or which have led or may lead to such effects: 1) Price fixing among competing undertakings, allocation of customers, suppliers, regions or trade channels, restriction of supply amounts or imposing quotas, collusive bidding in tenders, sharing competitively sensitive information including future prices, output or sales amounts; 2) fixing flat or minimum sales rates of the buyer in a relationship between undertakings operating at different levels of a production or distribution chain.

A similar definition of 'clear and hardcore violations' is provided within Communiqué No. 2021/2. In other words, cartels do not benefit from the de minimis principle.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

Under the Turkish leniency system, the first firm to file an appropriately prepared application for leniency may benefit from total immunity if the application is made before the investigation report is officially served and the Authority does not possess any evidence to support a charge of cartel infringement. Employees or managers of the first applicant will also be totally immune; the applicant must, however, not have been the coercer. If the applicant has forced any other cartel members to participate in the cartel, it may only qualify for a reduction in fine of between 33 per cent and 50 per cent for the firm and between 33 per cent and 100 per cent for the employees or managers. There is a marker system for leniency applications: the Authority can grant a grace period to applicants for submission of the necessary information and evidence to complete their applications.

There is also no legal obstacle to submitting a leniency application orally, in which case, the information submitted should be put into writing by the administrative staff of the Authority and confirmed by the relevant applicant or its representatives. Turkish law does not prevent counsel from representing both the investigated corporation and its employees as long as there are no conflicts of interest. That said, employees are hardly ever investigated separately. Barring criminally prosecutable acts such as bid rigging in public tenders, there is no criminal sanction against employees for antitrust infringements in practice.

The Board may impose on the applicants a turnover-based monetary fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account) in cases where incorrect or misleading information is provided (as discussed earlier).

In terms of leniency applications, the Board's most important decision concerning leniency applications was the Corporate Loans decision, which concerned 13 financial institutions, including local and international banks, active in the corporate and commercial banking markets in Turkey. The Board launched an investigation against these financial institutions to determine whether they had violated article 4 of the Competition Law by exchanging competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU) made a leniency application on 14 October 2015 to benefit from article 4 of the Regulation on Leniency. After 19 months of in-depth investigation, the Board unanimously concluded that BTMU, ING Bank AŞ (ING) and the Royal Bank of Scotland Plc Merkezi Edinburgh İstanbul Merkez Şubesi (RBS) had violated article 4 of the Competition Law. In this respect, the Board imposed an administrative monetary fine on ING and RBS

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in the amounts of 21.1 million lira and 66,400 lira, respectively, on their annual turnover in the financial year 2016 (note that monetary amounts given here and elsewhere are rounded for brevity). However, the Board resolved that an administrative monetary fine should not be imposed on BTMU following its leniency application, and granted full immunity to BTMU while also letting off the other investigated undertakings from imposition of an administrative monetary fine (28 October 2017; 17-39/636-276).

The Mechanical Engineering decision was another important decision concerning leniency applications. The Board initiated an investigation against 16 freelance mechanical engineers to determine whether they had violated article 4 of the Competition Law by being part of a profit-sharing cartel. One of the investigated undertakings applied for leniency during the course of the preliminary investigation. The Board concluded that 14 of the freelance mechanical engineers were engaged in a profit-sharing cartel. The leniency applicant received full immunity from fines and the Board also excused another of the

freelance mechanical engineers from imposition of an administrative monetary fine (14 November 2017, 17-41/640–279).

In its decision regarding undertakings active in the ro-ro transportation sector, the Board decided that the undertaking that applied for leniency should have its administrative fine halved in consideration of its application. The Board noted that the information provided by the leniency applicant significantly contributed to the investigation. The Board further noted that the relevant contributions included the information that the starting point of the violation was earlier than detected in the on-site inspection and evidence illustrating that price information was exchanged, the undertakings acting in violation of the law and further details on how the price exchange was conducted (18 April 2019; 19-16/229-101).

Moreover, in another leniency case, initiated following a leniency application by Arçelik Pazarlama AŞ (Arçelik) upon discovery of sharing of insider information by an Arçelik employee with various companies, including Arçelik's competitor Vestel Tipcart AŞ (Vestel), the Board found that Arçelik and Vestel had not violated article 4 of the Competition Law as the investigated practices took place without the knowledge of the senior management, and so did not meet the mutual agreement criteria and did not constitute concerted practices. (2 January 2020, 20-01/13-5).

Additionally, the Board has launched an investigation against 12 undertakings operating in the market for auto expertise for violating article 4 by way of collectively fixing prices, coming to an agreement between their competitors in order to prevent providing services on Sundays or providing services in turns through designated undertakings. Süper Test Oto Ekspertizlik Hizmetleri Sanayi ve Ticaret Ltd Şti (Süper Test), made a leniency application on 4 April 2019, by providing information and documents including the names of the participants, dates and places regarding the cartel enforcement activity. Upon the Board's finding that the information and document

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"There is also no legal obstacle to submitting a leniency application orally, in which case, the information submitted should be put into writing by the administrative staff of the Authority and confirmed by the relevant applicant or its representatives."

stipulating the dates, parties and conduct of the violation provided by Süper Test contributed to the investigation, the Board reduced the administrative fine to be imposed on Süper Test by half pursuant to the Regulation on Fines, while also imposing administrative fines for the remaining investigated parties (9 July 2020, 20-33/439-196).

Finally, in the *Beypazarı/Kınık* decisions, the Board decided that the undertakings violated the article 4 of the Competition Law by way of implementing fixed prices, exchanging current and future price information and therefore establishing a cartel. The Board found evidence on exchange of information on future prices and decided that Beypazarı and Kınık were in an agreement for the purpose of restricting competition, in other words, in a cartel agreement. Importantly, these decisions constitute the first combined application of the settlement and leniency mechanisms. The Board applied a 25 per cent reduction (the highest possible reduction) under the Regulation on the Settlement Procedures to be Applied during Investigations Regarding Anti-competitive Agreements, Concerted Practices and Decisions as well as Abuse of Dominance (the Settlement Regulation) and a 35 per cent reduction under the leniency application, reducing the administrative monetary fine by 60 per cent in total. Thus, the monetary fines imposed on Kınık were significantly reduced from 2.322,329 lira to 928,932 lira. For Beypazarı, which applied for lenience after Kınık, the monetary fines were also reduced significantly, from 21,885,324 lira to 9,848,395 lira (14 April 2022; 22-17/283-128 and 18 May 2022; 22-23/379-158).

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

The Amendment Law introduces de minimis, commitment and settlement mechanisms under article 43 of the Competition Law

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in an effort to duly conclude investigation processes. Furthermore the Board enacted secondary legislation through 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 published on 16 March 2021 alongside the Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position that was published on 15 July 2021. The Board also enacted Communiqué No. 2021, which provides details on the process and procedure related to application of the de minimis principle came into force on 16 March 2021

The de minimis principle applies to (1) the agreements signed between competing undertakings, if the total market share of the parties to the agreement does not exceed 10 per cent in any of the relevant markets affected by the agreement, and (2) the agreements signed between non-competing undertakings. If the market share of each of the parties does not exceed 15 per cent in any of the relevant

> "The Board can decide not to launch a fully-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure."

markets affected by the agreement, the relevant agreements do not significantly restrict competition in the market.

The commitment mechanism allows parties to voluntarily offer commitments during a preliminary or fully fledged investigation to eliminate the Authority's competition concerns in terms of article 4 (anticompetitive agreements) and article 6 (abuse of dominant position). Depending on the sufficiency and the timing of the commitments, the Board can decide not to launch a fully-fledged investigation following the preliminary investigation or to end an ongoing investigation without completing the entire investigation procedure. The parties are allowed to submit commitments within the three months following the official service of the investigation notice.

This commitment mechanism is not applicable to hard core violations, including price-fixing, territory or customer sharing, and restriction of supply; in other words, it is not applicable to cartels. Nonetheless, the settlement mechanism is applicable to hard core violations – that is, it is applicable to cartels.

Under the settlement mechanism, the Board may, *ex officio* or upon parties' request, initiate a settlement procedure. As per the Regulation on The Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position, parties that admit to competition infringement before the official notification of the investigation report, may benefit from a reduction of the administrative monetary fine from 10 per cent to 25 per cent. The parties may not bring a dispute on the settled matters or the administrative monetary fine once an investigation has been finalised with a settlement.

In its first ever settlement decision the Board announced on its official website that its investigation against Türk Philips Ticaret AŞ (Philips Turkey), Dünya Dış Ticaret Ltd Şti, Melisa Elektrikli ve Elektronik Ev Eşyaları Bilg. Don İnş San Tic AŞ, Nit-Set Ev Aletleri Paz San ve Tic Ltd Şti and GİPA Dayanıklı Tüketim Mamülleri Tic AŞ, 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 October 2021, 21-37/524-258).

In another decision, the Board had 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 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 the 'non-carbonated drinks' must be withdrawn, 40 per cent of the space in refrigerators should be accessible to the competitors and the sales agreements and refrigerator *commodatum* (loan for use) agreements entered by Coca-Cola or its distributors, or both, 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 with sales points and executing separate agreements for 'carbonated drinks' and 'non-carbonated drinks' and termination of transitional terms and conditions across different product categories, increasing the refrigerator space accessible for the competitors by 25 per cent. 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 full-fledged investigation against Singer sewing machines on 4 March 2020 with its decision numbered 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 exceeded the time limit set by the legislation (ie, five years), alongside resale price maintenance practices. During the investigation, Singer applied to both settlement and commitment mechanisms. While 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 per cent for resale price maintenance violation (30 September 2021, 21-46/672-336).

In a more recent decision, the Board rendered a decision where it accepted the commitments proposed by Türkiye Şişe ve Cam Fabrikaları AŞ (Şişecam) and Sisecam Çevre Sistemleri AS (Çevre

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Sistemleri) 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).

5 Tell us about the authority's most important decisions over the year. What made them so significant?

The Authority's annual report for 2021 provides that the Board finalised a total of 74 cases relating to competition law violations. Among the 74 cases, 44 were subject to article 4 (anticompetitive agreements) only and 11 cases were subject to both article 4 and article 6 (abuse of dominant position). The Board issued monetary fines amounting to a total of 3.453 trillion lira as at 6 February 2023) for article 4 cases. The monetary fine figures of 2021 for article 4 cases show that the Board has in total imposed roughly twice the

monetary fines imposed last year, while the total of monetary fines imposed in article 6 cases decreased compared to the amount of fines imposed in 2020.

Overall, there has been an increase in the monetary fines that were levied under article 4. Specifically, the Board imposed monetary fines totalling 687.3 million lira in relation to horizontal anticompetitive arrangements in 2021, while the monetary fines for such arrangements in 2019 and 2020 were 164.4 million lira and 60 million lira respectively.

In one of its most notable decisions in 2021, the Board concluded imposition of an administrative monetary fine against chain markets engaged in retail food and cleaning products and their supplier, for their cartel arrangement. 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 2.6 billion lira on the undertakings. This was highest monetary fine imposed by the Board for an entire case (ie, total fine on all companies involved in the cartel conduct) as a result of a cartel investigation. In the same case, the Board also imposed the highest monetary fine that it imposed on a single company as a result of a cartel investigation, which was 958 million lira. This monetary fine was imposed by the Board on BİM Birleşik Mağazalar AŞ (BİM) . This amount represented 1.8 per cent of BİM's annual gross revenue for the year 2020 (28 October 2021; 19-16/229-101).

> "Overall, there has been an increase in the monetary fines that were levied under article 4."

Following this recent investigation explained above and in harmony with its continuing focus on the fast-moving consumer goods sector, the Board concluded another investigation just before the end of 2022 in the same sector (15 December 2022; 22-55/863-357). As a result of this latest investigation, the Board imposed administrative monetary fines based on a hub-and-spoke cartel once again while also fortifying its decisional practice in terms of the application of *ne bis in idem* principle by way of not imposing administrative monetary fines on certain chain stores and suppliers/retailers fined in the previous investigation.

In another recent decision, the Board conducted an investigation against Gedik Kaynak Sanayi ve Tic AŞ (Gedik), Kaynak Tekniği San ve Tic AŞ (Askaynak) under the control of Lincoln Electric Holdings, Inc, and Oerlikon Kaynak Elektrodları ve Sanayi AŞ (Oerlikon)/Magmaweld Uluslararası Tic AŞ (Magmaweld) under the control of Zaimoğlu Holding AŞ to decide whether these undertakings violated article 4 of the Competition Law. The Board found that, in 2011, (1) the general managers of Gedik, Askaynak and Oerlikon/Magmaweld took joint

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decisions on product prices and sales methods, (2) they showed an effort to ensure implementation of these decisions by each undertaking and (3) they warned those who do not comply with such decisions. Based on these findings, the Board decided that there was a cartel infringement in 2011 but did not impose an administrative fine on the investigated undertakings for their violation in 2011 due to the expiration of the eight-year statute of limitation. For the following periods from 2011 to 2019, the Board reached the conclusion that there is no sufficient finding to prove that the undertakings violated article 4 of the Competition Law by stating that (1) in the light of the economic analysis, the price changes did not show the effect of an infringement, and therefore, (2) the presumption of the concerted practice cannot be applied for the period of 2017–2019 since there are no indications of 'market behaviour that provides a presumption of communication' (8 April 2021; 21-20/247-104).

The Board's recent healthcare sector decision is another significant example of its enforcement activity: it investigated 29 undertakings and associations of undertakings and imposed monetary fines for three different violations. Considering price-fixing regarding freelance doctors and other services as a single violation, the Board concluded that six undertakings had established a pricing cartel in two different cities. On the other hand, the Board found that the practices of 16 undertakings aimed at limiting competition in the labour market by preventing personnel transfers and wage-fixing constituted another single violation of Article 4 of Law 4054. Finally, the Board imposed administrative monetary fines on eight undertakings on the grounds of exchanging competitively sensitive information; seven undertaking were found to have been directly active in information exchange, while one was a facilitator (24 February 2022; 22-10/152-62).

Although, there was no finding as to a cartel agreement, in the Board's *Beypazarı/Kınık* decisions, it decided that the undertakings violated article 4 of the Competition Law by way of implementing fixed prices, exchanging current and future price information and therefore establishing a cartel. The Board found evidence of exchange of information on future prices and decided that Beypazarı and Kınık were in an agreement for the purpose of restricting competition, in other words, in a cartel agreement. Importantly, these decisions constitute the first combined application of the settlement and leniency mechanisms. The Board applied a 25 per cent reduction (the highest possible reduction) under the Settlement Regulation and a 35 per cent reduction under the leniency application, reducing the administrative monetary fine by 60 per cent in total. Thus, the monetary fines imposed on Kınık were significantly reduced from 2.32 million lira to 929,000 lira. For Beypazarı, which applied for lenience after Kınık, the monetary fines were also reduced significantly, from 21.89 million lira to 9.85 million lira (14 April 2022; 22-17/283-128 and 18 May 2022;22-23/379-158).

"Article 57 et seq of the Competition Law entitles any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times the amount of their damage plus litigation costs and attorney fees."

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The Authority is an independent administrative body and is not required to apply to another body or authority before rendering its decisions. However, the existence of a leniency application or immunity or reduction in fines would not preclude third parties from suing the violators to seek compensation for damage suffered. As in US antitrust enforcement, one of the most distinctive features of the Turkish competition law regime is that it provides for lawsuits for treble damages. Article 57 et seq of the Competition Law entitles any person injured in his or her business or property by reason of anything forbidden by the antitrust laws to sue the violators for three times the amount of their damage plus litigation costs and attorney fees. That way, administrative enforcement is supplemented with private lawsuits. 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 an infringing agreement or concerted practice, waiting instead for the Board to render its opinion on the matter, therefore treating the issue as a pre-judicial question.

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted for judicial review before the administrative courts in Ankara by filing an appeal case within 60 days of receipt by the parties of the reasoned decision of the Board. Under article 27 of the Administrative Procedural Law, filing an administrative action does not automatically stay the execution of the decision of the Board. However, upon request of the plaintiff, the court, by providing its justifications, may decide to stay the execution of the decision if its execution is likely to cause serious and irreparable damage, and if the decision is highly likely to be found to be against the law (ie, a prima facie case).

If the challenged decision is annulled in full or in part, the administrative court returns it to the Board for review and reconsideration.

Administrative litigation cases (including private litigation cases) are subject to judicial review before the regional courts (the appellate courts), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the court of appeal for private cases). The regional court will go through the case file, both on procedural and substantive grounds, and will investigate the case file and make its decision considering the merits of the case.

The regional court's decision will be considered final in nature but will be subject to review by the Council of State in exceptional circumstances (as set out in article 46 of the Administrative Procedure Law). In such circumstances, the decision of the regional court will not be considered a final decision and the Council of State may decide to uphold or reverse the regional court's decision. If the decision is reversed by the Council of State, it will be returned to the regional court, which will in turn issue a new decision taking into account the Council of State's decision. As the regional courts are newly established, we have yet to see how long it takes for a regional court to finalise its review of a file. Overall, there is no judicial deadline for the relevant decisions, and the decision-making periods vary greatly.

7 How is private cartel enforcement developing in your jurisdiction?

There is no private cartel enforcement in the Turkish competition law regime. The existence of a leniency application or immunity or reduction in fines would not preclude third parties from suing violators to seek compensation for any damage suffered.

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8 What developments do you see in antitrust compliance?

Competition compliance programmes are designed to reduce the risk of anticompetitive behaviour by companies. The Competition Authority Competition Law Compliance Programme (the Compliance Programme) states that a regular assessment and monitoring mechanism is essential for the success of a compliance programme. Since each company operates in different markets with different market conditions, the Authority does not set out a specific monitoring mechanism requirement; however, briefly, it would be appropriate to test employees' knowledge of the law and of the undertaking's policy and procedures regarding the compliance programme, and to monitor the activities of the employees on a given date, or without notice, to control actual or potential infringements. In addition, notifying senior management of actual or potential infringements and determining suitable problem-solving mechanisms require a regular assessment system to be developed. Moreover, the Compliance

Programme suggests that if the undertaking's size permits it and there is the opportunity, it should have a specific department or a consultant for competition policy. According to the Compliance Programme, the company official or consultant should make regular competition inspections, preferably without notice, and monitor the compliance efforts. Therefore, an effective compliance programme with all essential monitoring mechanisms would minimise the risk of competition infringement.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

The Amendment Law introduces certain significant substantive and procedural changes to Competition Law. As elaborated in the previous questions, the Amendment Law introduces new provisions related to the de minimis principle, on-site inspection powers, behavioural and structural remedies and commitment and settlement mechanisms. The Amendment Law replaces, Inter alia, the dominance test taken into consideration in merger control assessments under article 7 with the significant impediment of effective competition (SIEC) test, clarifies the self-assessment procedure applied to individual exemption cases under Article 5 and also grants the Authority 15 more days for preparation of its additional opinion in response to the undertakings' second written defence in a fully-fledged investigation under article 45. Since the Amendment Law, the majority of the newly introduced mechanisms and investigation methods were clarified via enactment of secondary legislation. 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 electronic media and information systems, during on-site inspections.

"The Amendment Law introduces new provisions related to the de minimis principle, on-site inspection powers, behavioural and structural remedies and commitment and settlement mechanisms."

Moreover, 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 on 15 July 2021, which set forth rules and procedures concerning the settlement process for undertakings that admit to the existence of the 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 the competition problems. The Authority also published the Communiqué on Agreements, Concerted Practices and Decisions and Practices of Associations of Undertakings That Do Not Significantly Restrict Competition on 16 March 2021, which set out the principles regarding criteria to be used to identify the practices

of the undertakings which can be excluded from the scope of the investigation.

Furthermore, with the new amendment introduced by Communiqué No. 2021/4 on the Amendments to the Block Exemption Communiqué on Vertical Agreements, which promulgated in the Official Gazette dated 5 November 2021 and No. 31650, the threshold regarding the supplier's market share for the market or markets for the contract goods has now been lowered to 30 per cent. Accordingly, only agreements of undertakings that have market shares below 30 per cent in the relevant product markets qualify for the block exemption under the Block Exemption Communiqué No. 2002/2 on Vertical Agreements. Thus, the relevant market shares of the undertakings in question exceed the 30 per cent threshold, the agreement automatically falls outside the scope of the block exemption rules. In that case, the relevant suppliers may not impose any kind of direct or indirect vertical restraints on buyers with respect to the goods or services covered by the agreements, unless an 'individual exemption' is granted by the decision of the Board.

Moreover, consequent to its sector inquiry on the fast-moving consumer goods (FMCG) retailers, the Authority published its preliminary report on 5 February 2021, which addresses the changes in dynamics in the retail sector.

As in the rest of the world, technology and digital platforms feature on the Authority's radar. In May 2020, the Authority announced plans for a strategy development unit to focus on digital markets, and on 16 July 2020 it launched a sector inquiry focusing on electronic marketplace platforms. On 9 December 2021, the Authority published its report titled 'Analysis Report on the Financial Technologies in Payment Services', which, inter alia, evaluates the effect of the use of financial technologies in the financial sector, the obstacles to innovation and competition in the relevant markets and the entry of

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big technology companies (eg, Facebook, Amazon, Google and Apple) into the market.

On 14 April 2022, the Authority published its Final Report on the E-Marketplace Sector Inquiry. The report analysed how e-marketplace platforms affect competition and accordingly proposed a policy towards e-marketplaces. The report remarked that network externalities, multi-homing, economies of scope and scale, multi-sidedness and data-driven business models contribute to the market power of e-marketplace platforms. As a result of these market characteristics, e-marketplaces are associated with high barriers of entry and expansion and a tendency to evolve into a single platform (ie, tipping). The report concluded with two main policy proposals concerning competition law legislation in order to address these competition concerns in the market (1) *ex ante* gatekeeper regulation; and (2) strengthening of secondary legislation. In line with this, the Authority is in the process of considering legislative actions concerning digital markets. It is expected that regulations focusing on gatekeepers mentioned in the online marketplaces report will be

"On 14 April 2022, the Authority published its Final Report on the E-Marketplace Sector Inquiry. The report analysed how e-marketplace platforms affect competition and accordingly proposed a policy towards e-marketplaces."

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 the law on digital markets and is speculatively expected to compound the EU Digital Markets Act with increasing antitrust focus on digital.

The draft amendment to Law 4054, which was prepared by the Authority in 2022, includes various proposed amendments to regulate digital markets. In particular, the amendment would introduce:

- several new definitions concerning digital markets (eg, relating to core platform services and undertakings with significant market power); and
- new obligations for undertakings with significant market power.

The draft amendment is a result of the Authority's efforts to regulate competition issues in digital markets, which have been ongoing since at least early 2021. The timing for its adoption remains unclear at this stage.

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

No specific measures have been implemented to address the pandemic through competition law rules. Moreover, the Authority has announced no limitations on its operational capacity and has not requested applicants' cooperation regarding the special circumstances of the ongoing pandemic. As usual, the Authority has encouraged use of the electronic submission system to ensure the continued smooth running of day-to-day activities.

Having said that, in 2020, the Authority made covid-19 pandemic-related infringement warnings to various stakeholders. On separate

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occasions, the Authority announced on its official websites different complaints received regarding price hikes in various sectors, such as fresh fruit and vegetables, and the health and hygiene sector, as well as the food sector in general. In this context, the Authority invited third parties to report any competition-sensitive practices and emphasised that they will be further investigating such practices. During this term, the Authority launched various preliminary and fully fledged investigations for evaluation of practices adopted during the pandemic period.

Additionally, the investigation against retail grocery chains and suppliers of such chains, active in the fields of retail food and cleaning products is noteworthy in terms of competition law enforcement activity in covid-19 pandemic. The investigation involved leading global suppliers of food and cleaning products such as Henkel, Unilever, Nestlé, Johnson & Johnson, Procter & Gamble and Nivea as well as almost all retailers active in the fast-moving consumer goods business in Turkey. In the reasoned decision, the Board found that there is either a direct or indirect contact via mutual distributors between retail grocery chains that enable the coordination of price transitions and share of competitively sensitive information including future prices, term activities and campaigns. The Board also found that one of the parties to the investigation violated article 4 by way of interfering with the prices of its customers who did not increase their prices (28 October 2021, 21-53/747-360). Following this recent investigation, the Board concluded another investigation just before the end of 2022 in the same sector (15 December 2022; 22-55/863-357). As a result of this latest investigation, the Board imposed administrative monetary fines based on a hub-and-spoke cartel once again while also fortifying its decisional practice in terms of the application of the *ne bis in idem* principle by way of not imposing administrative monetary fines to certain chain stores and suppliers or retailers fined in the previous investigation.

Gönenç Gürkaynak
gonenc.gurkaynak@elig.com

Öznur İnanılır
oznur.inanilir@elig.com

ELIG Gurkaynak Attorneys-at-Law
Istanbul
www.gurkaynak.av.tr

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QUESTIONS

QUESTIONS

The Inside Track

What was the most interesting case you worked on recently?

On 19 January 2022, the Authority published a highly anticipated decision of the Board regarding the investigation handled by ELIG Gürkaynak against retail grocery chains and suppliers, active in the fields of retail food and cleaning products. The investigation concerned potential involvement in agreements and concerted practices showing characteristics of a hub-and-spoke cartel. The Decision of the Board serves as a game-changer in the retail and wholesale FMCG sector given that the remarks of the Board clarify the rules of the game in terms of information exchange at horizontal level as well as vertical level (28 October 2021, 21-53/747-360). In addition to this investigation, the Board concluded another investigation in the same sector where it fortified its decisional practice in terms of the application of the *ne bis in idem* principle by way of not imposing administrative monetary fines on certain chain stores and suppliers or retailers fined in the previous investigation (15 December 2022; 22-55/863-357).

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

The Authority already has an economic analysis and research department (the Department), which is empowered to conduct examinations and analyses in sectors or markets relevant to Board investigations. Ideally, the Department would be expanded and would also be charged with submitting its independent opinion to the Board in each investigation. That way, the Department's know-how would be much better utilised, enabling the Board to incorporate more sophisticated economic analyses into its reviews of alleged anticompetitive behaviour.

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United Kingdom

Lisa Wright is a partner in the Slaughter and May competition group working in the London and Brussels offices. Lisa has extensive experience across a wide range of competition, regulatory and EU work, including antitrust, merger control, market investigations, competition litigation, state aid, public procurement, sector regulation and the free movement rules.

Lisa's recent highlights include advising Ferrovial on the sale of its Amey business, NEXT on its acquisition of Joules, ContourGlobal plc on its recommended cash acquisition by KKR, Hong Kong Exchanges and Clearing Limited on the merger control and foreign investment aspects of its possible offer for London Stock Exchange Group and Marsh & McLennan on its acquisition of Jardine Lloyd Thompson.

Lisa topped the MergerLinks list of female lawyers acting on the highest value of deals in Europe, the Middle East and Africa in 2019 and was placed second in the MergerLinks ranking for top antitrust lawyers in the region. She has also featured in W@Competition's list of '40 in their 40s – notable women competition professionals', their 2023 list of Five Star Women Competition Professionals and previously in *Global Competition Review*'s '40 under 40' leading competition lawyers. She has also been noted as 'a superstar in the making' with 'superb technical knowledge' by *The Legal 500 – United Kingdom*.

QUESTIONS

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

The Competition and Markets Authority (CMA) (the UK's primary competition authority) has continued to pursue its interests in the pharmaceutical sector and in the construction sector over the past year. For example, the CMA recently fined four pharmaceutical companies and a private equity company for agreeing to restrict the supply of anti-nausea tablets. In relation to construction, it is currently investigating 10 suppliers of demolition and removal of asbestos services for taking part in potential bid rigging and fined a group of construction companies for price-fixing and regularly exchanging competitively sensitive information in respect of precast drainage products. The CMA has also continued to develop its focus on the digital sector, for instance, it recently concluded a market study into competition in the music streaming market and into mobile ecosystems. Following on from this, it has opened a market investigation into the supply of mobile browsers and browser engines, and the distribution of cloud gaming services through app stores in the UK.

The CMA has also continued to investigate a wide variety of other industries over the past year, with investigations into a capacity sharing agreement in the shipping sector, suspected anticompetitive conduct in relation to recycling of end-of-life vehicles and the pricing of replica kit in the sportswear sector.

Anticompetitive conduct in labour markets may also be a focus given the CMA's February 2023 publication of guidance for employers on no-poaching agreements, wage-fixing agreements and information sharing about the terms and conditions of employees' contracts.

Lisa Wright

However, the CMA is not the UK's only competition authority – sectoral regulators have concurrent enforcement powers – thereby increasing the UK's capacity to enforce against anticompetitive conduct. In February 2019, the financial watchdog (the Financial Conduct Authority (FCA)) issued its first competition law decision, fining three asset management firms for breaching competition law after they were found to have exchanged sensitive information. The FCA also recently announced that it would be conducting a market study into the markets for credit ratings, trading data and benchmarks and indices, due to start in 2023. Similarly, the UK's new Payment Systems Regulator (PSR) made its first antitrust settlement in January 2022, fining four prepaid card issuers more than £33 million after they admitted to colluding and allocating customers in the UK prepaid welfare card sector for six years.

"Investigations by the CMA may be triggered by leniency applications, third-party complaints or through the CMA's own market monitoring function. They may also arise out of merger reviews."

The energy regulator (Ofgem) and communications regulator (Ofcom) have also investigated market sharing and information exchange cases in recent years, with Ofgem imposing total fines of £870,000 on suppliers of energy software and consultancy services in May 2019. In a case that closed in December 2022, Ofcom found that certain providers of electronic communications equipment and related services exchanged competitively sensitive information, including on future pricing. One of the parties was granted immunity under the CMA's leniency policy and the other was fined £1.5 million. As the CMA's workload increases, the rate at which sectoral regulators will investigate suspected infringements looks set to increase.

In its draft 2023–2024 Annual Plan, the CMA pledged to focus on certain key outcomes. These are: (1) acting to ensure that people can be confident that they are getting great choices and fair deals; (2) ensuring that competitive, fair-dealing businesses can innovate and thrive; and (3) ensuring that the whole UK economy can grow productively and sustainably. Under each of these outcomes, the CMA has a number of stated aims for 2023–2024. These include acting in areas of essential spending and where people are under financial pressure, such as accommodation; enabling innovating businesses to access digital markets; and acting in existing and emergent markets for sustainable products and services. The Annual Plan is expected to be published in its final form by the end of March 2023.

2 What do recent investigations in your jurisdiction teach us?

Investigations by the CMA may be triggered by leniency applications, third-party complaints or through the CMA's own market monitoring function. They may also arise out of merger reviews (as happened in the *Laundry Services* investigation, which resulted in the imposition of £1.71 million worth of fines at the end of 2017), out of market studies

or as a result of information received during previous investigations (as happened in the *Estate Agents* investigation that opened in March 2018).

CMA investigations can also begin on the back of information received from individual whistle-blowers, and the CMA actively encourages business representatives who suspect that their business has been involved in cartel activity to blow the whistle on the cartel. In February 2020, the CMA launched a 'Cheating or Competing' campaign to promote awareness among businesses of illegal cartel behaviour, following on from a successful previous campaign, launched in October 2018, to encourage whistle-blowers to expose business cartels. The CMA also offers financial rewards of up to £100,000 (in exceptional circumstances) for information about cartel activity.

Whatever the trigger, the CMA can only open a formal investigation once it has reasonable grounds to suspect that an infringement has actually taken place. After opening a formal investigation, the CMA can use its statutory powers to require businesses under investigation or third parties (such as customers, suppliers and competitors) to answer information requests and can impose penalties for failure to comply with such requests. It can also conduct dawn raids to seize information, although the procedure for, and scope of, dawn raids will depend on whether they are conducted with or without a court warrant. Dawn raids have returned over the past year after the covid-19 restrictions put dawn raids on hold. In spring 2022, for instance, the European Commission and the CMA carried out their first parallel dawn raid since Brexit into firms in the automotive sector who are suspected of breaching competition laws governing how end-of-life vehicles are recycled.

The CMA generally provides case updates to businesses under investigation either by telephone or in writing. The CMA also offers opportunities to interact with the case team at 'state of play' meetings, during which the businesses under investigation are informed about

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the next stages of the investigation. If the CMA reaches a provisional view that the conduct under investigation amounts to an infringement of competition law, it will issue a statement of objections. At this time, the CMA will also give the businesses under investigation the opportunity to inspect its file using data rooms and confidentiality rings where appropriate.

Businesses under investigation are then given the opportunity to respond to the statement of objections orally and in writing. The CMA will then issue its decision. Businesses under investigation may be able to cut this process short by offering commitments in relation to their future conduct that address the CMA's concerns or by entering into a settlement agreement.

Nonetheless, the CMA's recent investigatory practice shows that it is prepared to balance its competition enforcement objectives with other public policy considerations (including its response to the covid-19 pandemic (see question 10)). For example, in September 2021 following a surge in fuel prices, the CMA temporarily exempted

fuel suppliers from certain competition rules, allowing them to share information in order to ensure effective supply to petrol stations with the least fuel. A month later, the CMA took similar measures to help combat a shortage in the supply of carbon dioxide, allowing suppliers to work together to ensure supply to key sectors.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

There have, for a while now, been rumours (not limited to the UK) of leniency applications being on the decline, with the CMA commenting in 2015 that it wanted to reduce its reliance on the leniency policy as a method of cartel detection, including through the recruitment of additional staff and investment in intelligence. In June 2022, the CMA's executive director of enforcement said that the number of leniency applications in the UK has been stable. However, the head of the Commission's cartel unit has said that there has been a sharp decline in the number of leniency applications in recent years.

However, the leniency policy clearly still plays a vital role in the detection of cartels. By way of example, in September 2022, the CMA found two suppliers of Rangers-branded replica kits and other clothing products had infringed competition law by fixing the retail prices of the foods. Elite Sports was fined £459,000 and JD Sports was fined £1.4 million. These two penalties included a discount for coming forward and cooperating with the CMA's investigation under the leniency policy. In another example from 2022, the CMA granted a 40 per cent discount to a fine for one of the pharmaceutical companies involved in restricting the supply of anti-nausea tablets as a result of being granted leniency for admitting its involvement and for cooperating with the CMA's investigation.

"Businesses under investigation are then given the opportunity to respond to the statement of objections orally and in writing. The CMA will then issue its decision. Businesses under investigation may be able to cut this process short by offering commitments in relation to their future conduct that address the CMA's concerns or by entering into a settlement agreement."

To the extent any such decline in leniency applications does exist, it is generally thought to be, to a large degree, attributable to the introduction of the EU Damages Directive (implemented in the UK by Schedule 8A of the Competition Act 1998 and largely retained following Brexit) and the resulting increased exposure – including for leniency applicants – to private damages claims.

For instance, members of the *Foreign Exchange* cartel are facing a possible class action enforcement case in the Competition Appeal Tribunal (CAT) (the UK's specialist competition tribunal). Similarly, members of the *Trucks* cartel are facing a possible class-action enforcement case in the CAT stemming from their participation in a 14-year price-fixing cartel. In June 2022, the CAT granted a collective proceedings order and allowed the Road Haulage Association (RHA) to proceed as class representative. Such cases should serve as a reminder to organisations of the long-term dangers of participating in cartels (even where they subsequently apply for leniency), beyond any fine imposed for anticompetitive behaviour.

Where the CMA does receive leniency applications, whether it ultimately pursues the case will depend on various considerations including its own prioritisation principles. The CMA will consider the impact of the behaviour concerned, its significance to the CMA's strategy and the likelihood of success, and will generally think twice before committing resources to a new project when it already has worthy cases on its books. This is likely to continue, given its increased workload following the UK's departure from the European Union.

It is also worth noting that, where appropriate, the CMA may send warning letters or advisory letters, instead of opening investigations.

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QUESTIONS

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

Settlement discussions can be initiated either before or after the issue of the statement of objections. Parties must be prepared to admit liability and accept the CMA's adoption of a streamlined administrative procedure for the remainder of the investigation to benefit from a reduced penalty. The CMA retains discretion in determining which cases it wishes to settle.

However, the CMA's recent practice suggests that it is more than open to settling cases where appropriate. For example, in July 2020 the CMA imposed a £278,945 fine on two retailers of musical instruments that had engaged in resale price maintenance. The fine included a 20 per cent reduction to reflect savings made by the CMA as a result of the companies settling the case. Similarly, the penalties imposed against Elite Sports and JD Sports (see question 3) included

a settlement discount. Sectoral regulators are also willing to settle cases where appropriate. For example, in January 2022 the members of the *Prepaid Cards* cartel (see question 1) settled with the PSR, who applied discounts of 10 to 20 per cent depending on when the settlement was reached.

The streamlined administrative procedure usually involves scaled-back access to file arrangements with no written representations on the statement of objections other than in relation to factual inaccuracies, no oral hearings, no separate draft penalty statement after settlement has been reached and no appointment of a case decision group. Where a settling party has made representations on the statement of objections before settling, the CMA also requires the party to formally withdraw those representations (other than in relation to factual inaccuracies) in its settlement confirmation letter.

In deciding whether to enter into a settlement agreement, businesses must weigh the benefits of early resolution against factors such as the admission of liability and the implications for appeal, including that they might not benefit from a successful appeal against the CMA's decision by the other businesses being investigated (this issue was considered in the *Gallaher/Somerfield* tobacco litigation).

In December 2021, prompted by musical equipment maker Roland's unsuccessful appeal to the CAT after Roland agreed a settlement with the CMA, the CMA updated its settlement guidance. Settling businesses must now accept that the CMA's decision will remain final (even if challenged by another addressee) and that they will not challenge or appeal the decision to the CAT. The change reflects the CMA's intention that settlements should be final, where previously settling parties could appeal the CMA's decision subject to the revocation of the settlement discount if they lost the appeal (as was the case in *Roland*).

"In deciding whether to enter into a settlement agreement, businesses must weigh the benefits of early resolution against factors such as the admission of liability and the implications for appeal."

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5 Tell us about the authority's most important decisions over the year. What made them so significant?

As noted in question 1, in the past year the CMA has continued to pursue its interests in the pharmaceutical and construction sectors. Among other things, it has concluded an investigation into anticompetitive agreements between pharmaceutical companies to delay entry into the market for supply of hydrocortisone tablets.

The CMA has also exercised its director disqualification powers in these sectors, following its updated guidance on director disqualifications in 2019. In particular, the CMA secured undertakings from three directors (for three, four and six and a half years) for their involvement in a cartel in the supply of roofing materials, and from two directors (for 11 and 12 years) for their involvement in a price-fixing cartel in the supply of precast concrete drainage products. In January 2022, the CMA secured a legally binding director disqualification from a director for four years for his involvement in a pharmaceutical cartel. The terms of a director disqualification undertaking require that the relevant director will not be a director of a company, or an insolvency practitioner, for the duration of the undertaking. Since the power was first used in 2016, there have been 25 director disqualifications arising from CMA investigations.

In March 2022, the CMA concluded an investigation into the long-term exclusive contracts between an electric car charge point operator and the operators of motorway service stations at which they are placed. The final decision accepted commitments from the electric car charge point operator that it would not enforce certain exclusive rights in agreements with the operators of motorway service stations. This is demonstrative of the CMA's commitment to support the transition to low carbon growth, as set out in its 2022–2023 Annual Plan and reiterated in its draft 2023–2024 Annual Plan.

Furthermore, the digital sector continues to be an area of focus. In June 2022, the CMA completed a market study into mobile ecosystems. As mentioned in question 1, this has led to a new market investigation in respect of mobile browsers and cloud gaming services. This reflects the CMA's increased focus on the digital markets as noted in their draft 2023–2024 Annual Plan.

Given a Digital Markets Unit (DMU) was established within the CMA in 2021, and the government recently confirmed that it will be bringing forward the Digital Markets, Competition and Consumer Bill in Spring 2023, cases dealing with anticompetitive behaviour in the digital market are likely to continue to be a key focus going forward.

"The UK is widely regarded (with some competition from Germany and the Netherlands) as the jurisdiction of choice for private cartel enforcement in Europe."

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

The CMA makes decisions at first instance by itself, but those decisions may be appealed to the CAT (unless a party has settled with the CMA, in which case the right of appeal is forfeited (see question 4)). The CMA's antitrust infringement decisions are subject to appeal on the full merits of the case (in contrast to its merger control and market investigation decisions, which can only be appealed on the (narrower) grounds available for judicial review). Following a decision by the CAT, any party to the appeal or a third party with sufficient interest (and permission from the CAT) may bring an appeal to the Court of Appeal on a question of law (but not the merits of the case), or the amount of a penalty.

A noteworthy challenge was that lodged by Lexon, the largest independent wholesaler to independent pharmacies in the UK, against a fine imposed on it by the CMA. The case began in March 2020 when the CMA issued an infringement decision, finding that Lexon had illegally shared competitively sensitive information with other suppliers about an antidepressant drug. The suppliers had exchanged information about prices, the volumes of the drug being shipped and one of the supplier's plans to enter the market, with the aim of keeping the price of the drug high. The CMA fined Lexon, who did not admit to breaking the law (unlike the other suppliers who received lesser fines), £1.22 million. In February 2021, the CAT upheld the CMA's decision, finding that the sharing of competitively sensitive information amounted to an illegal object restriction, and that the level of the fine was not harsh and inappropriate as Lexon had argued.

Lexon has recently launched another challenge against a CMA decision. The CMA fined four pharmaceutical companies (including Lexon) and a private equity company for agreeing to restrict the supply of anti-nausea tablets. The four pharmaceutical companies have appealed the decision seeking the annulment of the CMA's decision and the annulment, or reduction of the fines imposed (which totalled £35.3 million).

7 How is private cartel enforcement developing in your jurisdiction?

The UK is widely regarded (with some competition from Germany and the Netherlands) as the jurisdiction of choice for private cartel enforcement in Europe. One particularly attractive feature for claimants is the UK's system of disclosure. It is routine for defendants to be required to hand over all documents relevant to the case (whether helpful or unhelpful to them). Although disclosure in competition cases has become part of national law in all EU member states (as a result of the EU Damages Directive), the procedures surrounding it remain underdeveloped in all but a few of those

jurisdictions. The UK, therefore, seems likely to remain a leading forum for these cases.

The UK has also seen a rise in competition class actions since the Supreme Court affirmed a significantly lower threshold for bringing such claims in the *Merricks* case in April 2019. In *Merricks*, the Court of Appeal overturned a decision by the CAT that prohibited the bringing of a collective action by Merricks against Mastercard, following a Commission decision in 2007 that its interchange fees had been set illegally high. Overturning the CAT's finding that it would be difficult to allocate the loss to each customer affected, the Court of Appeal held – and the Supreme Court largely upheld – that the CAT should have asked itself whether a claim is suitable to be brought in collective proceedings rather than individual proceedings and suitable for an award of aggregate rather than individual damages. The Supreme Court also emphasised that the courts should not deprive claimants of a trial merely because of challenges relating to the quantification of harm.

As noted in question 3, the CAT recently granted permission for the RHA to bring a claim against the members of the *Trucks* cartel. This marked the first time the CAT has allowed an application for collective proceedings on an opt-in basis, meaning the RHA will be able to invite any qualifying individual or entity to join the claim.

Further, in March 2022, the CAT refused to grant an opt-out collective proceedings order to class representatives in claims for follow-up damages arising from the Commission's *Foreign Exchange* cartel decision. However, the CAT stayed the claims, and the applicants were given permission to make revised applications on an opt-in basis. The applicants have appealed the CAT's decision, which is expected to be heard in the Court of Appeal in 2023. The legislation implementing the EU Damages Directive in the UK came into force in March 2017 (and remains in force after Brexit). This legislation makes it easier to bring a claim by introducing a rebuttable presumption that cartels

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cause harm. The legislation, however, restricts claimants' access to materials that may be helpful for their case, such as leniency statements (which are not disclosable), settlement submissions (which are disclosable only if withdrawn) and information or material on a competition authority's file (which is disclosable only if the court or tribunal making the disclosure order is satisfied that no one else is reasonably able to provide the documents or information).

8 What developments do you see in antitrust compliance?

There continues to be an ever-increasing focus on the digital market, where the emergence of tech giants and new technologies have presented regulators with fresh challenges. From the threat of online selling platforms to the brand image of luxury goods to the use of sophisticated pricing algorithms, as the way we do business changes, so do the perceived threats to competition. In the face of this changing landscape, following a detailed market study, the CMA established the

"Another key aim set out in the CMA's draft 2023–2024 Annual Plan is to support the UK economy to grow productively and sustainably, including through acting in existing and emergent markets for sustainable products and services."

DMU in April 2021 on a temporary and non-statutory basis to prepare for the new statutory regime for digital platforms. In particular, it is envisaged that the DMU will designate large digital platforms with 'strategic market status' (SMS), enforce a code of conduct to govern the behaviour of SMS platforms and have powers enabling it to make a number of competitive interventions, including requiring new interoperability to be introduced.

Accordingly, the CMA's draft Annual Plan states that it is focusing on ensuring that the digital markets are competitive in 2023-2024. In particular, the CMA notes that it is committed to enabling innovating business to access digital markets such as mobile browsers and the distribution of cloud gaming services, e-commerce and digital advertising. In line with this, the CMA has already announced its market investigation in respect of the supply of mobile browsers and browser engines and the distribution of cloud gaming services through app stores on mobile devices in the UK.

Another key aim set out in the CMA's draft 2023–2024 Annual Plan is to support the UK economy to grow productively and sustainably, including through acting in existing and emergent markets for sustainable products and services. This includes ensuring that businesses engaged in sustainability initiatives understand their competition compliance obligations, for which the CMA has published an information sheet that (among other things) offers information to businesses on how to avoid serious restrictions of competition and anticompetitive behaviour stemming from sustainability agreements. As exemplified by the investigation into electric car charge point operators (referred to in question 5), the CMA is also continuing to prioritise cases where practices could impede the transition to a low carbon economy.

We may also see a focus on anticompetitive conduct in labour markets following the February 2023 guidance (referred to in question 1).

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

In July 2021, the government announced its proposals for the wide-ranging reform of competition policy in the UK. In addition to its proposals on digital markets (see question 8) and consumer law, the reforms would introduce a tougher enforcement and investigatory regime. The new regime would, among other things, broaden the reach of the UK regime to capture anticompetitive agreements that have substantial effects within the UK; grant the CMA new evidence-gathering powers in investigations with regard to interviews, preserving evidence and obtaining information stored remotely when executing a warrant; allow the CMA to impose tougher penalties on non-cooperative undertakings; and arm the CMA with stronger tools for more effective collaboration with international regulators.

The new proposals aim to bring the CMA's powers in line with its global equivalents following the UK's exit from the European Union, and the CMA is already scaling up its portfolio of major investigations over which the Commission previously had exclusive jurisdiction as it seeks to position itself as a global competition authority. It intends, for example, to increase fining levels in cases involving large multinationals operating in the UK, and accordingly updated its penalty calculation guidance in December 2021 to (among other things) allow the CMA to take into account turnover outside the UK when calculating fines. Businesses now risk undergoing parallel investigations in the UK and the EU, resulting in an increased regulatory burden for businesses and a risk of inconsistent outcomes. Similarly, leniency applicants will need to consider lodging applications with both the UK and EU authorities.

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As noted in question 1, in its draft 2023–2024 Annual Plan, the CMA has pledged to focus its activities on certain key outcomes. In particular, the CMA intends to focus on ensuring consumers obtain fair deals and great choices, ensuring that fair-dealing businesses can innovate and thrive and ensuring the whole UK economy can grow productively and sustainably.

As noted in question 5, the CMA is continuing to deploy its formerly neglected director disqualification powers, having updated its guidance on these disqualification powers in February 2019 and secured some noteworthy disqualifications in recent years. It is also likely that class action enforcements will continue to increase in frequency following the Supreme Court's ruling in *Merricks* (see question 7).

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10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

In response to the covid-19 pandemic, the government used its legislative powers to temporarily relax elements of competition law in certain sectors. In particular, the government has powers to relax rules for certain agreements that might normally be considered anticompetitive. The government used these powers to introduce measures to permit cooperation in the management of several supply chains (such as provisions for data sharing) in respect of dairy produce, Solent maritime crossings and health services for patients. These have now been revoked.

In March 2020, at the outset of the pandemic in the UK, the CMA issued guidance stating that it would focus on whether coordination could cause harm to consumers or to the wider economy. Where the coordination is necessary, for example to make sure that essential supplies find their way to consumers or that key workers can travel safely to their place of work, it would be highly unlikely that this coordination would cause harm to consumers. This applies even if the coordination would lead to a reduction in the range of products available to consumers, as long as that reduction is necessary to avoid supply shortages of the relevant products in the first place.

In its 2022–2023 Annual Plan, the CMA listed protecting consumers from unfair behaviour by businesses, during and beyond the covid-19 pandemic, as a key theme. In this respect, the CMA monitored anticompetitive and unfair trading practices by businesses closely in relation to covid-19. In 2021, for instance, it secured commitments of over £200 million from holiday firms to refund consumers for package holidays that were cancelled due to the restrictions imposed as a result of the covid-19 pandemic. The CMA also wrote to over 100 package travel firms reminding them of their obligations under consumer law.

The UK has now moved beyond its covid-19 restrictions and we have seen the CMA restarting activities such as dawn raids and site visits, which had generally been suspended while covid-19 restrictions were in place and many businesses were working from home.

Lisa Wright
lisa.wright@slaughterandmay.com

Slaughter and May
London
www.slaughterandmay.com

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QUESTIONS

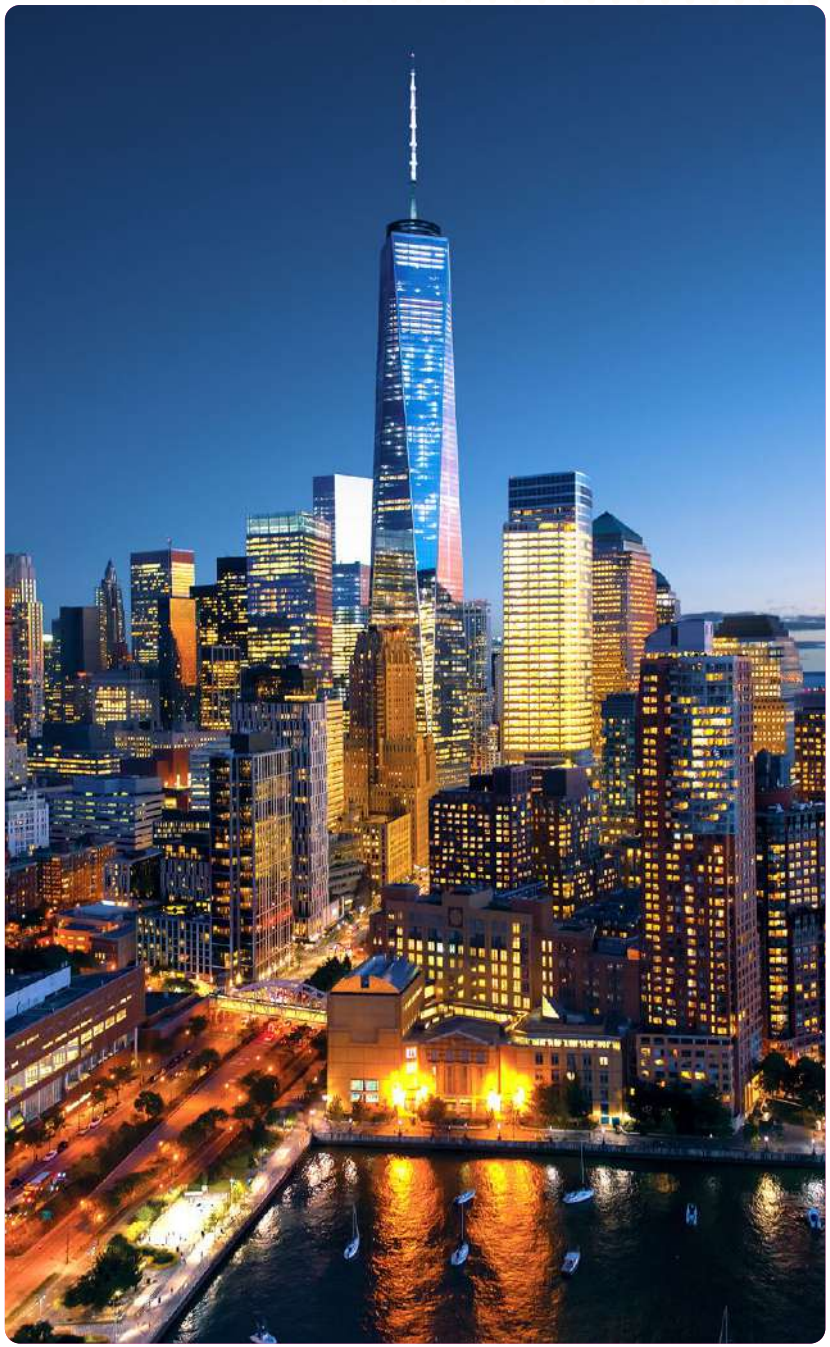
The Inside Track

What was the most interesting case you worked on recently?

I recently worked on a case involving some pretty novel conduct for which the legal assessment was not clear. Bringing the case to a successful conclusion required a fresh look at traditional concepts and some innovative thinking to apply them to the facts.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

Cartel and antitrust enforcement in the UK is based on robust legislation and clear guidelines. Transparency and due process have also improved in the past few years. The CMA attempts to avoid imposing unnecessary burdens on (third) parties in its use of investigative tools (eg, by using draft information requests). However, the authority's requests for information are still relatively burdensome, and so there is still room for improvement in this area.



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United States

Adam Hemlock is a partner in the antitrust practice at Weil Gotshal & Manges LLP. He represents clients in civil and criminal antitrust investigations and litigations, and he is recognised as a leading antitrust lawyer in a variety of industry publications, including *Chambers Global*, *Chambers USA* and *The Legal 500*.

Adam regularly represents clients in criminal antitrust investigations by the US Department of Justice and has served as lead coordinating counsel for clients under investigation in multiple jurisdictions by other international governmental agencies. Adam also defends clients in cartel class action lawsuits across the United States, as well as private antitrust litigation, including disputes regarding exclusivity, bundling and tying, joint ventures and group boycotts. Additionally, he has substantial experience counselling in the anti-trust and IP area, including regarding the antitrust legality of patent pools, standard setting activities and technology transactions among competitors.

Adam is currently a co-chair of the Joint Conduct Committee of the American Bar Association antitrust section and previously served as vice chair of the cartel and criminal practice and intellectual property committees. He is an adjunct professor at Columbia Law School, where he teaches a class on international antitrust cartels.

1 What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

The US Department of Justice's (DOJ's) Antitrust Division has historically focused its criminal enforcement efforts on hardcore cartels (price-fixing, bid rigging, and market allocation). Until several years ago, it had obtained most of its largest fines from the prosecution of international cartels. Over the past few years, however, we have seen more enforcement with respect to domestic cartels, including investigations in the pharmaceutical, healthcare, aerospace and agriculture sectors. Fines resulting from DOJ investigations decreased from US$639 million in 2020 to US$150 million in 2021 to US$2 million in 2022.

The DOJ has continued to focus on collusion among employers, prosecuting 'no-poach' and wage-fixing agreements. To date, the DOJ has secured victories at the motion to dismiss stage in its no-poach and wage fixing prosecutions, further to the DOJ's view that HR-related cartel behaviour should be treated no differently than cartel conduct affecting goods and services. The DOJ also obtained its first guilty plea in *United States v Hee*, a wage fixing and no-poach case, in October 2022. However, the DOJ has yet to obtain a conviction in no-poach and wage fixing cases at trial, losing trials in *United States v DaVita* and *United States v Jindal*.

Since its establishment three years ago, the Procurement Collusion Strike Force (PCSF), a DOJ-led inter-agency partnership focused on deterring, detecting, investigating and prosecuting antitrust crimes in government programme funding, has expanded significantly. The PCSF has secured guilty pleas and indictments in construction and government contracting cases across the country, including in Alaska, California, Connecticut , Florida, Montana, Minnesota and Texas. The


Adam Hemlock

PCSF has focused its efforts on conduct in regional markets, such as a scheme between an owner of a commercial flooring contractor and an employee of a prime contractor that included paying US$100,000 in kickbacks over five years. By focusing on such conduct, the PCSF sent a clear message that no conspiracy regarding government funding is too small to avoid scrutiny by the DOJ.

2 What do recent investigations in your jurisdiction teach us?

Over the course of 2022, the DOJ furthered its effort to push the boundaries of criminal enforcement and pursue cases with challenging facts. Defendants have responded to the DOJ's more aggressive approach by taking their chances at trial and often succeeding.

"Over the course of 2022, the DOJ furthered its effort to push the boundaries of criminal enforcement and pursue cases with challenging facts."

Late last year, the DOJ's years-long effort to prosecute alleged price-fixing in the broiler chicken market ended in defeat. The DOJ initially indicted the CEO of Pilgrim's Pride and certain other executives, and then entered into a plea agreement with Pilgrim's Pride in 2021 for US$107 million. However, the DOJ's first two trials ended with hung juries, as the DOJ struggled to convince the juries that a violation had taken place under the 'beyond a reasonable doubt' standard. Undeterred, the DOJ took five chicken industry executives to trial a third time, which is quite rare in federal antitrust prosecutions. Before trial, District Court judge Phillip Brimmer held a hearing during which he asked DOJ Assistant Attorney General Jonathan Kanter to explain the DOJ's decision to seek a conviction a third time. Kanter responded: '[t]hese are hard decisions . . . I don't want you to be left with the impression that this is one being done lightly or reflexively'. In the third trial, the jury acquitted the remaining Pilgrim's Pride executives. Despite this loss, the DOJ continued preparing for trial of certain other chicken industry executives in a separate case. However, on 14 October 2022, Judge Daniel Domenico issued an order excluding all of the government's 294 exhibits of co-conspirator evidence from the record. Domenico wrote that the government's exhibits contain 'only the faintest whiffs of an agreement to fix prices'. After that order, the DOJ dropped its remaining charges.

The DOJ's prosecution of executives in the market for broiler chickens illustrates that the DOJ's current leadership under Assistant Attorney General Jonathan Kanter will bring cases to trial even if the facts and surrounding circumstances do not point to a near-certain win by the DOJ. Kanter testified before the Senate Judiciary Committee on 20 September 2022:

> *Bringing tough cases, when warranted by the facts and the law and consistent with the Principles of Federal Prosecution, matters because it ensures we are fulfilling our mission to stamp*

out anticompetitive conduct and protect workers from collusion. That is the essence of deterrence.

We can expect the DOJ to continue to bring tough cases under the Kanter administration, and we can expect many defendants to fight those cases in court.

3 How is the leniency system developing, and which factors should clients consider before applying for leniency?

The leniency programme continues to be an important element of the DOJ's enforcement efforts, and a substantial means of detecting cartel activity, although its strength and efficacy has been the subject of much discussion in the past several years. A successful leniency applicant can entirely avoid criminal liability for the reported conduct, as well as benefit from mitigated damages in any follow-on civil private damages suit. Leniency applications have led to the majority of the Antitrust Division's international cartel prosecutions, resulting in substantial fines, prison sentences and opportunities for recovery for victims.

A prospective leniency applicant must first and foremost consider the strength of the DOJ's case against the company. The applicable statute of limitations, and federal law limiting the DOJ's jurisdiction over foreign conduct, can act as potential full-stop defences to criminal liability, and therefore counsel must promptly evaluate their applicability in each case. This is especially important because, in the United States, being a leniency applicant does not fully protect a company from liability from private lawsuits, such as the purchaser class actions and private state attorneys general cases that are typically filed against corporates following disclosure of a criminal investigation by the DOJ. This means that a company may potentially avoid civil exposure if it decides not to self-report to the DOJ. Another

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key consideration is whether other companies with knowledge of the sensitive conduct may choose to self-report to, and cooperate with, the DOJ. Only one company can enjoy leniency in the US, and the benefits to 'second in' cooperators are far less substantial than those for the 'first in' leniency applicant.

In April 2022, the DOJ added a condition to its leniency policy to provide that the leniency applicant must, 'upon its discovery of illegal activity, promptly report[] it to the Antitrust Division'. This was a change from previous practice, as companies that have waited too long after learning of the cartel conduct in question will now not qualify for leniency. The DOJ also amended its FAQs to clarify the new promptness requirement. According to the FAQs, the DOJ will measure promptness from the earliest date on which an authorised 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. An organisation will not be eligible for leniency if an authoritative representative learns of potential illegal activity and refrains from investigating

"The DOJ's revisions to broaden liability for individuals in Type B leniency applications have changed the calculus for prospective leniency applicants. A company must now consider that self-reporting could reasonably lead to prosecution of its own employees, including senior executives, who played a role in the unlawful agreement for which the company is seeking leniency."

further. Similarly, an organisation that confirms its involvement in illegal activity and then chooses not to self-report until later learning that the Division has opened an investigation will not be eligible for leniency. Note that the DOJ concedes that 'an organization may still be eligible for leniency if it conducts a preliminary investigation in a timely fashion' to be certain that a crime occurred. Ultimately, it is the applicant's burden to prove that its self-reporting was prompt, and the DOJ's determination will be 'based on the facts and circumstances of the illegal activity and the size and complexity of operations of the corporate applicant'. The new promptness requirement associated with leniency eligibility for reporting a violation makes it more important than ever that corporate counsel promptly investigate potential cartel behaviour. The days of a 'wait and see' approach to applying for leniency are long gone.

The DOJ also added a requirement that a leniency applicant must remediate the harm caused by the violation and improve its compliance programme once a violation occurs. Further, the DOJ revised its guidance for Type B leniency applications so that it would no longer presumptively protect current directors, officers and employees. Type B leniency applications differ from Type A leniency applications in that, to qualify for Type A leniency, an applicant must report the illegal activity before the Antitrust Division has received information about it from any other source. A company may still qualify for Type B leniency if it discloses the illegal activity before the Antitrust Division has evidence that, in the Antitrust Division's sole discretion, is likely to result in a sustainable conviction against the company, and granting leniency to the applicant would not be unfair to others. The DOJ's revisions to broaden liability for individuals in Type B leniency applications have changed the calculus for prospective leniency applicants. A company must now consider that self-reporting could reasonably lead to prosecution of its own employees, including senior executives, who played a role in the unlawful agreement for which the company is seeking leniency.

4 What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure), and what are your experiences in this regard?

The pace with which the DOJ moves can be influenced by many factors outside the control of defence counsel, the individual or the corporation. Investigations can become a low government priority for any number of reasons, and, as a result, at varying stages of the process the government may become less (or more) active in requesting documents, seeking witness testimony or interviews, scheduling meetings or otherwise engaging with the subjects of investigations. Other factors, such as the pace of cooperation with foreign authorities and the speed with which cooperating corporates and individuals provide assistance to the DOJ's attorneys, can impact the pace of an investigation. DOJ officials have recognised that expediting interventions into civil cases that involve ongoing criminal investigations and staying civil discovery will assist in protecting government investigations.

It is often preferable not to seek a faster DOJ investigation, as the subject of the investigation often needs time to conduct its internal inquiry. If it is otherwise helpful to increase the pace of an investigation, there are some things a company can do to ensure that it is not the bottleneck. On the substance of the conduct, getting a firm and thorough grasp of the relevant conduct as soon as possible. When responding to a grand jury subpoena, understanding the organisation – including its people, documents and data – inside and out. In addition to being prepared for the questions that the DOJ's attorneys are likely to ask, it is preferable to be responsive and not to create unreasonable delay by taking too long to respond to the DOJ's queries. This can, for example, undermine the company's credibility and cause the DOJ's attorneys, in turn, to take more aggressive positions or discount the company's assertions. Our

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experience has shown that being responsive and well prepared goes a long way to keeping an investigation moving along and maintaining trustworthiness with the DOJ.

5 Tell us about the authority's most important decisions over the year. What made them so significant?

In 2022, the DOJ continued to focus on cartel conduct affecting local markets. The DOJ remained active in the antitrust/HR space and continued to pursue wage-fixing and non-solicitation cases as per se violations of Section 1 of the Sherman Act. The DOJ also brought criminal monopolization actions under Section 2 of the Sherman Act – a first since the 1970s, and reflecting the DOJ's willingness to push the envelope of criminally enforced anticompetitive conduct. Additionally, the DOJ's Procurement Collusion Strike Force continued to pursue cartel behaviour that allegedly injured the government.

"The possibilities of a large criminal fine, an award of restitution as well as potential jail time for defendants have significantly increased the exposure that individuals and corporations face in no-poach cases."

In 2021, the DOJ brought its first ever criminal wage-fixing case in *United States v Jindal*, taking the position that an alleged wage-fixing agreement was per se illegal. In 2022, the DOJ lost that case at trial, with the jury crediting evidence that the companies did not intend to fix wages, and citing the fact that wages of only some of the employees in question were the same after the alleged conspiracy. While the facts in *Jindal* may not have led the jury to a guilty verdict, *Jindal* nevertheless serves as a reminder that the DOJ will continue to view and prosecute wage-fixing as criminal behaviour. The DOJ also brought its first criminal non-solicitation case in *United States v DaVita*, where the agency argued that defendants conspired not to solicit each other's senior level employees in the dialysis services industry. Though the DOJ lost at trial, it prevailed at the motion to dismiss stage, where the judge held that even a non-solicit agreement could be per se illegal if there was a showing that defendants entered into the agreement with the purpose of allocating the market. The DOJ secured its first no-poach guilty plea in *United States v Hee* on 27 October 2022. Although the fine was quite small (US$62,000 and restitution of US$72,000), the alleged conspiracy appears to have been short-lived and localised.

The possibilities of a large criminal fine, an award of restitution as well as potential jail time for defendants have significantly increased the exposure that individuals and corporations face in no-poach cases. The DOJ currently has two pending federal no-poach cases scheduled to go to trial in 2023: *United States v Manahe* and *United States v Patel*. These cases will test the DOJ's ability to win no-poach cases at trial, rather than securing convictions by a guilty plea.

In April 2022, AAG Jonathan Kanter indicated a renewed effort to criminally enforce section 2:

> *If the facts and the law, and a careful analysis of Department policies guiding our use of prosecutorial discretion, warrant*

a criminal Section 2 charge, [DOJ] will not hesitate to enforce the law.

Section 2 of the Sherman Act addresses single-firm anticompetitive conduct – monopolisation, attempted monopolisation and conspiracy to monopolise – and has not been enforced criminally since the 1970s (and even then it had been quite rare). On 31 October 2022, in *United States v Zito*, Kanter made good on that warning, and the DOJ obtained a guilty plea from the president of an asphalt and pavement contractor on an attempted monopolisation charge under section 2. *Zito* demonstrates that the DOJ may charge a mere conspiracy to monopolise under section 2, even if no monopoly is ultimately achieved.

On 6 December 2022, in *United States v Martinez*, the DOJ unsealed an indictment charging 12 individuals with criminal section 1 and section 2 violations by allocating customers, fixing prices and attempting to monopolise the transmigrante forwarding industry (transportation of goods, often used vehicles, from the United States through Mexico to Central America). The DOJ charged the violation under section 2 in part because the defendants operated as a single entity by pooling and dividing their revenues according to pre-negotiated agreements. The renewed criminal enforcement of monopolisation cases signifies that the DOJ is endeavouring to use all tools at its disposal to prosecute anticompetitive behaviour.

Many of the agencies' 2022 victories came from efforts of the Procurement Collusion Strike Force. The initiative scored its first win in February, when a jury convicted a former engineering executive for participating in a conspiracy to rig bids for projects funded by the North Carolina Department of Transportation. The DOJ continued to collect guilty pleas and trial wins over the course of the year while increasing its workload. In Spring 2022, the Division noted that it had more than 60 probes into bid rigging and government contracts. On 15 November 2022, the DOJ announced that the Offices of the Inspector

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General for the US Department of Energy, the Department of the Interior, the Department of Transportation and the Environmental Protection Agency had all joined the PCSF. These agencies oversee hundreds of billions of dollars of government funding recently made available through the Infrastructure Investment and Jobs Act, the Inflation Reduction Act and the CHIPS Act. The scale of these government spending programmes and the success of the PCSF in obtaining convictions and guilty pleas in 2022 indicate that procurement collusion will likely be an enforcement priority in the coming year.

6 What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority's decisions in the courts over the past year?

In the United States, cartel violations are investigated by the DOJ through federal grand juries, which are granted grand jury subpoena

"All plea agreements are subject to federal court review and approval. If a defendant is unwilling to accept a plea agreement, the DOJ must seek an indictment from the grand jury and subsequently prosecute the case to trial in court."

power to obtain documents and witness testimony. If the DOJ concludes that a violation has occurred, it can negotiate an agreement with the company or individual to plead guilty to a Sherman Act violation and pay a fine. All plea agreements are subject to federal court review and approval. If a defendant is unwilling to accept a plea agreement, the DOJ must seek an indictment from the grand jury and subsequently prosecute the case to trial in court.

At trial, the DOJ bears the burden of proving to a jury, beyond a reasonable doubt, that a violation has occurred. In the past, it was rare for corporate defendants facing cartel charges to go to trial in light of the substantial fine exposure and the reputational implications and stigma associated with a potential criminal conviction. If a defendant is tried and convicted, it may be able to appeal that decision to the applicable Court of Appeals. Over the course of 2022, certain corporate and individual defendants did go to trial and prevailed. The agency got a stern reprimand by Judge Brimmer, who asked Kanter to explain his decision to bring five chicken industry executives to trial a third time, and a 'reality check' by Judge Domenico, who excluded all of the DOJ's conspiracy exhibits in a parallel case for lack of evidence.

7 How is private cartel enforcement developing in your jurisdiction?

Private cartel-related cases tend to take the form of class action litigation brought on behalf of consumers or entities that purchased the affected products, and private cases by larger purchasers. Because civil cases, especially large class actions, can take years to resolve, private cartel litigation can remain active even in times when government cartel enforcement has decreased. Most private damages claims that follow a criminal plea will result in a settlement of the claims by the company. The potential exposure on private

antitrust damages claims in the United States is very high for three main reasons:

- any jury award of damages is automatically trebled;
- each defendant in a cartel case is jointly and severally liable for the total damages caused by the conspiracy; and
- plaintiffs are entitled to attorneys' fees and costs in the event of a judgment in their favour.

Lawsuits by state attorneys general may add to the costs of private antitrust litigation in the US. In the follow-on civil litigation against generic drug manufacturers, almost every state has brought actions through their state attorneys general, along with actions by the governments of the Northern Mariana Islands, Puerto Rico, the District of Columbia and the US Virgin Islands. Given the size of these cases, settlements can be very large, often exceeding the size of the criminal fines imposed by the DOJ.

8 What developments do you see in antitrust compliance?

In July 2019, the DOJ announced a new policy to incentivise corporate antitrust compliance programmes. The DOJ will now consider (and potentially provide credit for) robust corporate compliance programmes at the charging and sentencing stages in criminal antitrust investigations, a notable change that is reflected in the DOJ's Antitrust Division Manual. In an effort to provide the public with 'greater transparency of the Division's compliance analysis', the DOJ also published a document to guide prosecutors' evaluation of corporate compliance programmes at the charging and sentencing stages. In June 2020, the DOJ further clarified its new policy, explaining that there is no 'one-size-fits-all' model for corporate compliance programmes. Instead, the DOJ will focus broadly on the programme's design, whether it was implemented in good

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faith and whether it actually works in practice. These open-ended considerations are viewed with other factors, such as the size of the company, to evaluate the compliance programme. Notably, the DOJ may credit a compliance programme even if it failed to detect a violation.

In light of the DOJ's update of its leniency programme to include a promptness requirement as a condition for eligibility, it is more important than ever to detect possible cartel violations as soon as they arise. In another April policy update, the DOJ made clear that the leniency applicant must now endeavour 'to improve its compliance program to mitigate the risk of engaging in future illegal activity'.

A compliance programme should also ensure that records associated with conduct related to a potential leniency application are properly collected and preserved. Businesses, even those located in foreign jurisdictions, must now ensure that they preserve, collect and produce all relevant records that could assist with a leniency application. In a January 2023 update, the DOJ made clear that when a foreign

jurisdiction's privacy or 'blocking statutes' prohibit the processing or transfer of protected records, the applicant now bears the burden of establishing the existence of any restriction on production and identifying reasonable alternatives to provide these records to the Division. The applicant must work diligently to identify all available legal bases to provide such records to the Division.

9 What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

As noted above, we recently witnessed greater activity in the domestic cartel space and an expanded focus on cartels in labour markets. The domestic matters that the DOJ pursued in 2022 were on a smaller scale than the large international investigations it conducted in earlier years, and US fine totals for 2022 dropped to historically low levels. The lower fine totals reflected a shift in focus, but not a drop in enforcement, as the DOJ brought many cases directed at cartel conduct in government procurement, and continued its focus on the labour/HR space.

We can expect to see a continued focus on employment cartel behaviour in 2023. The DOJ established precedent that these cases are on reasonable legal footing at the motion to dismiss stage, and secured its first guilty plea in October of 2022. With two no-poach trials scheduled for 2023, the DOJ will endeavour to learn from its mistakes in the no-poach trials of 2022, and use its best efforts secure its first no-poach victory in front of a jury. The historic drop in fine totals in 2022 may serve as a signal for the DOJ to reverse the trend in 2023 and instead focus on larger international cartel investigations.

Clients should ensure that their compliance programmes are up to date, particularly with respect to human resources, and conduct

"We can expect to see a continued focus on employment cartel behaviour in 2023. The DOJ established precedent that these cases are on reasonable legal footing at the motion to dismiss stage."

an audit of their labour-related agreements to ensure they are complaint with the agencies' positions on wage-fixing, no-poach and non-compete agreements. Further, clients should be aware that even an attempted or monopolisation conspiracy could possibly be charged as a criminal violation of the antitrust laws.

10 How has the covid-19 pandemic affected cartel enforcement in your jurisdiction?

At the start of the pandemic in the United States, the DOJ issued a strong warning, stating that it planned to hold market participants accountable for violating the antitrust laws in connection with manufacturing, distributing or selling personal health protection equipment. The DOJ also warned that the PCSF would be on high alert for collusive practices involving products such as face masks, respirators and diagnostics.

On 17 February 2022, the DOJ announced an initiative to protect Americans from supply chain disruptions caused by the covid-19 pandemic. Assistant Attorney General Kanter commented that the Antitrust Division would not allow companies to collude in order to overcharge consumers under the guise of supply chain disruptions. As part of the initiative, the DOJ prioritised investigations where competitors may be profiting from exploiting these challenges. The DOJ also took action to investigate collusion in industries particularly affected by supply chain disruptions, such as agriculture and healthcare. The DOJ also formed a working group focused on global supply chain disruption with the Australian Competition and Consumer Commission, the Canadian Competition Bureau, the New Zealand Commerce Commission and the United Kingdom Competition and Markets Authority. The working group is developing and sharing intelligence and utilising existing international cooperation tools to detect and combat collusive schemes.

On 28 February 2022, the DOJ and FMC (the Federal Maritime Commission) reaffirmed their commitment to strengthening cooperation between the agencies and enforcing the antitrust laws. US Attorney General Merrick Garland and FMC Chairman Daniel Maffei announced two steps that the agencies would take to build upon their MOU: the DOJ committed to providing attorneys and economists from the Division to assist the FMC in enforcing violations of the Shipping Act and FMC regulations; and the FMC committed to providing the Division with support and industry expertise in civil and criminal antitrust investigations. This collaboration came to fruition in March 2022, when the DOJ launched an investigation into collusion in the market for ocean freight transportation. The DOJ's investigation has come after shippers, retailers, manufacturers and agricultural interests have complained over the sudden increases in fees that emerged during the pandemic in an industry where over 80 per cent of the volume is now controlled by three alliances. The FTC has also investigated supply chain disruptions related to the covid pandemic: in November 2021, the agency ordered nine retailers including Walmart and Amazon to provide detailed information concerning the causes behind ongoing supply chain disruptions and the effect of those disruptions on consumers. The FTC accepted public comments related to these disruptions in 2022, but ultimately did not bring suit. Nonetheless, the agencies' attention to this area suggests that it may be an area of continued focus in the future.

Adam Hemlock
adam.hemlock@weil.com

Weil Gotshal & Manges LLP
New York
www.weil.com

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The Inside Track

What was the most interesting case you worked on recently?

Our team has been working on many of the cases at the forefront of the DOJ's cartel enforcement efforts, including in the employment, agriculture, hospitality, pharmaceuticals, tech/internet, consumer retail, entertainment and other industries. Each of these cases has brought forth original challenges and unique strategic issues. We also see the Justice Department continuing to evolve its enforcement approach, with a range of methods and techniques depending on the facts of the case and the trial attorneys involved.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

I continue to believe that individual prosecution for cartel behaviour should be further limited to only highly culpable individuals and that many individual prosecutions are not equitable. This is especially the case with prosecution of some foreign nationals who may have engaged in the behaviour with limited understanding of US laws and within the context of their domestic business culture. This is not to say that cartel behaviour is always excusable – but imposing significant jail time on certain individuals may not achieve deterrence, where other means of creating incentives for individual and corporate behaviour may be more effective.

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