Competition Compliance

Contributing editors
Susan Ning and Kate Peng

2018

GETTING THE DEAL THROUGH

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King & Wood Mallesons

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
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87 Lancaster Road
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Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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Competition Compliance 2018

Second edition

Getting the Deal Through is delighted to publish the second edition of *Competition Compliance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

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

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Italy, Malaysia and Switzerland.

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

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

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Susan Ning and Kate Peng of King & Wood Mallesons, the contributing editors, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

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Global overview

Susan Ning and Kate Peng
King & Wood Mallesons

Introduction
Competition compliance has become more and more challenging for multinational companies doing businesses around the world. Currently, more than 120 countries are adopting or have already adopted their own national competition laws, which vary from country to country. Yet competition authorities' support for competition compliance programmes is wildly inconsistent. For example, a few provide guidance about compliance, and will consider a genuinely implemented compliance programme to be a mitigating factor. But many will not give credit to such programme. Attitudes towards legal professional privilege also differ across the globe. This may create difficulty in the face of a cross-border antitrust investigation as to how to disclose information to different competition authorities.

Nevertheless, the different national competition laws still share similarities. First, the ultimate purposes of competition compliance shared across jurisdictions are to ensure efficiency in resource allocation, to protect the interests of consumers, and to create a level playing field for all the participants. Second, detection and prevention of competition law violations is the primary focus of compliance programmes. Third, the major themes that are most frequently found in most countries are horizontal restraints of trade among competitors, vertical restraints of trade among non-competitors, abuse of dominant position and mergers. Last, common methods for deterring competition law violations are also widely adopted, such as pecuniary fines and leniency programmes.

For the purpose of providing businesses, legal practitioners and in-house counsels with a global overview of the state of play of competition compliance, in this edition we survey 19 jurisdictions, including the European Union, to summarise their countries' applicable rules and practices in relation to competition compliance.

New trends
We would like to highlight a few major trends of competition law developments, which may give rise to new challenges for businesses to mitigate competition law risk.

The growing digitisation of economy impacts competition law in a comprehensive way. Against this backdrop, there is an ongoing debate as to whether the competition authorities should refrain from intervening in fast-moving, technology-driven industries. Conversely, some observers argue that a new regulatory framework would be required to address new problems arising from the digital economy. As such, the current competition legal framework around the globe may have to be reassessed and potentially improved to meet the new challenges posed by the digital economy.

China is in the process of a State Council reshuffle, which includes the proposed establishment of a new comprehensive department, the State Administration of Market Supervision (SAMS). The SAMS will consolidate the country's three antitrust agencies, namely, the National Development and Reform Commission, the State Administration for Industry and Commerce , and the Ministry of Commerce (MOFCOM). Under the new plan, the SAMS will be the direct subordinate agency under the State Council. This new setting, which is reported to complete within the first half of this year, will have a decisive influence on China's future anti-monopoly law enforcement landscape.

Antitrust
In antitrust, we notice that big data has become more and more influential to businesses. Especially, if such data is costly and time-consuming to replicate and gives a business a competitive advantage that is difficult or impossible for others to match, it could be considered as a barrier to entry or even the 'essential facility' to which competitors should be given access. As such, big data could be used in a way that enhances the ability of a dominant player to employ abusive measures to the detriment of its competitors or customers. In this regard, such exponential growth of the digital economy has already raised the new issue as to how to assess the power of data in antitrust cases.

Antitrust investigation and sanction
In antitrust investigations, we notice that increasingly sophisticated investigative techniques are being employed by competition authorities. Such as, the types of media that agencies may want to access, data protection and even the types of behaviour treated as cartels.

In addition, we also notice there is an increased tendency towards deterrence in countries such as Australia, Canada, Israel, Japan, Norway, the UK and the US, to impose sanction against individuals, including imprisonment. Certain concerns may thus arise when cartels are investigated in a multi-jurisdictional context. For example, evidence from one jurisdiction could be used elsewhere, thus subjecting an individual to be prosecuted in multiple jurisdictions. The principle of double jeopardy may prevent authorities in different countries from sanctioning the same individual for participation in the same cartel. As such, certain coordination among jurisdictions would be needed to avoid any conflict or excessive penalties.

Merger control
In merger control, the new challenge relates to jurisdictional nexus. The European Commission, the German competition authority and MOFCOM are currently considering whether to introduce a 'deal value' into the notification thresholds to increase the jurisdictional nexus to deals in the digital economy.

Another visible trend in mergers is that China's MOFCOM has intensified efforts to increase punishment for companies failing to notify. The speculation is that MOFCOM may follow the European Commission's model to calculate the pecuniary fine to be imposed on the company who fails to notify based on the company's turnover in the year prior to the proposed transaction. But whether this new model will be effectively adopted still remains to be seen. Under the current Anti-Monopoly Law regime, the highest pecuniary fine for failure to notify is 500,000 yuan, with the most severe punishment being a MOFCOM order to restore the transactional parties to the position they were in before the transaction was entered into. It is, therefore, strongly advised that companies are fully aware of the merger filing triggering thresholds, particularly for countries that have mandatory notification requirements.

For cross-border transactions, companies should take into consideration that there is an increase in protectionist sentiment around the world globally, notably, in the US, the EU, the UK, Germany and Australia. Many countries are taking stricter attitudes towards assessment on inbound investment. For example, the Committee on Foreign Investment in the United States shows a tendency to block more transactions than before.

Conclusion

In view of the ongoing changes in the economic world, together with the ever developing and expanding global competition law enforcement, businesses need to keep abreast of issues that may pose antitrust risks during their daily operations. As the old Chinese proverb provides, 'preparedness ensures success, unpreparedness spells failure', and businesses are thus strongly advised to have a credible and comprehensive ex ante compliance programme in place to rise to numerous challenges within the context of competition law.

KING&WOOD MALLESONS
金杜律师事务所

Susan Ning **susan.ning@cn.kwm.com**
Kate Peng **pengheyue@cn.kwm.com**

40th floor, Tower A, Beijing Fortune Plaza
7 Dongsanhuan Zhonglu
Chaoyang District
Beijing, 100020
China

Tel: +86 10 5878 5588/5010
Fax: +86 10 5878 5599
www.kwm.com/en

Australia

Sharon Henrick and Wayne Leach
King & Wood Mallesons

General

1 What is the general attitude of business and the authorities to competition compliance?

Australia's competition and consumer laws are contained in the Competition and Consumer Act 2010 (Cth) (the Act). In general, companies are keen to comply with the Act and many ensure that they have compliance programmes for this purpose. Large corporate entities in particular may have dedicated compliance officers.

The competition authority in Australia, the Australian Competition and Consumer Commission (ACCC), takes compliance very seriously. The ACCC is a strong advocate of compliance programmes and encourages voluntary compliance by individual businesses and industry sectors, including through charters and voluntary codes of conduct tailored for individual industries.

The ACCC has stated that compliance programmes must create both a credible threat of detection and a real prospect that the penalty for the businesses and individuals involved will outweigh any private gain from the anticompetitive conduct.

Compliance programmes are regularly used in the ACCC's enforcement activities. In court proceedings, the ACCC routinely seeks orders requiring companies to implement compliance programmes. Since 2006, the ACCC has successfully sought a court order in 73 competition and 99 consumer law proceedings. In 80 cases (approximately 47 per cent), orders were made to implement or strengthen compliance programmes. In other instances, which do not involve litigation but do involve an agreed administrative outcome with the ACCC, parties may undertake to implement or strengthen compliance programmes.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

No. However, the ACCC has published guidance and a template for compliance programme undertakings catering for micro-business and large corporate entities. These templates indicate what the ACCC considers advisable in voluntary programmes.

The guidance and the templates are available at: www.accc.gov.au/business/business-rights-protection/implementing-a-compliance-programme.

The ACCC considers an effective compliance programme will:

- identify and reduce the risk of breaching the Act – in particular, in those areas of the law that the company is most exposed to;
- rapidly and effectively remedy any breach that may occur; and
- inculcate a culture of compliance such that playing by the rules becomes business as usual.

In Australia, there is widespread acceptance that an effective compliance programme should comprise five elements: (i) measures to encourage or ensure a culture of compliance; (ii) compliance procedures that are clear, consistent and repeatable; (iii) training that is appropriate for the business and not overly complicated; (iv) management support systems to track progress, including in priority areas; and (v) accountability and audit reports to assist the compliance programme to assume its important place in the competing priorities of business people.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

Best practice and obligations (and the expectations of the ACCC and courts) depend on a company's size and the sector of the economy in which it operates. The ACCC prioritises enforcement action against large companies in preference to small ones because enforcement action against large companies attracts more publicity and has a greater educative value.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The ACCC and the Federal Court have recognised that an effective competition compliance programme may be a mitigating factor when assessing penalties for a breach of the Act. However, the mere existence of a compliance programme is not sufficient – it must be meaningfully incorporated into the company's culture.

Introducing a compliance programme during the course of an ACCC investigation can operate to reduce the penalty imposed.

The extent of mitigation will depend on the circumstances of the case. For example, the Federal Court (and the ACCC in its administrative resolution of matters) may consider:

- the company's prior history of compliance with the Act or prior contraventions;
- the existence and effectiveness of the compliance programme, including how recently it was implemented, how extensive it is and whether it is tailored to the company's operations;
- the company's culture of compliance;
- the extent to which employees involved in a contravention deviated from the company's compliance programme; and
- whether senior management were aware of the employees' actions, and what actions they may have taken if they had been aware.

In nearly 58 per cent of cases brought by the ACCC since 2006, the Court has considered the existence (or lack) of a compliance programme as a relevant factor in determining penalties.

Where a company has an inadequate or no compliance programme, the ACCC may seek, and the Court may order, that the company implement an adequate compliance programme or update its existing compliance programme. Absence of a compliance programme (or evidence of complacency or carelessness in regards to compliance) is not viewed favourably by the ACCC or the Court.

Implementing a competition compliance programme

5 How does a company demonstrate its commitment to competition compliance?

A company may demonstrate its commitment to competition compliance by having a comprehensive and tailored compliance programme, which is endorsed by representatives of the company's most senior management. The ACCC has identified four principles that it considers underpin successful compliance programmes: commitment, implementation, monitoring and reporting, and continual improvement.

For larger companies, an effective programme typically includes:
- appointment of a suitably qualified director or senior manager to act as a compliance officer to ensure the compliance programme is effectively designed, implemented and maintained;
- appointment of a compliance adviser to conduct risk assessments and prepare a risk report;
- a company policy statement or manual for competition law compliance, which:
  - states the company's commitment to compliance;
  - states how compliance will be achieved;
  - requires staff to report compliance issues;
  - provides whistle-blower protections;
  - provides internal sanctions for employees who knowingly or recklessly contravene the Act; and
  - is endorsed by senior management;
- a complaints handling system or processes to detect and escalate competition concerns;
- whistle-blower protections for employees to come forward with competition concerns;
- compliance training (eg, online modules and face-to-face) that is specific to the Act, is regularly 'refreshed' and delivered to employees (including directors, officers and agents) by a suitably qualified person with competition expertise at least once a year;
- mechanisms for regular reporting to the board or senior management on the programme's effectiveness;
- regular (eg, annual) and independent reviews of the compliance programme, including compliance reports that identify material deficiencies and recommend steps to address these;
- mechanisms for the company to address issues identified in the compliance reports;
- legal approval processes, for example, before entering into arrangements involving competitors, or attending industry functions where competitors may be present, etc; and
- sanctions by the company for individuals for non-compliance with policy.

Companies should be able to demonstrate that the programme is actively maintained and that the company is not merely paying lip service to it.

6 What are the key features of a compliance programme regarding risk identification?

To properly identify competition risks, a compliance programme should be tailored to the company and the industry in which it operates. This may involve identifying the extent to which:
- employees have contact with competitors at industry events, socially or move between competing businesses or have relatives who are employed by a competitor (the latter factor may be managed by the company putting in place a conflicts of interest policy);
- customers of the company are its competitors;
- the company collaborates with its competitors (including through joint selling or procurement);
- the company has long-term exclusive contracts;
- the company shares with competitors, or receives from them, information about prices, business plans or other commercially sensitive information;
- the company has a substantial market share in any market; and
- the company imposes resale restrictions on resellers of its products.

To identify the risks, a compliance officer, the legal department or other personnel with appropriate competition expertise may interview or survey different personnel to understand their daily operations and determine which parts of the business face specific competition law risks.

7 What are the key features of a compliance programme regarding risk assessment?

The ACCC emphasises that effective compliance programmes, particularly in global companies, should have specific regard to the Act. To assess the seriousness of the identified risks, companies may adopt a 'traffic light' system or classify the risks as low, medium or high.

For example:
- procurement functions may be at higher risk of cartel conduct involving big rigging or allocating markets or customers (eg, when pitching for tenders);
- sales teams may be at higher risk of price fixing or anticompetitive information sharing, particularly if they have frequent contact with competitors, eg, at industry forums; and
- IT, administrative and other back-office functions generally may be low risk.

8 What are the key features of a compliance programme regarding risk mitigation?

See question 5 for some of the key features for risk mitigation.

In relation to compliance training for employees in particular, this is likely to involve:
- focusing on the particular provisions in the Act that are likely to be most relevant to individuals within the company and the risks they may face in their specific roles;
- identifying and focusing on the individuals most at risk by reference to what they do within the company. For example, sales personnel, persons responsible for setting strategy or tactics, persons who represent the company at industry forums and persons involved in procurement are usually in the 'at risk' category;
- explaining inappropriate conduct to employees and officers, as well as the potential sanctions. In our experience, this is usually more effective if it involves 'war stories' and hypothetical examples directly linked to the company's business and providing employees and officers with adequate opportunity to ask questions without feeling they are being judged;
- identifying the types of behaviour or commercial dealings that require legal advice or approval, dedicating a person within the company to provide the advice or approval and effectively communicating to the company's employees and officers how to contact that person;
- having an effective complaints handling procedure for representatives of the company and customers and suppliers. In our experience, an effective complaints handling procedure (which deals with all complaints in a timely and transparent manner) can go a long way to reducing actual risk of prosecution because most prosecutions commence with a complaint that is not effectively managed through to resolution; and
- providing 'dos and don'ts' lists to employees and officers.

9 What are the key features of a compliance programme regarding review?

The ACCC encourages voluntary compliance programmes to include regular reviews to ensure the programme is effective and is continually improved.

Companies should undertake annual reviews of their compliance programmes and adjust them to take into account any changes to the Act and the way the company operates as well as to reflect any trends in complaints and any remedial steps required (including by the ACCC) where breaches or potential breaches have been identified.

In some cases, an independent review of the effectiveness of the compliance programme may be desirable. The review could be undertaken by external legal counsel who could provide a privileged report to the company's General Counsel or Board recommending changes.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

Companies should limit their dealings with their competitors to the absolute minimum necessary to carry out their businesses lawfully and successfully.

Some industries involve more collaboration with competitors than others. For example, the financial services, aviation, oil and gas, construction and defence industries often involve competitors collaborating.

Employees and officers who are likely to be involved in any dealings with competitors should be given written guidance on what they can and must not do. They should be encouraged to seek legal advice about

what they can and must not do on a case-by-case basis to mitigate the risk that they will inadvertently cross the line from lawful collaboration to unlawful collaboration.

In general, companies must avoid entering into the following types of arrangements, even informally through 'winks and nods' with their competitors:

- arrangements that have the purpose or effect of fixing, controlling (including through agreed benchmarks), or maintaining a price or a component of a price such as a rebate, credit, discount or allowance;
- arrangements that harmonise any term of trade, including credit limits, payment terms, delivery times and places, liabilities and so on;
- arrangements to rig bids;
- arrangements to restrict output; and
- arrangements to share markets, customers or suppliers.

The Act does provide a limited number of exemptions for those types of arrangements. Legal advice should be sought on their applicability to each situation.

The Competition and Consumer Amendment (Competition Policy Reform) Act 2017 (Cth) (Competition Policy Reform Act) introduced a new civil prohibition on companies engaging in 'concerted practices' that have the purpose, or have or are likely to have the effect, of substantially lessening competition in a market.

The term 'concerted practice', although not defined in the Act itself, is described in the Explanatory Memorandum to the Bill as 'any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition'.

Parties to a concerted practice do not necessarily have to act in the same manner, be in the same market, or engage in conduct at the same time. Further, the concerted practice does not have to be expressly communicated between the parties, or expressly committed to, in order for it to exist. The new prohibition is designed to capture conduct that falls short of a contract, arrangement or understanding or an attempt to enter into one of those things.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

Companies should ensure that all arrangements with competitors have a legitimate business rationale (purpose), have neither the purpose (object) nor effect of substantially lessening competition in any market and are subject to one of the express exemptions in the Act that prohibit outright arrangements with competitors. The arrangement should not be agreed until it has been signed off by a lawyer with knowledge of the Act.

In cases where a company is carrying on business in an industry where collaboration between competitors is common, the company may issue a protocol to those of its employees and officers who are directly responsible for negotiating, or signing off on, the arrangements with competitors. The protocol should clearly set out what may and what must not be agreed.

12 What form must behaviour take to constitute a cartel?

The definition of a 'cartel provision' under the Act includes 'contracts, arrangements and understandings'. An understanding is a meeting of minds that results in a morally binding commitment to act in a certain way.

The Act prohibits attempts to engage in cartel conduct, including unsuccessful attempts. Mere preparation is not sufficient to amount to an attempt. An attempt requires an intention to bring about a result. That is, it requires an action undertaken with the intention of bringing about a cartel but it does not require an expectation that a cartel will result.

13 Under what circumstances can cartels be exempted from sanctions?

The Act contains a number of exemptions from the prohibitions and, separately, making or giving effect to a cartel provision that do not require notifying the ACCC.

The main exemptions relate to:

- any production, supply or acquisition of joint ventures;
- collective acquisitions by competitors;
- acquiring shares in the capital of a body corporate or assets of a person;
- if the cartel provision is also exclusive dealing conduct or involves vertical price fixing;
- restraints of trade in sale and purchase agreements solely for the protection of the goodwill to be acquired by the purchaser;
- things done in relation to the remuneration, conditions of employment, hours or work or working conditions of employees;
- certain provisions in contracts of service pursuant to which the service provider (who cannot be a company) agrees to accept specified restrictions; and
- provisions in contracts, arrangements or understandings that relate exclusively to the export of goods from Australia, or the supply of services outside Australia.

Parties can also seek authorisation from the ACCC for cartel conduct if the cartel conduct would be likely to give rise to a net public benefit, such as substantial efficiencies. Authorisation is a transparent statutory process, subject to a statutory time frame of six months, subject to extensions by agreement with the applicant.

Since the enactment of the Competition Policy Reform Act, the ACCC has the power to grant class exemptions. However, parties will need to self-assess whether their conduct would come within any such exemptions. As at April 2008, the ACCC had not yet granted any class exemptions.

The Competition Policy Reform Act also extended the exemption for joint ventures to joint acquisition ventures. However, the amending legislation also narrowed the exemption by requiring that the exempted cartel provision be reasonably necessary for undertaking the joint venture.

14 Can the company exchange information with its competitors?

Exchanges of confidential information about future prices or strategies between competitors run the risk of contravening the prohibition on entering into or giving effect to contracts, arrangements or understandings, or engaging in concerted practices, that have the purpose or likely effect of substantially lessening competition. It also runs the risk of contravening the prohibitions on cartel provisions.

Information that is non-aggregated, private and that relates to future sales or purchases is more likely to have anticompetitive impact if it is exchanged. Conversely, information that is aggregated, historic and publicly available is less likely to be have an anticompetitive impact if exchanged with one or more competitors.

In 2014 the ACCC commenced proceedings against a data services company called Informed Sources and five petrol retailers, alleging that information sharing arrangements between them had the effect of substantially lessening competition. The arrangements involved:

- petrol retailers providing pricing data to Informed Sources at frequent, regular intervals; and
- petrol retailers receiving from Informed Sources collated data from other petrol retailers and various reports containing pricing information across particular regions.

The ACCC alleged that the exchange of this information allowed retailers to monitor and respond to each other's prices on a near real-time basis. The parties settled the proceedings and provided court enforceable undertakings to the ACCC not to enter into or give effect to a price information exchange service unless the information each received was made available to consumers and third-party organisations at the same time.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

Yes, there are immunity and leniency programmes for companies. These are contained in the ACCC's 2014 Immunity and Co-operation Policy for Cartel Conduct (the Immunity Policy).

Immunity programme

All applications for civil and criminal immunity must be made to the ACCC.

Under the Immunity Policy, a company will be eligible for, and may be granted, conditional civil immunity where:

- it is or was party to a cartel;
- it admits that its conduct in respect of the cartel may constitute a contravention of the Act;
- it is the first person to apply for immunity in respect of the cartel;
- it has not coerced others to participate in the cartel;
- it has ceased its involvement in the cartel or indicates to the ACCC that it will do so;
- its admissions are a truly corporate act (as opposed to isolated confessions of individual representatives);
- it undertakes to provide full disclosure and cooperation to the ACCC; and
- at the time of the immunity application, the ACCC has not received legal advice that it has sufficient evidence to commence proceedings in relation to a contravention of the Act arising from the cartel conduct.

The company must also provide ongoing full disclosure and cooperation to the ACCC for conditional civil immunity to remain and to be eligible for final civil immunity.

If the applicant meets the immunity criteria, the ACCC will grant final civil immunity after the resolution of any proceedings against cartel participants (or, at its discretion, at an earlier stage).

The Policy implicitly contemplates that a leader of a cartel may receive immunity and provides that the ACCC will, 'as a matter of course' (but subject to its discretion), require applicants for immunity or leniency to grant the ACCC a confidentiality waiver to facilitate the exchange of information regarding international cartel investigations with foreign competition regulators.

The ACCC may recommend that the Commonwealth Public Prosecutor (CDPP) grant criminal immunity. The Immunity Policy provides that the CDPP may grant applicants for civil immunity a 'letter of comfort' at the same time the ACCC offers conditional civil immunity.

However, the CDPP must independently decide whether to grant criminal immunity by applying the same criteria outlined in the Policy (set out above). If the CDPP grants criminal immunity, it will provide a written undertaking to the applicant that, subject to fulfilment of the applicant's ongoing obligations, the applicant will not be prosecuted for the relevant cartel offence. The conditions for immunity will include that the applicant provide ongoing full cooperation during the investigations, and for individuals, that they will appear as a witness for the prosecution where requested in any proceedings against the other cartel participants and will give evidence truthfully, accurately and not withhold anything of relevance.

The ACCC may revoke the grant of conditional or final civil immunity if it decides, on reasonable grounds, that the applicant does not or did not satisfy the conditions for immunity.

Similarly, the CDPP may revoke immunity if the ACCC recommends that the CDPP do so and the CDPP believes, on reasonable grounds, that the applicant has provided false or misleading information or not fulfilled the conditions of its undertaking.

Leniency programme

The Immunity Policy provides that civil leniency for applicants that are ineligible will be considered where the applicant:

- has approached the ACCC in a timely manner seeking leniency;
- has either ceased their involvement in the cartel or indicates to the ACCC that they will do so;
- has not coerced any other person or corporation to participate in the cartel;
- acts in good faith in its dealings with the ACCC;
- provides significant evidence regarding the cartel conduct;
- provides full, frank and truthful disclosure, and cooperates fully and expeditiously on a continuing basis through the ACCC's investigation and any ensuing court proceedings; or
- (for an individual leniency applicant) agrees not to use the same legal representation as the corporation by which they are employed.

If leniency is offered, the ACCC's practice is to agree to make a recommendation to the court regarding the reduction in civil sanctions, and the Immunity Policy provides that, in determining the reduction, the ACCC will consider:

- the nature and extent of cooperation with the ACCC;
- whether the contravention arose out of the conduct of senior management, or at a lower level;
- whether the corporation has a corporate culture conducive to compliance with the law;
- the nature and extent of the contravening conduct;
- whether the conduct has ceased;
- the amount of loss or damage caused;
- the circumstances in which the conduct took place;
- the size and power of the corporation; and
- whether the contravention was deliberate and the period over which it extended.

Criminal leniency will be considered by the CDPP in accordance with its own Prosecution Policy, having no regard to any recommendation made by the ACCC. Although the CDPP will acknowledge the cooperation of a defendant subject to leniency, the sanctions imposed will be ultimately determined by the court.

16 Can the company apply for leniency for itself and its individual officers and employees?

Yes. If a company qualifies for conditional civil immunity, all current and former directors, officers and employees of the company who admit their involvement in the cartel and provide full disclosure and cooperation to the ACCC will be eligible for civil immunity.

Similarly, if a company is granted conditional criminal immunity, all current and former directors, officers and employees who request immunity, admit their involvement in the conduct and undertake to provide full disclosure and cooperation will be eligible for criminal immunity.

17 Can the company reserve a place in line before a formal leniency application is ready?

Yes. A person who intends to make an immunity application can request a marker from the ACCC. To obtain a marker, the person must provide a description of the cartel conduct in sufficient detail to allow the ACCC to confirm that no other person has applied for immunity or obtained a marker for the same conduct and the ACCC has not received legal advice that it has sufficient evidence to commence proceedings in relation to the cartel. The person does not have to satisfy all the requirements for conditional immunity at the time of the request for a marker.

The ACCC will inform the person if a marker is available. If a marker is available, the ACCC and the person will discuss the time required by the person to complete their internal investigation and provide the ACCC with the information required to satisfy the requirements for conditional immunity. Generally, a marker will be valid for a maximum of 28 days.

Holding a marker means that no other cartel participants can take the person's place in the immunity queue.

18 If the company blows the whistle on other cartels, can it get any benefit?

Yes, the ACCC's Immunity Policy includes an amnesty-plus regime for cartelists who are not eligible for immunity in a cartel already being investigated by the ACCC but who provide the ACCC with evidence of a second cartel of which the ACCC was not previously aware.

If the person reports a second cartel that is independent and unrelated to the first cartel, they will gain immunity from prosecution for the second cartel, and the ACCC will recommend to the court that any penalty in civil proceedings be further reduced in relation to the first cartel. If the first cartel is being pursued as a criminal matter, the CDPP will advise the court of the full extent of the cooperation provided.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

The primary provisions of the Act that apply to vertical arrangements are a prohibition on exclusive dealing that has the purpose or likely effect of substantially lessening competition and a per se prohibition on minimum resale price maintenance. The Act provides for exemptions for these prohibitions. The exemptions are based on net public benefits and involve filing public applications with the ACCC.

In this context, the Act does not expressly preserve the common law position on agency (as it does in relation to other common law concepts, such as restraints of trade and breaches of confidence). However, the High Court of Australia's decision in *ACCC v Flight Centre Travel Group Ltd* in December 2016 may have implications for principal-agent relationships. The High Court found that, where an agent is free to act in its own interests (for example, where it has discretion to set its prices), it may be in competition with its principal. In these circumstances, a principal and agent may be prohibited from entering into certain arrangements with each other, including in relation to price, capacity, customer and territorial allocations, even if the agreement is predominantly vertical in nature.

The general prohibitions on contracts, arrangements or understandings, and unilateral conduct by a person with substantial market power, which has the purpose or likely effect of substantially lessening competition, may also be relevant to vertical arrangements.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

Exclusive dealing conduct (including third line forcing) will not contravene the Act unless the conduct has the purpose, effect or likely effect of substantially lessening competition.

Third-line forcing, which is where goods or services (including credits, discounts, allowances and rebates) are offered on the condition that the purchaser also acquires goods or services from a third party, was previously prohibited per se. However, the Competition Policy Review Act removed the per se nature of the civil prohibition on third-line forcing as of 6 November 2017.

Supplying goods or services on the condition that the purchaser will not resupply the goods or services below a price specified by the supplier (ie, resale price maintenance) is a per se contravention of the Act. However, after the Competition Policy Review Act took effect on 6 November 2017, resale price maintenance between related companies will not breach the prohibition.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Exclusive dealing conduct that may contravene the Act may be notified to the ACCC. A notifying party is provided with immunity in relation to the notified conduct from the date the notice is lodged with the ACCC until the ACCC revokes the immunity. The notification must describe the proposed exclusive dealing conduct and why it would be likely to give rise to a net public benefit. Immunity cannot be granted retrospectively.

The ACCC can also authorise exclusive dealing conduct and minimum resale price maintenance in circumstances where it would be likely to result in a net benefit to the public.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The test in Australia is whether a company has a substantial degree of power in a market.

The factors taken into account include the extent to which the company is constrained by its competitors, suppliers and customers, the height of barriers to entry and exit in the market, the company's market share, the structure of the market, whether the market is dynamic and innovative (including the nature and likelihood of any disruption) and whether, as a whole, the company and its related companies have substantial market power.

The Act also specifies that courts may take into account any market power that results from any contracts, arrangements or understandings that the company has with another party.

The Court has a residual discretion to take into account any other matter for determining whether a company has a substantial degree of market power. This could include statutory rights and the ability to tacitly coordinate with other companies to create substantial market power.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance?

The Act prohibits a corporation that has a substantial degree of market power from engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in that or any other market (known as 'misuse of market power').

As a result of amendments contained in the Competition and Consumer Amendment (Misuse of Market Power) Act 2017 (Cth) (Misuse of Market Power Act), which took effect on 6 November 2017, the following changes have been made to the prohibition on misuse of market power:

- There is no longer a requirement for a causal connection between the substantial market power and 'taking advantage of' that market power, which means that the prohibition may now extend to a broader range of commercial behaviour by the corporation.
- A corporation with market power could also be found to have contravened the prohibition on misuse of market power because of the effect of its conduct on competition, notwithstanding that the conduct can be explained by commercial objectives that would otherwise be considered legitimate.
- The specific prohibition on 'predatory pricing' was removed. However, it is still possible for below-cost selling to breach the prohibition on misuse of market power if a corporation has substantial market power and engaged in that conduct with a purpose or the likely effect of substantially lessening competition.

The ACCC has yet to bring proceedings under the amended prohibition on misuse of market power. However, here have been a number of cases brought under the prohibition prior to its amendment.

In *ACCC v Ticketek* and *ACCC v NT Power*, the Court's findings were based on refusals to deal. In *ACCC v Universal Music*, the Court's findings were based on a threatened refusal to deal. In May 2017, the ACCC recently commenced a case against Ramsay Health Care for threatening to reduce the rights of visiting doctors if they associated themselves with a new entrant in the private hospital sector.

In *ACCC v Cabcharge*, the Court's findings were based on supplying goods for free. In *ACCC v Boral*, it was held that supplying goods below cost in the face of new competition was not a misuse of substantial market power.

In *ACCC v Safeway*, the Court based its findings on a decision by a supermarket to reduce the amount of goods that were purchased due to the supplier's dealings with a rival supermarket.

In February 2015, a case brought by the ACCC against Pfizer Australia failed in part on the finding that steps taken by Pfizer in preparation for the expiry of a key patent were taken for legitimate commercial purposes, and not the proscribed purposes required for a breach. The ACCC appealed the outcome in March 2015, which was heard by the Court in November 2015. However, judgment of the Court has been reserved.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Conduct that would be in breach of the prohibitions on anticompetitive agreements or anticompetitive concerted practices; collective boycotts; exclusive dealing; and anticompetitive mergers, but that which has been authorised or cleared in accordance with the competition law, is carved out of the misuse of market power provisions.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

In Australia, an acquirer of shares or assets may notify the ACCC to seek informal clearance (ie, a letter from the ACCC stating that it will not seek to intervene in relation to the acquisition) or formal merger authorisation (ie, statutory protection). To gain informal clearance, the acquirer must convince the ACCC that the proposed acquisition will not have the effect and will not be likely (in the future) to have the effect of substantially lessening competition in a market.

An acquirer of shares or assets may also apply to the ACCC for a merger authorisation if the proposed acquisition will not have the effect and will not be likely (in the future) to have an effect of substantially lessening competition, or would be likely to give rise to a net public benefit.

The regime in Australia is neither mandatory nor suspensory. Accordingly, there are no asset or turnover-based thresholds that trigger merger filing requirements in Australia.

The ACCC 'encourages' parties (under its Merger Guidelines) to notify it of proposals to acquire shares or assets where the parties supply products that are either substitutes or complements and they will together have a share of 20 per cent or greater in a market in Australia after closing.

Importantly, if an acquisition of shares or assets is notifiable to Australia's Foreign Investment Review Board (FIRB) under the Foreign Acquisitions and Takeovers Act 1975 (Cth), FIRB consults with the ACCC as a matter of course. FIRB will not make a recommendation to the Australian Federal Treasurer to issue a notice of no objection in respect of the acquisition unless and until the ACCC informs FIRB that it has no competition concerns.

The practical effect of this interaction between FIRB and the ACCC is that for those acquisitions where it is mandatory for the acquirer to notify FIRB and obtain a notice of no objection from the Australia Federal Treasurer, filing with the ACCC is quasi-mandatory and suspensory.

The onus is on the acquiring party to gain approval.

Notwithstanding the voluntary nature of the regime, it is common for an acquirer to seek informal clearance for a transaction to obtain greater certainty if the market in which the transaction occurs is relatively concentrated or if they are operating in a sector that is one of the ACCC's enforcement priorities. This is because the ACCC can review an acquisition regardless of whether or not it is notified by the acquirer and, if it has any concerns, the ACCC can apply to the Federal Court of Australia for an injunction to prevent closing (at least of the Australian limb of the acquisition), or apply to the Federal Court of Australia for other remedies (including penalties, orders for divestment and banning orders) if the transaction has already closed (see question 28).

26 How long does it normally take to obtain approval?

Informal merger clearance

'Informal clearance' from the ACCC is a non-statutory process that does not provide formal immunity for an acquisition. It involves only confirmation that the ACCC will not seek to intervene in relation to the acquisition.

Applications for informal clearance may be made confidentially.

For simple cases, it may be possible for the acquirer to obtain informal clearance through 'pre-assessment' of the transaction, which is a 'fast track' process. Under this process, the ACCC may be able to informally clear the transaction without conducting public market inquiries or by only conducting limited, targeted inquiries. According to the ACCC's Merger Process Guidelines, pre-assessment takes between two to four weeks of notification by the acquirer. However, in our experience, the process is likely to take between two to six weeks (in one of our recent cases, it has taken 14 weeks and could take longer).

For acquisitions that require public market inquiries, the transaction and the ACCC's review will have to be announced. The ACCC will conduct two to five weeks of market inquiries where it will actively canvass information from competitors, suppliers and customers of the parties, as well as other interested persons. Usually within six to 12 weeks of announcement, the ACCC will either decide not to oppose the proposed acquisition, or will make public a statement of issues (SOI) outlining the issues it has identified.

If an SOI is published, the ACCC will conduct another round of market inquiries. In such cases, the clearance process may take an additional six to 12 weeks or longer.

The ACCC may extend its indicative timelines for considering an acquisition if it identifies potential issues, experiences delays in obtaining information, or the acquirer negotiates remedies.

In our experience, if the acquirer is required to offer a remedy (which will be in the form of a court-enforceable undertaking) before the ACCC is willing to clear the transaction, it could extend the review timeline for about six months or longer.

Merger authorisation

As of 6 November 2017, the ACCC became the first-instance decision-maker for all merger authorisation applications. The ACCC may authorise acquisitions of shares or assets where it is satisfied that the transaction will not have the effect and will not be likely (in the future) to have an effect of substantially lessening competition in Australia, or would be likely to result in a net public benefit.

The merger authorisation process is subject to a 90-day statutory clock, which may be extended with consent. If authorisation is granted, it will confer immunity from suit for the merger provided the merger is completed within 12 months of the decision to formally authorise it. Parties have a right to apply to the Australian Competition Tribunal (Tribunal) for limited merits review of the ACCC's decision and a right to apply to the Federal Court of Australia for judicial review of the ACCC's decision.

Between 2007 and 6 November 2017, the ACCC was not the first-instance decision maker for formal merger authorisations – the Tribunal had the power to formally authorise a merger that would provide a net public benefit (and the ACCC's role in this process was amicus curiae to the Tribunal).

The Tribunal's formal merger authorisation process between 2007 and 6 November 2017 was used very infrequently. Acquirers applied to the Tribunal for authorisation of transactions that have been objected to by the ACCC.

In June 2014, the Tribunal authorised AGL's acquisition of Macquarie Generation.

In July 2016, Sea Swift received authorisation from the Tribunal for its acquisition of certain Toll Marine assets after the ACCC opposed the deal under an informal merger clearance application. On 13 March 2017, Tabcorp withdrew its application for informal clearance by the ACCC and applied to the Tribunal for authorisation of its proposal to merge with Tatts, after the ACCC published an SOI in relation to the transaction. This was the last authorisation application to the Tribunal before the process was abolished under the Competition Policy Reform Act.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

No. The comfort from an informal clearance or statutory protection from a formal clearance or authorisation is only afforded for the acquisition and not any ancillary restraints included in any agreements between the parties.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

As the merger control regime in voluntary, there is no penalty for not filing.

The risks of not filing arise from the ACCC's ability to bring proceedings to seek a range of orders from the Federal Court if parties implement a transaction that is found to have the effect or likely effect of substantially lessening competition in a market.

These orders are as follows:

- If the ACCC considers that an acquisition will substantially lessen competition in a market in Australia, it can, prior to closing, seek an injunction from the Federal Court to prevent the transaction from closing.
- If the merger parties proceed to close a transaction (which is subsequently found to contravene the mergers test), the ACCC can seek from the Federal Court:

- an order to divest the shares or assets acquired;
- a declaration that an acquisition is void;
- a court-enforceable undertaking from the parties to dispose of other shares or assets owned by the parties; or
- pecuniary penalties against the corporation and its officers.

In the case of a corporation, penalties can be up to the greater of:
- A$10 million;
- three times the value of the benefit to the parties that is reasonably attributable to the contravention; or
- 10 per cent of the parties' annual Australian turnover of each body corporate and related bodies corporate.

Third parties can also seek a declaration that the acquisition will substantially lessen competition in a market, divestment orders, and monetary compensation for any loss they have suffered as a result.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

In cartel investigations, the interests of a company and its officers may not be aligned. Accordingly, it is common for some companies and their officers and employees to have separate legal representation to ensure that their respective interests are protected. For example, where an officer of a company has played a key role in a cartel, they would require separate representation to the company. In some cases, the ACCC insists on companies and certain of their officers or employees having separate representation.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The ACCC has the ability to search and seize information, documents and other materials from premises if it has first obtained a search and seizure warrant from the Federal Court of Australia.

Dawn raids are typically used for the ACCC's cartel investigations, particularly since its criminalisation in 2009. However, dawn raids do not occur frequently in Australia compared to other jurisdictions.

The last reported instance an ACCC dawn raid was in July 2016 when 20 ACCC officers executed a search and seizure warrant at the premises of Construction, Mining, Forestry and Energy Union as part of an investigation into allegations of price-fixing. In Australia, the more commonly used power is the ACCC's broad information gathering powers under section 155 of the Act. Under this statutory power, the ACCC may issue a notice to compel the production of information, documents or summons individuals to provide information under oath.

31 What are the company's rights and obligations during a dawn raid?

The company is entitled to and should have legal representation present at its premise during the dawn raid. The legal representative should ensure that the ACCC officers do not go beyond the scope of the warrant.

During a dawn raid by the ACCC, the company has the right to:
- ask to see a copy of the search and seizure warrant and take a copy;
- ask to see the ACCC officer's identity card and take a copy;
- refuse entry if the ACCC cannot produce either;
- ask the ACCC to wait until the company's senior management and legal representative arrive at the premises; and
- monitor the ACCC's search and take notes of all materials accessed or seized by the ACCC during the process.

Companies are not required to produce documents that are subject to legal professional privilege. If the staff on the premises cannot verify whether particular documents are subject to legal professional privilege, but consider they may be, staff should expressly reserve the company's right to continue to claim privilege. In such circumstances, the staff should take a copy or make a note of such documents and ask that the documents be stored separately from the other documents seized and not be reviewed by the ACCC until the privilege issue is resolved.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Parties can offer court enforceable undertakings that they will take certain steps, or refrain from certain actions, in order to address the ACCC's competition law concerns.

The ACCC is not obliged to accept an undertaking, but if the parties offer undertakings and the ACCC accepts the undertakings, the ACCC may cease the investigation. The undertakings are published on the ACCC's public register and become statutory instruments.

In these undertakings, companies or individuals generally agree to:
- remedy the harm caused by the conduct;
- accept responsibility for their actions; and
- establish or review and improve their competition law compliance programme and culture.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

In general, the weight attributed by the ACCC or a court to a company undertaking to implement or review and amend their compliance programme to address competition law concerns will depend on the particular circumstances (see question 4).

34 Are corporate monitorships used in your jurisdiction?

As part of the undertaking accepted by the ACCC, the company usually undertakes to appoint an independent auditor to monitor the company's compliance with an undertaking and report periodically to the ACCC in that regard.

The undertaking itself will specify:
- the powers of the independent auditor and the company's obligations to cooperate with the auditor; and
- when the independent auditor is discharged from its monitoring function (typically, this will be when the obligations of the company under the undertaking have expired).

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

The ACCC and a party being investigated can agree on statements of fact and penalties, which can be submitted to the Federal Court for consent to settle the allegations against the party.

However, the Court retains discretion as to whether the penalties proposed by the ACCC and the party are appropriate in the circumstances. For example, in one case where the ACCC and the other party to the proceedings agreed on a penalty between A$1 – 1.5 million, the Federal Court thought that A$3.5 million was more appropriate (*ACCC v FFE Building Services Ltd*). The Court generally will not depart from the agreed penalties if they are within the 'permissible range' (*ACCC v Netti Atom Pty Ltd*).

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Companies and individuals may claim legal professional privilege over documents requested by the ACCC on a voluntary basis or compelled by the ACCC under a compulsory statutory notice and, during a dawn raid, companies are not required to produce documents that are subject to legal professional privilege (see question 31).

The privilege against self-incrimination does not entitle a person to refuse to comply with a statutory notice requiring them to appear before the ACCC for examination under oath. Answers given by individuals during examinations pursuant to a notice cannot be used as evidence in criminal proceedings against the individual other than proceedings for an offence under Part XII of the Act (ie, the part containing section 155) or the offence of providing false or misleading information, false or misleading documents or obstruction of Commonwealth public officials under the Criminal Code.

However, documents produced to the ACCC under a section 155 notice can be used in evidence against the individual in criminal proceedings.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

In general, the ACCC conducts its investigations confidentially and does not comment publicly on matters it may or may not be investigating. However, the ACCC may make a public statement about the investigation where it is already in the public domain and the ACCC considers it would be in the public interest to do so.

The Act provides some protections for information given to the ACCC in confidence. ACCC officials cannot disclose the information except to perform the duties or functions of the ACCC or where required by law.

The Act provides further protections for information provided to the ACCC in relation to cartel investigations, known as 'protected cartel information'. For example, the ACCC is not required to disclose to a court or tribunal a document containing protected cartel information without leave of the court or tribunal.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

It is a criminal offence not to comply with a compulsory notice issued under section 155. If a company or individual fails to comply with a compulsory section 155 notice issued by the ACCC, the ACCC can commence proceedings in the Federal Court for the breach.

Currently, a person is liable for a fine of up to a maximum of A$21,000 or imprisonment for two years if they:

- refuse or fail to comply with a section 155 notice if they are capable of complying with it; or
- knowingly provide information or give evidence to the ACCC that is false or misleading.

Previous penalties on individuals have included a fine of A$3,500 (*ACCC v Boyle*), a fine of A$2,160 along with 200 hours of community service (*ACCC v Neville*) and imprisonment for six months (*ACCC v Rana*).

Refusal to answer questions, or to provide reasonable facilities and assistance in relation to a dawn raid that is being validly conducted by the ACCC under a warrant can result in a fine of A$6,300.

39 Is there a duty to notify the regulator of competition infringements?

No. However, it may be the interest of a party to a cartel arrangement to do so in order to have the benefit of immunity or leniency (see question 15).

40 What are the limitation periods for competition infringements?

The statutory limitation period on the ACCC seeking civil pecuniary penalties for a breach of the Act is within six years after the contravention. However, the ACCC can seek other remedies (such as a declaration of breach by the Federal Court) even after six years has passed since the contravention. There is no statutory limitation period for criminal offences.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

In addition to being subject to the general statutory test relating to companies with a substantial degree of market power, there is a specific prohibition on companies with a substantial degree of market power in a telecommunications market from taking advantage of that market power with the effect, or likely effect, of substantially lessening competition in a telecommunications market. There was debate as to whether the specific prohibition for companies with substantial degree of market power in telecommunications markets should be repealed at the same time as the general prohibition on misuse of market power was being amended (see question 23). However, the Misuse of Market Power Act ultimately did not abolish the specific prohibition in the Act.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

No. Australia's competition policy framework recently underwent a wide ranging review, which ultimately resulted in the passing of the Competition Policy Review Act and Misuse of Market Power Act, which took effect on 6 November 2017. Some of changes implemented by these enactments are discussed in questions 10, 13, 20, 23 and 26.

KING&WOOD MALLESONS
金杜律师事务所

Sharon Henrick **sharon.henrick@au.kwm.com**
Wayne Leach **wayne.leach@au.kwm.com**

Level 61, Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000
Australia

Tel: +61 2 9296 2000
Fax: +61 2 9296 3999
www.kwm.com

Brazil

Leopoldo Pagotto*
Freitas Leite

General

1 What is the general attitude of business and the authorities to competition compliance?

Competition compliance has become increasingly important in Brazil in recent years, especially after the fines for non-compliance escalated and the number of criminal prosecutions increased.

The Brazilian competition authority (CADE) issued guidelines on how a robust compliance programme should be structured, and implementation of compliance programmes is often being included in settlement agreements entered into by companies that were found guilty of competition violation.

In addition, the CADE Tribunal deems that competition compliance may be an effective tool to counterbalance the effects of a higher market share. On at least two occasions CADE Tribunal requested the adoption of a compliance programme as one of the conditions to approve a merger (*HSBC/Bradesco* and *Innova/Videolar*).

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

CADE guidelines set out six criteria for a compliance programme to be considered effective, namely, 'tone from the top'; appropriate resources; autonomy and independence; risk assessment; risk mitigation; and periodic review of the programme. Note that the standards should be assessed on a case-by-case analysis.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

CADE guidelines on compliance programmes are generally applicable to all companies, as they only provide a general guidance on how to implement a robust programme. CADE guidelines also stress that a compliance programme should be appropriate to each company's risks, depending on its size and industry in which it operates. The company will have to assess the risks it is subject to in view of its activities in order to implement its compliance programme. CADE guidelines set the common ground compliance programmes should follow in order to be considered effective.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

CADE guidelines establish that a robust compliance programme may be considered as an attenuating circumstance leading to a lower fine, if the company breaks competition rules. However, there are no details on how any reduction in penalty would be calculated.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

Pursuant to CADE guidelines, a company must evidence its legitimate interest in complying with the antitrust legislation essentially with three measures: involvement of top management; the allocation of appropriate resources to the compliance programme; and the assurance of autonomy and independency for the person in charge of the programme.

6 What are the key features of a compliance programme regarding risk identification?

CADE guidelines set forth that robust compliance programmes are usually preceded and followed by a detailed risk analysis. The methodology to proceed with risk identification is not set in the guidelines and will depend on the size of the company and industry it operates in. Depending on the competition risks, it may be required to consult outside experts. Nonetheless, the guidelines suggest that an in-depth risk analysis may consist of the following:

- interviews with employees from different areas and different hierarchical levels;
- visits to operational units and monitoring of the market;
- constant review of strategies and risk assessment methodology; and
- adoption of open communication channels with employees, especially those exposed to greater competition risks, among others.

7 What are the key features of a compliance programme regarding risk assessment?

Based on the steps above, a company must identify the risks it is subject to and assess which activities are critical in relation to competition compliance.

8 What are the key features of a compliance programme regarding risk mitigation?

Once the main risks the company faces in relation to competition issues are identified, the guidelines suggest that the following steps should be taken to mitigate those risks:

- regular training of employees, including high-profile officers;
- constant monitoring of the programme, which may require help from external auditor and use of whistle-blowing channels, among others;
- documentation of all compliance measures taken by the company; and
- punishing any non-compliance by employees and officers without any exception.

9 What are the key features of a compliance programme regarding review?

CADE guidelines stress that compliance programmes must be frequently reviewed, since market risks may change and require new preventive measures. Top management should be informed of the need to improve the existing compliance programme due to the market changes – it is suggested that a periodic report of compliance activities should be made to the company's board. CADE guidelines also stress that the companies should constantly monitor new guidelines issued by authorities in Brazil and abroad.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

Any arrangement that aims to fix commercial conditions (such as, but not limited to, prices, margins, discounts, etc) between competitors

should be avoided. However, CADE has a very broad view about what is an antitrust violation, and it might consider the mere receipt of sensitive information as a cartel. Although not all arrangement with competitors are considered illegal, we recommend the careful assessment prior to entering into one. Moreover, arrangements between competitors may be subject to merger control if they are considered 'associative agreements' (ie, the companies compete in the subject matter of the agreement, the agreement results in the sharing risks and results and lasts two or more years, including renewals) and the revenue thresholds are met.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

CADE guidelines describe a set of best practices when dealing with competitors, namely:

- never share confidential or competitively sensitive information (such as current and future prices, costs, production levels, expansion plans, discount policies and others);
- never discuss prices or market division with competitors;
- attendance to meetings where competitors will be present should be limited to those persons strictly necessary and the companies' representatives should be accompanied by a company's lawyer; and
- immediately report to the legal department any improper conversation initiated by a competitor.

12 What form must behaviour take to constitute a cartel?

CADE has a very broad concept of what constitutes a cartel, which may include any sort of concerted action between competitors. According to the Brazilian Antitrust Law, the conduct does not have to produce any effect in the market in order to be considered an antitrust violation. In other words, a mere attempt may be considered illegal by CADE.

13 Under what circumstances can cartels be exempted from sanctions?

There are no exemption mechanisms for cartels under the Brazilian Antitrust Law.

14 Can the company exchange information with its competitors?

CADE guidelines recommend that companies should never share confidential or competitively sensitive information, such as current and future prices, costs, production levels, expansion plans, discount policies and others. With regards to trade associations, CADE guidelines provide that exchange of information should be limited to the companies historical and aggregated data and, whenever possible, the information collected should also be available to third parties (even if not for free).

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

Leniency is available to companies and individuals, provided that: the company or individual is the first to come forward in relation to the infringement; it ceases its involvement in the conduct as of proposing the leniency agreement; CADE does not have enough information on the conduct to condemn the other companies or individuals involved; and the company or individual fully cooperates with the investigation, identifying other undertakings involved and providing evidence of the reported conduct.

Leniency may result in full immunity from administrative sanctions for both the company and individuals who come forward. If CADE was aware of the conduct by the time of the leniency application, then only a reduction of one to two-thirds is available. Leniency may also result in immunity in relation to sanctions under the Public Procurement Law.

In Brazil, criminal liability for antitrust infringements only applies to individuals. Leniency agreements negotiated with CADE may also lead to immunity for individuals who are criminally liable for the cartel.

Cartels targeting the state-owned entities may also be considered a violation of the Brazilian Clean Company Act. If this is the case, the leniency is available only for companies and it must be negotiated with the Federal Prosecutor's Office and the General Comptroller of the Union. There has been a great deal of discussion about the enforcement of these provisions, so caution is recommended.

16 Can the company apply for leniency for itself and its individual officers and employees?

A company may apply for a leniency agreement together with its officers and employees. Under certain circumstances, it is usually possible to include officers and employees at a subsequent moment, provided they were not offered to join the leniency application at the onset.

17 Can the company reserve a place in line before a formal leniency application is ready?

CADE has a marker system, which allows companies to secure their place in line before it can gather enough information to present a formal leniency application.

18 If the company blows the whistle on other cartels, can it get any benefit?

Yes, the company can get benefits. If a company is being investigated by CADE for a cartel conduct and blows the whistle on another conduct, it may be granted a reduction of up to a third of its fine in relation to the original conduct, as well as immunity in relation to the new conduct reported.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

In Brazil, resale price maintenance might be deemed illegal even if the supplier has a low market share or there are no effects in the market, if the supplier is not able to demonstrate the efficiencies from the conduct, for which CADE sets a very high bar. Although this conduct is not illegal per se, in practice there is a presumption of illegality. Price suggestions may be considered legitimate if there is no pressure on the distributors to follow suggested prices. Other vertical restraints, such as maximum prices or exclusivity agreements, are assessed based on the rule of reason, so companies that hold market power must assess any vertical restraints before implementing them.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

With the exception of resale price maintenance (which, as explained above, is not illegal per se, but in practice might be presumed illegal), all other vertical restrains are assessed under the rule of reason and thus are not illegal per se. CADE will assess whether the company holds a market position, as well as the effect of the conduct in the market. Efficiency arguments may be accepted by CADE, although the burden to prove any efficiency would be on the company.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

There are no exemptions for vertical restraints in Brazil.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The Antitrust Law established a presumption of dominance in case a company holds 20 per cent or more of market share. Thus, a company holding more than 20 per cent in any relevant market should assess its business practices more carefully in light of competition rules.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

If a company holds a dominant position, any conduct that causes actual or potential negative effect in the market may be considered illegal. CADE has already imposed fines on companies for fixing minimum

resale prices and implementing exclusivity programmes that hindered the activities of competitors in the market.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

There are no exemptions for abuse of dominance in Brazil.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Yes, companies need to obtain clearance from CADE for mergers and acquisitions if they meet the following turnover thresholds:

- one of the economic groups involved in the transaction (buyer or seller, or partner to a joint venture) registered gross revenues in Brazil in excess of 750 million reais in the fiscal year previous to the transaction; and
- at least another other economic group involved in the transaction (again, buyer or seller or partner to a joint venture) registered gross revenues in Brazil in excess of 75 million reais also in the fiscal year previous to the transaction.

In addition to that, the transaction would only be reportable to CADE if it has effects on the Brazilian market – CADE case law clarifies that there are effects in Brazil whenever the target company has any sales in the Brazilian territory (even if minimal), although there are precedents against this interpretation.

In Brazil, the burden to submit the transaction to CADE lies both with the acquirer and the seller. There are no fines for failure to notify, but for implementing the transaction prior to CADE's clearance (gun jumping), which applies to both companies involved.

26 How long does it normally take to obtain approval?

Simple cases are analysed under the fast-track procedure, in which a decision is issued within 30 calendar days as of filing. All other cases are subject to the 'ordinary track' procedure, which usually takes from 60–120 calendar days as of filing to be decided, provided that CADE accepts the filing as complete. The statutory deadline for ordinary track cases is 240 calendar days as of the filing date, with a possible extension of 60 calendar days, at the parties' request, or 90 calendar days, at CADE's request, and complex cases can take the full 240 calendar days – or more in case of an extension – to be decided. Note that cases subject to the ordinary track procedure should also undergo a pre-notification period, which can take from 15 to 30 calendar days on average.

When the transaction is approved by CADE's Directorate General (as opposed to being challenged to CADE Tribunal), there is an additional 15-day waiting period for the decision to be final, as this is the appeal period for the decision (appeals are very rare, but the regulation still requires the parties to wait this additional period to close).

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

Approval means that CADE agrees with the terms of the transaction documents submitted to it by the companies involved. CADE may request adjustments in provisions that are not in line with its case law, such as non-competition provisions longer than five years.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

Implementing a transaction without CADE prior approval may result in fines raging from 60,000 to 60 million reais. Moreover, CADE might also determine that the acts performed by merged or merging entity are null and void, and open an investigation for anticompetitive acts that could result from the prior implementation. CADE has already imposed several fines for gun jumping – the highest being approximately US$10 million (*Cisco/Technicolor*).

CADE can request the amendment of a filing deemed incomplete once (in this case, the review period will only start running once the complete filing is submitted). If after the re-submission CADE understands that the filing is still not complete, it might reject the filing. In this case, the parties will have to re-file and pay a new filing fee (approximately US$27,000).

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

CADE has no specific guidelines on legal representation, so the general rules of the Brazilian Bar Association (shall apply. It is advisable that companies and employees use separate legal representation if their interests are conflicting in relation to the potential strategies to be used (eg, the company wants to settle the case and its employee prefer to rebut the allegations).

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

Dawn raids are very common in Brazil, especially in cartel investigations. CADE may conduct a dawn raid if previously authorised by a decision from federal courts. Such a decision will be granted when there are reasonable grounds for suspecting that the company has engaged in illegal conduct. The decision will specify the premises that can be searched. Dawn raids are usually conducted together with the federal police, which can be intimidating to employees.

31 What are the company's rights and obligations during a dawn raid?

There is little a company can do during a dawn raid. The company has the right to check the warrant before allowing the authorities into the premises and it may require the presence of two law clerks. The company is allowed to make copies of all documents seized, provided it will not delay the dawn raid.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Companies and individuals may request to settle any investigation initiated by CADE. The earlier a company or individuals apply for a settlement, the greater the benefits will be in relation to the expected fine. In Brazil, investigations are conducted by CADE's Directorate General and then referred to CADE Tribunal for a decision. Companies can apply for a settlement at any time before the case is decided.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

Having a compliance programme in place may be seen as an indication of good faith of the company, and considered as a attenuating circumstance for calculating the expected fine of the company, resulting in a lower fine. In some cases, CADE may also regard implementing a compliance programme as obligatory for the settling company.

34 Are corporate monitorships used in your jurisdiction?

Corporate monitorships are not used in Brazil in antitrust settlements.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

As a general rule, CADE does not make statement of facts provided by companies in settlement negotiations available to third parties. Those documents are kept confidential unless there is a court order obliging CADE to disclose the documents to third parties.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

CADE has no specific guidelines on legal privilege, although it is possible to request it in relation to the company's documents during an investigation. Privilege against self-incrimination is afforded under Brazilian law.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

As a general rule, investigations are public in Brazil. Investigations arising from leniency are mostly confidential until CADE Tribunal reaches a final decision on the case. The companies can request confidential treatment to information in the case records that is commercially sensitive.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

Refusing to provide information requested by CADE may result in daily fines of 5,000 reais. Such a fine can be multiplied by 20 if it is necessary to guarantee that the information is provided by the company.

39 Is there a duty to notify the regulator of competition infringements?

There is no duty to notify regulators of competition infringements in Brazil.

40 What are the limitation periods for competition infringements?

As a general rule, the statute of limitation for antitrust infringements is five years. With regard to cartel conduct, CADE takes the view that the statute of limitation is 12 years, although there are legal arguments to defend five years.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

The Antitrust Law establishes that any conduct that may cause harm – even potentially – to the marketplace may be considered illegal.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

No.

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FREITASLEITE 20 anos

Leopoldo Pagotto **pagotto@fladv.com.br**

Rua Elvira Ferraz
Via Olimpia
250 – 11 andar
São Paulo - 04552-040
Brazil

Tel: +55 11 3728 8100
www.freitasleite.com.br

China

Susan Ning and Kate Peng
King & Wood Mallesons

General

1 What is the general attitude of business and the authorities to competition compliance?

China introduced the Antimonopoly Law (AML) in 2008, which has been in effect for less than a decade, and competition compliance is, therefore, still a novelty in China. After years of developing the AML, companies are beginning to understand the importance of competition compliance. In the past, more foreign companies than Chinese companies paid attention to competition compliance. More and more Chinese companies are now placing an emphasis on competition compliance, either to have it done within the company as a whole or as a separate compliance programme.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

There is no such government-approved standard for compliance programmes in China yet. The Compliance Management Systems Guidelines (Compliance Guidelines) was drafted and published by China National Institute of Standardisation in February 2017 to solicit public comments. The Compliance Guidelines were officially published on 29 December 2017 and would come into effect on 1 August 2018. The Compliance Guidelines are applicable to all sectors of compliance programmes and, therefore, are applicable to competition compliance as well. These guidelines are not binding, but provide guidance on compliance management systems and recommended practices.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

The Compliance Guidelines are applicable to all types of organisations, while the extent of the application of these guidelines depends on the size, structure, nature and complexity of the organisation. In practice, companies may follow the guidelines discretionarily.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

Based on our experience, while there is no explicit expression provided in the laws or regulations that a competition compliance programme is a factor for lighter or mitigated penalties in China, in practice, a competition compliance programme is usually a factor taken into consideration by the AML enforcement agencies. However, having a competition compliance programme will not exempt the company from punishment. A competition compliance programme may contribute to mitigating penalties in two ways: first, the AML enforcement agencies will regard the company itself to be in compliance with the AML while only some employees of the company fail to follow the law; second, as part of rectification measures, a competition compliance programme is commonly listed as a requirement. For example, in the public notice of the *Medtronic* case, the National Reform and Development Commission (NDRC) listed Medtronic's rectification measures, which include reinforcing training employees to recognise antitrust and improving the company's competition compliance programme. In the *Medtronic* case, we understand that the competition compliance programme was considered to be 'taking the initiative to eliminate or lessen the harmful consequences brought about by the unlawful act' listed in article 27(1) of the Law of the People's Republic of China on Administrative Penalties (the Administrative Penalties Law), which is a factor for lighter or mitigated penalties, and thereby might have contributed to mitigating sanctions imposed on Medtronic.

In addition, the Draft Guidelines on the Application of the Leniency Programme to Cases Involving Horizontal Monopoly Agreements (Draft Leniency Guidelines), issued by the National Development and Reform Commission (NDRC) on 2 February 2016 to solicit public comments, require that, in addition to voluntarily reporting the facts of a monopoly agreement and providing important evidence, the applicants should also cooperate with the AML enforcement agencies' investigation in a prompt, continuous, comprehensive and faithful manner. To have a competition compliance programme in place would be considered continuous and comprehensive cooperation.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

A company's commitment to competition compliance should be demonstrated at all levels of the company organisation. In practice, a company may demonstrate its commitment to competition compliance in many ways, depending on the situation, including but not limited to the following:

- providing competition compliance guidance and competition compliance training with mandatory attendance requirement;
- examining officers and employees' competition compliance knowledge, and considering the resulting grade as one of the factors when deciding key performance indicators, promotions or bonuses;
- requiring competition compliance from top to bottom to make sure that employees put a high value on competition compliance; and
- establishing the position of compliance officers or notification system, and requiring officers and employees to consult or notify compliance officers or outside counsel before they conduct any activity with potential risks.

While under investigation, a company should demonstrate its commitment to competition compliance by cooperating with enforcement agencies, and rectify existing problems by setting up or improving a competition programme.

6 What are the key features of a compliance programme regarding risk identification?

As the first step in a compliance programme, risk identification means to identify the key competition law risks faced by the company. Article 4.6 of the Compliance Guidelines provides that compliance risks should be identified by relating its compliance obligations to its activities, products, services and relevant aspects of its operations in order to identify situations where non-compliance can occur. The causes for and consequences of non-compliance should be identified as well. It is generally advisable that business operators develop a methodology for mapping internal and external antitrust compliance risks as part of the company's general risk management and controls systems, consistently evaluate the effectiveness of control activities

developed and deployed, and run regular checks (deep dives) to test the company's assumptions about residual risk.

7 What are the key features of a compliance programme regarding risk assessment?

As the second step of compliance programme, risk assessment means to work out how serious the identified risks are. Article 4.6 of the Compliance Guidelines provides that the company should analyse compliance risks by considering the causes and sources of non-compliance and the severity of their consequences, as well as the likelihood that noncompliance and associated consequences can occur. Consequences can include, for example, personal and environmental harm, economic loss, reputational harm and administrative liability. Risk evaluation involves comparing the level of compliance risk found during the analysis process with the level of compliance risk the organisation is able and willing to accept. Based on this comparison, priorities can be set as a basis for determining the need for implementing controls and the extent of these controls. For example, if the company has identified a risk of cartel activity, staff such as senior managers, employees in the sales and marketing departments and employees dealing with competitors may be identified as being at high risk, while staff such as employees in back-office and HR may be identified as being at low risk. The compliance risks should be reassessed periodically if certain conditions exist.

8 What are the key features of a compliance programme regarding risk mitigation?

As the third step of the compliance programme, risk mitigation means to set up appropriate policies, procedures and training with the aim that the risks have identified do not occur, and to ensure that company will detect and deal with the risks when they occur. In the Compliance Guidelines, article 8.1 provides that the company should control operational planned changes and review the consequences of unintended operational changes, and take action to mitigate any adverse effects if necessary. Article 10.1.2 provides that, when a company is required by law to report non-compliance, it should inform authorities in accordance with the applicable regulations or as otherwise agreed. When the company is not required by law to report noncompliance, they may consider voluntary self-disclosure of non-compliance to authorities to mitigate the consequences. In this respect, the leniency programme under the AML is a good example for such voluntary self-disclosure.

To mitigate the identified risks, a company may enforce a culture of compliance through its policies and procedures to integrate competition law compliance into the day-to-day activities of the business. A company may also provide competition law training, which may vary for different staff, for example, higher risk employees will be required to have more in-depth training than medium risk employees. The training might be supported by other activity such as testing the employees' knowledge and understanding of competition law and the company's policies.

9 What are the key features of a compliance programme regarding review?

As the fourth step of A compliance programme, review means to review the above three steps as well as company's commitment to competition compliance on a regular basis. Article 10.1.2 of the Compliance Guidelines provides that the company should maintain accurate and up-to-date records of its compliance activities to assist in the monitoring and review process and demonstrate conformity with the compliance management system. Article 9.3 of the Compliance Guidelines provides that top management should review the company's compliance management system, at planned intervals, to ensure its continuing suitability, adequacy and effectiveness. The depth and frequency of such reviews depends on the nature of the company and its policies. Company should retain documented information as evidence of the results of management reviews and a copy should be provided to the governing body.

Since the key competition law compliance risks faced by a company might change over time, a company should regularly review all stages of its process to ensure that there is a clear and unambiguous commitment to compliance from the top down, and the risks identified or the assessment of them have not changed and that the risk mitigation activities remain appropriate and effective.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

In China, the main law governing cartel activities is the AML. Under the AML, competing business operators should avoid reaching the following monopoly agreements, which are prohibited by article 13:

- fixing or altering the prices of commodities;
- restricting the production quantity or sales quantity of commodities;
- dividing sales markets or procurement markets of raw materials;
- restricting the procurement of new technologies and new equipment, or restricting the development of new technologies and new products;
- jointly boycotting transactions; or
- any other monopoly agreement as defined by the AML enforcement authority of the state council.

'Monopoly agreements' in article 13 can take multiple forms, including agreements, decisions or other concerted conducts that eliminate or restrict competition.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

In practice, it is common that competing companies cooperate in the collective purchase and sale of goods, etc. However, such cooperation may have an anticompetitive effect on the market, due to the potential risks of exchanging sensitive information. In this regard, when the company enters into an arrangement with a competitor, they may take the following precautions to prevent dissemination of sensitive information:

- training and taking awareness-raising measures for the personnel;
- monitoring measures (eg, identification of the processes involving contacts with competitors, internal or external audits, reports to be submitted to the competition authority); and
- inducing or sanctioning measures (elements for compliance with competition rules within the sales objectives for employees, employment contracts that include the possibility of dismissal in case of personal participation in a competition infringement).

12 What form must behaviour take to constitute a cartel?

Pursuant to the AML, a cartel may be conducted in both formal agreements and other informal agreements like decisions and concerted actions. The agreements may also be concluded in written or verbal form.

Information exchange alone does not constitute a cartel under the AML. However, if companies have any followed agreements or concerted actions, those behaviours together may be construed as constituting a cartel or reaching monopoly agreements.

13 Under what circumstances can cartels be exempted from sanctions?

The AML provides general exemptions in article 15 and a specific exemption for the agricultural industry in article 56. Pursuant to article 15 of the AML, cartels can be exempted from sanctions if a business operator is able to prove any of the following:

(i) the objective is for technological improvement or research and development of new products;
(ii) the objective is to raise product quality, lower costs, improve efficiency, standardise product specifications or standards, or implement specialisation;
(iii) the objective is to increase the efficiency of small and medium-sized enterprises and to strengthen their competitiveness;
(iv) the objective is to fulfil public interest objectives such as energy conservation, environmental protection and disaster relief;
(v) the objective is to alleviate a serious drop in sales quantity or obvious overproduction in times of recession;
(vi) the objective is to protect legitimate interests in foreign trade and economic cooperation; or
(vii) any other circumstances stipulated by the laws and the state council.

In addition, a company that intends to invoke exemptions under items (i) to (v) above must also prove that the agreement it has entered into

would not severely restrict competition in the relevant market, and that the agreement would bring about benefits for consumers.

For the agricultural industry, article 56 of the AML provides that the AML will not apply to cooperative or collaborative acts between agricultural producers and rural economic organisations in business activities such as the manufacturing, processing, sales, transportation and storage of agricultural products. There are no other industry-specific exemptions available thus far.

In the judicial area, there is a litigation case in which article 15 was applied. In *Shenzhen Huierxun v Shenzhen Pest Control Association* (No. 155 of the Third Civil Division of the High Court in Guangdong (2012), the Shenzhen Intermediate People's Court and Guangdong High People's Court both decided that the price agreement signed by the Shenzhen Pest Control Association with its members fell under the scope of article 15(1)(iv), thereby the agreement was exempted from article 13 and 14 of the AML. The courts considered that pest control service, unlike regular services, would involve life, health and safety of the public and environmental protection, as well as local health and epidemic prevention. In short, it was a service-related to social public interest. However, according to publicly available information, this is the only case where article 15 was applied. With regard to administrative enforcement, antitrust authorities rarely apply article 15 to cartel cases. To date, no administrative cartel cases have yet been exempted based on the above-mentioned exemptions. Generally speaking, a violation of article 13 could hardly be exempted pursuant to article 15 in practice.

There is no prior notification mechanism in China. The Draft Guidelines on General Conditions and Procedures on the Exemption of Monopoly Agreements (Draft Exemption Guidelines', issued by NDRC on 12 May 2016 to solicit public comments, establish an exemption-consulting mechanism. However, this mechanism will have limited application considering the prerequisites. According to article 17 of the Draft Exemption Guidelines, an anti-monopoly law enforcement authority generally does not provide exemption-consulting services. The anti-monopoly law enforcement department under the state council may provide exemption-consulting services if law enforcement resources permit and an agreement to be reached by business operators or trade associations is in either of the following circumstances: the agreement may affect the market competition in many countries or regions including China, and the relevant business operators or trade associations intend to apply for exemptions with authorities in other countries or regions; or a national trade association, on behalf of the entire industry, consults opinions for certain important or widely adopted agreements.

On top of the above, an agreement to be consulted must also meet certain conditions listed in article 18 of the Draft Exemption Guidelines, such as with certainty, not an issue in a pending case. Therefore, the exemption-consulting mechanism may be of little use for ordinary consultation.

The consulting opinions given by the anti-monopoly law enforcement department are not binding, but only indicate the law enforcement department's competition concerns and law enforcement preference based on materials available in respect of the agreement under the application for exemption.

14 Can the company exchange information with its competitors?

Under China's AML, the pure exchange of sensitive information without entering into a monopoly agreement would not be considered as a violation. However, it is clearly indicated in both the NDRC Rules and the State Administration for Industry and Commerce (SAIC) Provisions that when determining whether there exists any concerted practice prohibited by article 13 of the AML, the enforcement authorities will look into factors including communications of intention between the competitors and acts in concert by the competitors. Concerted practice can be acts in concert without the explicit conclusion of written or oral agreements, and can be presumed upon a consistent pattern of actions in the absence of reasonable explanations and with communication of intentions or exchange of information. The exchange of certain competitively sensitive information, such as pricing strategies, output or sales volume information or specific customer information between competitors may be considered a way to facilitate concerted practice.

Furthermore, it can be seen from practice of NDRC and SAIC that communication together with concerted actions is likely to be punished, while exchange of sensitive information is a key element to determine concerted actions. For example, in the *Estazolam* case published by NDRC on 27 July 2016, Changzhou Siyao Pharmaceutical Co, Ltd (Changzhou Siyao) attended the meetings with competitors to negotiate raising estazolam tablet prices, in which Changzhou Siyao did not express objections. After the meetings, Changzhou Siyao raised its estazolam tablet price in accordance with the price rises negotiated in the meetings. Thereby, NDRC decided that Changzhou Siyao had communicated with competitors and its price rises were concerted actions with competitors.

Therefore, even though exchange of sensitive information is not a per se violation, business operators should bear the above risk in mind and avoid engaging in behaviour such as exchanging sensitive information regulated by the AML.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

Yes, under the AML, there is a leniency programme available to companies or individuals who participate in a cartel. The legal basis is article 46 of the AML, which provides general rules for a leniency programme, indicating that where an operator has voluntarily reported the relevant facts on entering into a monopoly agreement to the regulatory authority and provides important evidence, the regulatory authority may, at its discretion, reduce or waive the sanction for such an operator. The Draft Guidelines on the Application of the Leniency Programme to Cases Involving Horizontal Monopoly Agreements (Draft Leniency Guidelines), issued by NDRC on 2 February 2016 to solicit public comments, are formulated to be applicable to horizontal monopoly agreements (that is, cartels) only. Before the Draft Leniency Guidelines, the leniency programme under the AML was interpreted as applicable to vertical monopoly agreements as well. After the Draft Leniency Guidelines come into effect, the leniency programme will no longer be applicable to vertical monopoly agreements.

There are two constitutive requirements for leniency application. One is that the applicant needs to voluntarily make a report on the monopoly agreement to the regulatory authority, and the other is that the applicant needs to provide important evidence that is crucial for the authorities to launch an investigation or to affirm monopolistic agreement behaviour, including the information concerning the business operators involved in the monopoly agreement, the scope of products involved, the content of the monopoly agreement and the way such an agreement was reached, and how such an agreement was implemented. According to the Draft Leniency Guidelines, important evidence refers to 'important evidentiary material that business operators possess' that is sufficient to enable the law enforcement authorities to launch investigation procedures if the law enforcement authorities have not yet obtained clues or evidence for the cases, and evidence with significant added value for the ultimate identification of monopoly agreement practice if the law enforcement authorities have already initiated investigation procedures.

In the Draft Leniency Guidelines, article 16 provides for the confidentiality obligations of the law enforcement authorities that the materials such as reports submitted by business operators to apply for the leniency programme in accordance with the Guidelines and documents generated shall be kept in special archives by the law enforcement authorities and shall not be disclosed to the public without the consent of business operators, and no other institutions, organisations or individuals may get access to them. Meanwhile, the aforesaid materials shall not be used as evidence for relevant civil proceedings, unless otherwise regulated by the laws. However, the Draft Leniency Guidelines do not mention whether the name of the applicant should be kept confidential. In practice, law enforcement authorities usually keep the name of the applicant confidential during the investigation process, but would disclose the fact that the applicant applied for leniency in their decision to explain the lenient treatment granted to the applicant.

16 Can the company apply for leniency for itself and its individual officers and employees?

Individual officers and employees are not punishable under the AML.

17 Can the company reserve a place in line before a formal leniency application is ready?

In the past, China has not had a marker system, which means that a company cannot reserve its place in line before submitting a formal application. The Draft Leniency Guidelines for the first time introduce the marker system into Chinese leniency programmes. According to the Draft Leniency Guidelines, if the business operator cannot provide all materials and information at the time it files for leniency, the operator can first submit a preliminary report to mark its ranking with the AML enforcement authority. In the preliminary report, the business operator must explicitly admit its involvement in the monopoly agreement and give a brief description of the conclusion and implementation of the monopoly agreement, including information as to the relevant participants, the products or services involved and time of conclusion and implementation. The AML enforcement authority will then issue a written opinion, requesting the business operator to supplement relevant materials within a limited period of time (no more than 30 days or 60 days under special circumstances). If the business operator can supplement the requested materials within the time limit, the AML enforcement authority will regard the time when the business operator submits the preliminary report as the time when the business operator files the leniency application.

18 If the company blows the whistle on other cartels, can it get any benefit?

Neither the AML nor the rules issued by NDRC and SAIC provides any 'immunity plus' or 'amnesty plus' mechanism. However, the company's blowing the whistle on other cartels is a factor taken into consideration by the AML enforcement authority when deciding mitigation of punishment. According to article 26(6) of the Draft Guidelines on Determining Illegal Income of Undertakings' Monopolistic Behaviours and Fines (the Draft Fines Guidelines), providing the first evidence of any other business operator who has violated the AML in other cases is a circumstance for lighter or mitigated penalties, which will cause the fine to be reduced by 0.5 per cent.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

Pursuant to article 14 of the AML, the company is prohibited from reaching any of the following monopoly agreements with its suppliers or customers:

- fixing the price of commodities for resale to a third party;
- restricting the minimum price of commodities for resale to a third party; or
- other monopoly agreements as determined by the AML Enforcement Authority under the state council.

Accordingly, among vertical arrangements, only cases involving resale price maintenance (RPM) are currently regulated under article 14(1) and 14(2). Other types of vertical arrangements, such as exclusive dealing, channel management have not been regulated separately yet, but only regulated together with RPM as methods of companies to implement RPM.

However, the latest trend is to enhance regulation on other types of vertical arrangements. For instance, the Draft Guidelines on Prohibiting the Abuse of Intellectual Property Rights (the Draft IP Guidelines), issued by NDRC on 23 March 2017 to solicit public comments, regulate restrictive clauses that restrict the application fields of IP rights, sales channels, scope of sales, transaction objects or quantity of the products provided by applying IP rights, etc.

There are proposed sector-specific rules on agency agreements. The Draft Guidelines on Anti-Monopoly of Auto Industry (the Draft Auto Guidelines), issued by NDRC on 23 March 2016 to solicit public comments, provide that if a distributor simply acts as an intermediary agent to facilitate transactions, referring to the condition that the selling price is directly agreed on between automobile suppliers and a specific third party or end user (for example, between an automobile supplier and an employee, key account or advertising sponsor of such distributors) and such distributor is just responsible for delivering automobiles, receiving payments and invoicing during the sales, then restricting the resale price in sales constitutes an individual exemption of vertical price limitations based on article 15 of the AML. Since the Draft Auto Guidelines have not become effective yet, there is no case on agency agreements to date.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

As explained in question 19, in practice, for vertical arrangements, only price-related monopoly activities have been regulated by NDRC. According to the literal interpretation of the relevant provisions, the monopoly agreements as listed in under article 14(1) and 14(2) are strictly forbidden, unless the parties can prove that the relevant agreements fall within the exemptions stipulated under article 15 of the AML (see question 19 and 21). However, it is very difficult to be exempted by NDRC under article 15. As a matter of fact, up to now, NDRC has never applied article 15 to exempt any infringements fell under article 14. Therefore, to some extent, we understand NDRC takes an 'illegal per se' and 'by object' approach.

However, in practice courts may take a rule of reason approach in adjudicating vertical agreement cases. For example, in the *Ruibang v Johnson & Johnson* case (No. 63 of the Third Civil Division (IP) of the High Court in Shanghai (2012)), the Shanghai High People's Court evaluated both the anticompetitive effects and pro-competitive effects of the vertical agreement in question, and determined that the agreement had an adverse impact on the market. The Court did not apply article 15 of the AML in its reasoning.

Given that there is no judicial review of NDRC's punishment decisions yet, it is not clear whether the law enforcement authority and judicial authority indeed take inconsistent approaches when deciding vertical arrangement cases under article 14(1) and 14(2) and, if yes, how they would resolve this.

Besides, article 14(3) has never been adopted by the law enforcement authority and judicial authority so far. Until any case is decided, it is uncertain which approach will prevail, though the enforcement authorities are likely to draw on the experience of the practice in the EU and US.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Vertical arrangements can be exempted from sanctions under article 15 of the AML, which is applicable to both cartel and vertical arrangements. See question 13.

It is worth noting that NDRC has never applied article 15 to exempt any infringements fell under article 14 in its decisions, and in judicial cases the court adopted a 'rule of reason' approach instead of analysing under article 15. Therefore, in practice, business operators can rarely obtain any exemption for violations under article 14 by invoking justifications prescribed in article 15.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The term 'dominance' is defined in article 17 of the AML as an economic strength possessed by one or several undertakings that enable it or them to control the price or quantity of products or other trading conditions in the relevant market, or to block or affect the access of other undertakings to the relevant market.

Dominance is assessed by reference to various factors. Article 18 of the AML stipulates that dominance could be assessed by reference to the following factors:

- the market share of the business operator and its competitive status in the relevant market;
- the ability of the business operator to control the sales market or the raw material supply market;
- the financial and technological conditions of the business operator;
- the extent of reliance on the business operator by other business operators in the transactions;
- the degree of difficulty for other business operators to enter the relevant market; and
- other factors relevant to the determination of the dominant market position of the business operator.

Market share is the primary parameter. Under article 19 of the AML, a market share above 50 per cent is presumed dominant. In the case of several undertakings, the combined market share of two undertakings as a whole above two-thirds, or the combined market share of three undertakings as a whole above three-quarters, is presumed dominant. However, any undertaking with a market share of less than 10 per cent is not presumed to be dominant.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

Article 17 of the AML provides that conduct may constitute an abuse if it consists of:

- selling products at unfairly high prices or buying products at unfairly low prices;
- selling products at prices below cost without justification;
- refusing to enter into transactions with other parties without justification;
- limiting other parties to enter into transactions exclusively with them or undertakings designated by them, without justification;
- tying products without justification or imposing any other unreasonable terms in the course of transactions; and
- applying dissimilar prices or other transaction terms to equivalent trading parties that are in the same position without justification.

Other forms of abusing the dominant market position as determined by the Anti-monopoly Law Enforcement Authority under the State Council.

A high-profile dominance case is the *Tetra Pak* (TP) case. On 16 November 2016, SAIC found that from 2009 to 2013, TP abused its dominant position in aseptic carton packaging machinery for liquid food products, technical services for aseptic carton packaging machinery for liquid food products, and cartons for liquid food product aseptic packaging and conducted tie-in sales, exclusive dealing and loyalty discounts without justifiable reasons in China. SAIC concluded TP's activities of abuse of market dominance in the following ways:

- TP was using its dominant position in machinery and technical service markets to impose restrictions on and affect customer's usage of cartons, which damaged the competition in the carton market and violated article 17(5) of the AML;
- TP's restrictions on the use of non-proprietary technical information that excluded the only companies that are able to achieve production at scale of brown paper from supplying brown paper to a third party constituted a violation of article 17(4) of the AML; and
- TP's two types of loyalty discount scheme have a loyalty inducing effect and constitute 'other forms of abuse of dominant market position' as prohibited by article 17(7) of the AML. The investigation lasted for almost five years, from January 2012, and the punishment imposed was a fine totalling 667.7 million yuan.

Another high-profile dominance case is the *Qualcomm* case. On 9 February 2015, NDRC decided that Qualcomm abused its dominant position in the licensing market for standard essential patents (SEPs) for CDMA, WCDMA and LTE wireless communications (the SEP licensing market) and the market for sales of baseband chips for CDMA, WCDMA, and LTE wireless communications (the baseband chip market). NDRC concluded TP's activities of abuse of market dominance as following:

- Qualcomm used its dominant position in the SEP licensing market to charge excessive royalties when licensing patents, including charging royalties for its expired patents and requiring licensees to cross-license their relevant SEPs and non-SEPs to Qualcomm without compensation or offsetting royalties, thereby violating article 17(1) of the AML;
- Qualcomm used its dominant position in the SEP licensing market to sell SEPs tying non-SEPs without justifications, which violated article 17(5) of the AML; and
- Qualcomm used its dominant position in the baseband chip market to impose unreasonable conditions on sales of baseband chip and violated article 17(5) of the AML. NDRC imposed a fine of 6.088 billion yuan in total.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

There is no exemption provided in the AML.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

For transactions that meet the following two criteria, notification is mandatory. Such transactions must be notified and cleared by the Ministry of Commerce (MOFCOM) before they can be completed. The transaction is deemed a concentration and the parties to a transaction must meet specified turnover thresholds.

The relevant turnover thresholds are either:

- during the previous fiscal year, the total global turnover of all operators participating in the concentration exceeded 10 billion yuan and at least two of these operators each had a turnover of more than 400 million yuan within China; or
- during the previous fiscal year, the total turnover within China of all the operators participating in the concentration exceeded 2 billion yuan, and at least two of these operators each had a turnover of more than 400 million yuan within China.

The Guidance on the Notification of Concentration of Business Operators (Notification Guidance), which was issued on 5 January 2009 by MOFCOM and revised on 6 June 2014, prescribes the detailed factors that need to be considered when determining whether one business operator will acquire control over another business operator or be able to exert decisive influence over another business operator through a transaction (change of control).

Under article 3 of the Notification Guidance, these factors include numerous legal and factual factors. Concentration agreements and the articles of association of the target are important bases for assessing control, but will not be considered as the only basis. In fact, for some cases, while we cannot conclude whether or not control will be acquired from the agreements and articles of association, the business operator will still be deemed as having acquired control as long as it obtained de facto control, due to, for example, the fragmented ownership of other shareholders and they could act in concert. Generally, factors such as the purpose of the transaction and future plans, the voting matters and voting mechanisms of the shareholders' meeting and the board of directors will be taken into consideration in determining whether one business operator acquires control over the other business operator through a transaction.

The Chinese merger control regime adopts an ex ante mandatory review regarding the concentration of business operators that a transaction involving concentration of business operators is not allowed to implement without obtaining MOFCOM's antitrust approval.

Notifications must be filed by all business operators involved in the merger. For all the other types of concentrations, notifications must be filed by the operator acquiring control of, or being able to exercise decisive influence, on other operators and other operators should cooperate with this operator (in respect of the filing).

Where there are two or more business operators with obligations to notify MOFCOM, either of them on agreement or all of them jointly may be responsible for the antitrust notification. Where business operators agree to appoint one of them to take the responsibility for the antitrust notification and if the agreed business operator does not make the notification, the other business operator or operators with obligation or obligations to notify will not be relieved from the legal liabilities for failure to make notification in accordance with the law. Where the obligor does not notify MOFCOM of the concentration, other business operators participating in the concentration can make the notification.

26 How long does it normally take to obtain approval?

According to the AML, there are two phases for MOFCOM's antitrust review.

In Phase I, MOFCOM must conduct a preliminary review and make a decision within 30 days from the date of formal acceptance of the complete filing documents. They must inform the applicant of the decision in writing. By the end of the 30-day period, MOFCOM may make a clearance decision without conditions, initiate a further review

that enters Phase II, or make a clearance decision with conditions, which is very rare. If MOFCOM takes no decision at all at the expiry of the 30-day period, the parties can execute the transaction.

In Phase II, if MOFCOM makes a decision to further review the filing, it will complete the review within 90 days from the date of issuing the decision and it must notify the parties involved in writing. MOFCOM may extend the 90-day time limit for Phase II by written notice, provided that the extension does not exceed 60 days and under certain circumstances.

At the end of the Phase II review, MOFCOM will make a decision either to approve the transaction, to approve it subject to restrictive conditions or to prohibit the transaction. Under the AML, if MOFCOM fails to make a decision at the expiry of the relevant time periods in Phase II, the transaction is presumed to be cleared and the parties can execute the transaction.

For simple cases, the Notification Guidance does not stipulate a specific time limit regarding MOFCOM's review; however, the review period for simple cases is generally less than that for normal cases. The above two phases of review procedure also apply to simple cases. From our experience, MOFCOM aims to clear a simple case within Phase I. Most simple cases filed were cleared within Phase I, ever since the establishment of the simplified procedure, with a limited number of cases entering into Phase II. As it is different from normal cases, once a simple case is officially accepted, MOFCOM will post the case's publicity form on its website for a 10-day period of public review. If any third party believes that the case is not qualified for the simplified procedure, that party can raise objections in that regard and submit relevant evidence. If MOFCOM discovers that the proposed transaction indeed does not qualify as a simple case, the authority must revoke the case from the simplified procedure and require the notifying parties to re-notify under the normal procedure.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

When a company obtains approval, it does not necessarily mean MOFCOM has confirmed the terms contained in the documents will be automatically considered compliant with the AML. This is because MOFCOM's main focus is the market structure, and its legal basis is Chapter 4 of the AML. When MOFCOM reviews merger cases, its focus is whether the merger will adversely affect competition structure in the relevant market. MOFCOM also pays attention to restrictive provisions in the agreements between the merging parties, such as non-competition clause, but only from perspective of whether the merger will preclude or restrain competition in the relevant market.

As competition authorities, MOFCOM, NDRC and SAIC have different responsibilities. MOFCOM is responsible for reviewing mergers, NDRC is responsible for regulating price-related monopolistic practices (for example, price-fixing), and SAIC is responsible for regulating non-price-related monopolistic practices (for example, dividing the market). The work of NDRC and SAIC is the investigation and punishment of monopolistic activities, and its legal basis is Chapters 2 and 3 of the AML. Therefore, their respective competition concerns are different.

Theoretically, MOFCOM may refer merger cases to NDRC and SAIC when it considers it necessary, such as when MOFCOM identifies monopoly agreement during its merger review process. However, in practice it has not happened yet.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

If the concentration is not notified to MOFCOM before its implementation, MOFCOM has the right to investigate and review the concentration, subject to the general two-year limitation period.

Article 48 of the AML provides that if operators fail to file, the AML Enforcement Authority, under the state council, shall order them to stop the concentration, to dispose shares or assets, transfer the business or adopt other necessary measures to restore the market situation before the concentration within a time limit, and may impose a fine of less than 500,000 yuan.

One helpful example would be MOFCOM's *Canon* decision published on 16 December 2016. Before the transaction, all outstanding shares of Toshiba Medical Systems, the acquired party, had been classified into three groups: 20 shares with voting rights (Class-A shares); one share without voting rights (Class-B shares); and 100 stock options (with right to purchase ordinary shares). The transaction had two steps. The first step was that Canon acquired one Class-B share and 100 stock options and M Company, established by the three natural persons, acquired the 20 Class-A shares (implemented before approval). The second step was that Canon exercised stock options by converting them into Class-A shares, and Toshiba Medical Systems repurchased the Class-A and Class-B shares (intended to implement after approved). MOFCOM decided that although the transaction was implemented in two steps, the two steps were closely related to each other and essential for Canon to acquire all shares of Toshiba Medical Systems. Therefore, the parties should have filed for concentration of business operators before implementing the first step; otherwise it constituted a failure to file. Canon was fined 300,000 yuan.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Since individual officers and employees are not punishable under the AML, there is no need for officers or employees to have separate legal representation.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

In practice, regulatory authorities may launch a dawn raid for all types of monopolistic activities, including cartel, vertical agreement and abuse of dominance. Authorities may search business premises or any other relevant premises of the business operator under investigation to carry out an inspection (article 39(1) of the AML). Relevant documents and materials include those both in forms of hardcopy and electronic data (article 39(3) of the AML).

Under article 37 of the Administrative Penalties Law as well as article 11 of the Provisions on Procedures of Investigating and Handling Cases of Monopoly Agreements and Abuse of Dominant Market Position by AIC (AIC Procedures Provisions) when administrative organs conduct investigations or inspections, there shall not be less than two law-enforcement officers, who shall show their identification papers to the party or other persons concerned. Article 37 also requires law enforcement agencies to make a written record to document the inquiry or inspection.

Pursuant to article 39 of the AML, in the investigation, NDRC or SAIC may adopt the following measures:

- enter the business premises or any other relevant premises of the business operator under investigation to carry out an inspection;
- interview the business operator under investigation, the interested parties or any other related organisations or individuals, and require them to provide a relevant explanation;
- inspect or make copies of relevant documents and materials such as certificates, agreements, accounts books, business correspondence and electronic data of the business operator under investigation, interested parties or any other related organisations or individuals;
- seize or impound the relevant evidence (further stipulated by articles 22 to 28 in the Administrative Compulsion Law); or
- enquire into the bank accounts of the business operator.

To adopt the foregoing measures, a written report must be submitted to the key person in charge of the AML enforcement authority for approval.

31 What are the company's rights and obligations during a dawn raid?

During a dawn raid, the company under investigation has an obligation to cooperate. First, the company should assist the AML Enforcement Authority in performing its functions and shall not refuse or obstruct the investigation conducted by the AML Enforcement Authority, as required by the article 42 of the AML. Second, according to article 52 of the AML, any party that refuses to provide the relevant materials or information to the AML enforcement authority, provides false materials and information, conceals, destroys or removes evidence, or commits any other act to refuse or obstruct investigation, may be ordered by the

AML enforcement authority to make reparations; a fine of up to 20,000 yuan may be imposed on individuals, and a fine of up to 200,000 yuan may be imposed on organisations. Where the case is serious, fines of between 20,000 and 100,000 yuan may be imposed on individuals, and fines of between 200,000 and 1 million yuan may be imposed on organisations. Where the case constitutes a criminal offence, criminal liability shall be pursued in accordance with the law.

There are limited regulations regarding the company's rights during a dawn raid, such as, according to article 43 of the AML, a company under investigation has the right to make statements on the investigation. As a whole, there are no explicit stipulations and company's rights are basically summarised according to practice.

It is not the company's right to have an attorney present during the dawn raid, and in certain past circumstances the authorities did not allow an attorney to attend the dawn raid, either by providing legal assistance or by helping with interviews. However, in recent cases, the authorities have allowed the company's attorneys to attend the dawn raid on more occasions. In addition, it is worth noting that the concept of attorney–client privilege does not exist under Chinese law.

Although the principle of proportionality is not stated in law, as a basic theory of administrative law, it requires the enforcement authority to limit their investigation to the necessary scope, which provides a basis for the company to argue during the dawn raid that the investigation measures and scope should be in accordance with the purpose of investigation and be relevant. However, in practice, the purpose of investigation is usually described in a broad way to provide enforcement agencies with a wide range of rights to conduct investigation. Therefore, it is hard to make the argument of relevancy. Nevertheless, the authorities usually will exclude employee's personal belongings from the investigation to protect personal privacy.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Currently, there is no settlement procedure provided in the legislation. However, companies can seek to apply for a suspension procedure by making commitments.

During the investigation, the business operator under investigation can undertake to remove the anticompetitive effects of the suspected monopolistic practice within an approved period. The AML enforcement agencies can decide whether to accept the commitments and suspend the investigation. During the suspension of the investigation, the agencies will supervise the performance of the undertaking and will have the right to resume the investigation if any of the following occur:

- the operator fails to perform its commitments;
- there are significant changes to the facts on which the suspension decision was made; and
- the suspension decision was made on the basis of incomplete or inaccurate information submitted by the business operator.

Where the agencies consider that the business operator has fulfilled its commitments, the regulator may decide to terminate the investigation.

The Draft Guidelines on Commitments Made by Business Operators in Antitrust Cases (the Draft Commitment Guidelines), one of the six antitrust guidelines drafted by NDRC (see question 13), was released by NDRC seeking for public comments on 2 February 2016. It provides that the commitment procedure will only be applicable to monopolistic conduct other than horizontal monopoly agreements on price fixing, on restricting production or sales quantity, or on allocation of sales market or raw material procurement market. The commitments can be made at any stage starting from the commencement of the investigation until the issuance of the advance notice of administrative penalty decision. However, if after investigation the AML enforcement authority holds that suspected monopolistic conduct constitutes an AML violation, the authority will not accept any commitment made by the operator concerned.

When making commitments and applying for suspension of the investigation, the business operator must submit a written application with the following information:

- the suspected monopolistic conduct under the investigation and its possible impact;
- the specific measures in the commitment to be taken to eliminate the consequences of the conduct;
- the timeline and approach to fulfil the commitment; and
- other contents that need be covered by the commitment.

Update and trends

China is in the process of a State Council reshuffle, which includes the proposed establishment of a new comprehensive department, the State Administration of Market Supervision (SAMS). The SAMS will consolidate the country's three antitrust agencies, namely, the NDRC, the SAIC, and the MOFCOM. Under the new plan, the SAMS will be the direct subordinate agency under the State Council. This new setting, which is reported to complete within the first half of this year, will have a decisive influence on China's future anti-monopoly law enforcement landscape.

Furthermore, the Draft Commitment Guidelines also confirm that the AML enforcement authorities' decisions on suspension or termination of the investigation must not be interpreted as an affirmation on whether the business operator's conduct constitutes an anti-monopoly violation and must not be taken as relevant evidence to affirm the violation before the people's court.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

There is no settlement procedure in China. Authorities usually take implementing or amending a compliance programme as a part of commitment. For example, according to the Draft Leniency Guidelines, implementing or amending a competition compliance programme may be considered as cooperation (see question 4).

34 Are corporate monitorships used in your jurisdiction?

There is no settlement procedure in China. Article 13 of the Draft Commitment Guidelines provides that law enforcement agencies shall supervise the implementation of commitments by operators, and if necessary, may entrust independent third-party professional agencies to carry out the supervision.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

There is no settlement procedure in China. As for the materials submitted in accordance with the leniency programme, the Draft Leniency Guidelines provide more clear guidance on whether it will be adopted in a court proceeding. According to the Draft Leniency Guidelines, all reports submitted and documents generated under the Draft Leniency Guidelines must be kept in special archives by the AML enforcement agencies and must not be disclosed to any third party without the consent of the business operator concerned; meanwhile, the documents must not be used as evidence in relevant civil proceedings, unless otherwise stipulated by the laws.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The concept of attorney–client privilege does not exist in the Chinese laws, so confidential communications between a lawyer and a client are not privileged. The Chinese laws require lawyers to protect the confidentiality of their clients' private information and, if they are aware of any of their clients' trade secrets, they must also protect them (see article 38 of the Lawyer's Law). However, according to article 70 of the Civil Procedure Law, a court can order a lawyer to testify about a client's private information or trade secrets in a judicial proceeding.

Under article 50 of Criminal Procedure Law revised in 2012, it is prohibited to force anyone to incriminate themselves. However, under the Chinese laws, there are no criminal penalties provided for monopoly activities.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

Article 41 of the AML provides that the AML enforcement authority and its personnel are obligated to keep confidential of any commercial

secrets that come to their notice during the enforcement process. Under Provisions on Evidence in Administrative Punishment of Price, article 4 requires the authorities not to use the evidence obtained during investigation for the purposes other than administrative punishment of price, and not to reveal commercial secrets and personal privacy.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

According to article 52 of the AML, any party that refuses to provide the relevant materials or information to the AML enforcement authority, provides false materials and information, conceals, destroys or removes evidence, or commits any other act to refuse or obstruct investigation, may be ordered by the AML enforcement authority to make reparations; a fine of up to 20,000 yuan may be imposed on individuals, and a fine of up to 200,000 yuan may be imposed on organisations. Where the case is serious, fines of between 20,000 and 100,000 yuan may be imposed on individuals, and fines of between 200,000 and 1 million yuan may be imposed on organisations. Where the case constitutes a criminal offence, criminal liability shall be pursued in accordance with the law.

39 Is there a duty to notify the regulator of competition infringements?

There is no duty to notify the regulator of competition infringements.

40 What are the limitation periods for competition infringements?

For administrative penalties, if a violation is not discovered within two years as of the time when it is committed, no punishment can be imposed by antitrust enforcement agencies. If the violation is of a continual or continuous nature, the two-year period is calculated from the date when the violation ends. In practice, due to the lack of a clear standard, enforcement authorities make a looser interpretation when deciding the meaning of 'discovered' and 'continual or continuous', and usually decide on the limitation period issue on a case-by-case basis.

For civil liabilities, the statute of limitations is two years as of the time when the claimant is aware of or should have been aware of the infringement caused by the monopoly practices. According to the Supreme People's Court's judicial interpretation on the trial of antitrust civil cases, when a claimant reports the monopolistic act to an AML enforcement authority, the statute of limitation will be suspended from the date of report. If the AML enforcement authority decides not to file the case, or to rescind the case or terminate the investigation, the statute of limitation will be calculated anew from the date on which the claimant is aware of or should have been aware of the AML enforcement authority's decision. If the AML enforcement authority, after the investigation, concludes on the existence of monopolistic acts, the statute of limitation will be calculated anew from the date on which the claimant is aware or should have been aware that the decision made by the AML enforcement authority on confirming the reported act as constituting a monopolistic act becomes legally effective.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

Chapter 5 of the AML regulates the abuse of administrative power to eliminate or restrict competition. The administrative organ or organisation empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to force or use a disguised form to force any entities or individuals to deal, purchase, or use the commodities provided by the business operators designated by such an administrative organ or organisation.

The AML came into effect in 2008. Before its enactment, several activities regulated in the AML were regulated by the Anti-Unfair Competition Law (AUCL), which was promulgated in 1993, and the Price Law, which was promulgated in 1997. After 2008, those activities are regulated by both the AML and the AUCL or the Price Law.

In particular, selling products at prices below cost without any justifiable causes (article 17(2) of the AML) is also regulated by article 11 of the AUCL, and implementing tie-in sales or imposing other unreasonable trading conditions at the time of trading without any justifiable causes (article 17(5) of the AML) is also regulated by article 12 of AUCL. Meanwhile, price collusion (article 13 of the AML), obtaining exorbitant profits (article 17(1) of the AML), predatory pricing (article 17(2) of the AML) and discriminatory pricing (article 17(6) of the AML) are also regulated by article 14 of the Price Law.

Currently, authorities at the central-level and provincial-level usually apply the AML as legal basis in antitrust cases in practice, while enforcement authorities at lower levels that cannot apply the AML use AUCL and the Price Law as legal basis. Another difference is that some monopoly activities prohibited by the AML require dominant position as prerequisite, while the AUCL and the Price Law do not have such a requirement.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

Under the authorisation of the Anti-Monopoly Commission (AMC) under the State Council, NDRC has drafted six antitrust guidelines and published them to solicit public comments, namely the Draft Leniency Guidelines, the Draft Exemption Guidelines, the Draft Commitment Guidelines, the Draft Fines Guidelines, the Draft Auto Guidelines, and Draft Guidelines on Prohibiting the Abuse of Intellectual Property Rights.

In the Chinese Competition Policies and Laws Annual Meeting on 12 January 2017, MOFCOM, NDRC and SAIC said that they would promote the issuance of the final versions of the six guidelines and amendment of the AML. In 2015, NDRC mentioned that it was working on amendment of the Price Law.

On 26 February 2017, the Standing Committee of the National People's Congress of China published draft amendments to the AUCL to solicit public comments.

KING&WOOD MALLESONS 金杜律师事务所

Susan Ning **susan.ning@cn.kwm.com**
Kate Peng **pengheyue@cn.kwm.com**

40th Floor, Tower A, Beijing Fortune Plaza
7 Dongsanhuan Zhonglu
Chaoyang District
Beijing, 100020
China

Tel: +86 10 5878 5588/5010
Fax: +86 10 5878 5599
www.kwm.com

France

Katrin Schallenberg and Amélie Lavenir
Clifford Chance

General

1 What is the general attitude of business and the authorities to competition compliance?

The French business community is increasingly concerned with compliance. This has recently been amplified by the new anti-corruption rules (Sapin 2). More companies now have dedicated in-house compliance teams, and the needs in this area have dramatically increased over the past few years.

The French Competition Authority (FCA) encouraged competition compliance programmes and for many years awarded fine reductions to companies committing to implement such a programme or upgrade an existing one; in 2012 it had published a framework document on antitrust compliance programmes (2012 Framework Document). However, on 19 October 2017 the FCA issued a statement (October 2017 Statement) indicating that it now considers that compliance programmes should be part of the day-to-day management of companies and that, as a general rule, it shall no longer award a fine reduction for commitments to implement such programmes, especially in the case of serious competition law infringements.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

As indicated above, the FCA repealed in October 2017 the 2012 Framework Document. There is thus no official guidance other than the FCA's case law. A compliance programme is a proactive strategy of governance that ensures risk avoidance where possible. To be effective, a compliance programme should achieve two objectives. It should prevent the risk of committing infringements (eg, anticompetitive agreement, sensitive information exchange between competitors, retail price management, abuse of a dominant position, etc), and provide the means of detecting and handling misconduct that has not been avoided in the first instance. To achieve these objectives, companies should create and maintain a culture of compliance.

A set of concrete measures combining learning strategies with supervisory, control and punishment systems may increase the effectiveness of a programme. These measures can consist in training, whistle-blowing systems, audits, etc (see section on implementing a competition compliance programme below).

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

The FCA always considered, including in the now repealed 2012 Framework Document, that one compliance programme may vary from another. There is no 'one size fits all' programme. To reduce and adapt to risks of antitrust infringement, a company's compliance programme must be tailor-made to its sector, its size, its organisation, its governance and its culture.

In the case of large corporate groups, the FCA will take into account whether the compliance programme offered in the context of commitments (which gives right to a fine reduction) is limited in scope to the activities or subsidiaries that were directly investigated or whether it is broader and applies more generally, in whole or in parts, to the group.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

As explained in question 1, there is no general policy for companies to receive a reduction if they have a compliance programme in place. Indeed, where a company already has a competition compliance programme and the FCA discovers an infringement has been committed, this is neither a mitigating nor an aggravating circumstance and thus has no impact on the sanction.

While for many years a commitment to implement a compliance programme or upgrade an existing one could give rise to a fine reduction, the FCA announced in October 2017 that it considers this shall no longer be the case.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

Since the repeal of the 2012 Framework Document, all guidance on compliance programmes is enshrined in the case law of the FCA. In order to demonstrate competition compliance, companies should generally:

- take a public and strong position stressing that compliance with antitrust rules is a key feature of the company. A company must also make a general commitment to comply with antitrust rules. This position should be public – for example, available on the institutional website of the company;
- appoint one or more persons empowered within the company to develop and monitor the compliance programme (ie, compliance officer);
- put in place information and training to ensure employees are aware of competition law issues, the compliance programme, etc;
- set up effective control – for example, audit, whistle blowing, etc; and
- set up an effective oversight system – namely, disciplinary sanctions for serious infringement of company policy regarding compliance with antitrust rules.

6 What are the key features of a compliance programme regarding risk identification?

Regular assessments of the internal processes regarding contacts with competitors, pricing mechanism, etc, are an efficient way of monitoring competition compliance. In addition, regular audits of specific functions in the company, which are considered particularly exposed to antitrust risks (eg, marketing, sales, etc) are also recommended. Such audits can be carried out by external counsel, and take the form of mock dawn raids, that is, exercises similar to an investigation by a competition authority (eg, interviews, copy and review of documents and emails, etc).

A whistle-blowing mechanism, whereby employees can report any risk they identify on an anonymous basis, is also a key feature of any compliance programme.

7 What are the key features of a compliance programme regarding risk assessment?

As part of the compliance programme, one or more compliance officers (depending on the size of the company) should be appointed. The

compliance officer should be appointed for his or her unquestionable skills and will, as such, be responsible for assessing the risks that may be identified. As the main contact point on all antitrust-related issues, the compliance officer must have the necessary authority within the company to take measures whenever risks are identified.

8 What are the key features of a compliance programme regarding risk mitigation?

To reduce the risk of infringement the company should ensure that relevant employees are informed, trained and aware of antitrust rules (eg, annual training sessions, e-learning tools, etc). To this educational dimension should be added disciplinary sanctions in case of serious infringement.

To reduce risks to a minimum, all employees should cooperate and refer every potential issue to the compliance officer. For better efficiency, the programme should have support from the board, and the competition officer should have significant power to implement and monitor the programme.

9 What are the key features of a compliance programme regarding review?

Regular evaluation of the programme should be carried out, especially during events that may create new risks for the company (eg, acquisition of a new company or development of a new activity). A competition programme can be adapted, as long as it continues to respect the best practices developed by the FCA. When the compliance programme constitutes a binding commitment made by the company, the FCA may regularly check if the programme is actually being implemented. The company must be prepared to complete a report for the FCA to check compliance.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

Article L.420-1 of the French Commercial Code (FCC) prohibits, like article 101 of the TFEU, all concerted practices, agreements and alliances, express or tacit, between undertakings that have as their object, or may have as their effect, the prevention, restriction or distortion of competition in a market.

The text does not provide an exhaustive list of prohibited practices, but in general, an undertaking should not engage in any form of coordination, collusion or agreement, whether express or implied, with competitors on prices, output, opportunities, investments, technical progress, etc. In addition, exchanges of sensitive information (recent and detailed information on prices, management, profitability, customer sales, etc) is considered to amount to a 'concerted practice'.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The following are examples of strategies that may be employed:

- A company should ensure that where meetings take place, agreed formalities are followed, including recording the agendas and minutes, and that follow-up tasks do not impact the external market conduct of the parties.
- In the context of a transaction between competitors, a company should take precautions in approaching data room access. This includes ensuring that the data room is password-protected and covered in a non-disclosure agreement. In addition, the most sensitive information should only be shared with a 'clean team', that is, a limited number of employees not involved in competing day-to-day market activities. A company may consider involving external counsel where substantial risk of infringement exists.

12 What form must behaviour take to constitute a cartel?

A cartel usually refers to the most serious types of anticompetitive agreements or concerted practices between competitors, such as price fixing, agreements to limit outputs, etc. A cartel may be oral or written, tacit or expressed, between competitors where the purpose is to prevent, restrain or distort market competition.

13 Under what circumstances can cartels be exempted from sanctions?

There are two exemptions from cartel prohibition, set out in article L.420-4 FCC. The first exemption is for practices implemented in application of a statute or regulation. For example, the French Court of Cassation held in 2010 that tariffs for the consultation and surgical acts of some doctors are subject to French price regulation, thereby excluding the application of L.420-1 FCC.

The second exemption applies where the practices at stake ensure economic progress through the creation or maintenance of jobs and reserve a fair share of the resulting profits to end consumers, without giving the undertakings the opportunity to eliminate competition for a substantial part of the products in question.

14 Can the company exchange information with its competitors?

The legality of information exchanges between competitors is assessed on a case-by-case basis by the FCA, in line with the guidance issued by the European Commission. For example, the FCA may take into account the structure of the market, the nature of the data (whether recent, strategic, future, etc) and whether the disclosure occurs only between the competitors, excluding customers. Taking into consideration the characteristics of an exchange and its legal and economic context, an exchange may be qualified as a restriction of competition by object, or may be assessed through the lens of its effects.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

The possibility of applying for leniency was introduced in 2001 (articles L.464-2 and R.464-5 FCC). The most recent procedural notice on leniency was published by the FCA in 2015 (the Leniency Notice). Leniency is only available in cases involving conduct prohibited by article L. 420-1 FCC (namely, anticompetitive agreements), and is only available to companies and not to individuals. An application for leniency can be made orally by appointment with the FCA or through registered, signed-for mail.

In its application, the applicant must provide at least the following information: name and address of the company concerned; circumstances that have led to the application; names of the cartel participants; and products and territories on which the cartel is likely to have an impact. The applicant must also provide leniency applications completed in relation to the same cartel. In order to be eligible for leniency, the applicant must cooperate with the FCA throughout the entire procedure and must disclose all relevant information on the cartel.

There are two types of leniency applicants: the first leniency applicant may benefit from a full immunity from any financial penalty imposed by the FCA. Subsequent applicants will only be eligible for fine reductions up to 50 per cent (depending of their ranking). A rank is attributed to each applicant, depending on the date of the application and the nature and level of detail of the information provided.

The applicant is prohibited from providing information to other competitors involved in the cartel. A failure to comply may lead to withdrawal of the application, imposition of fine, or a lower fine reduction. The level of penalty reduction is calculated based on rank and the evidence provided to the FCA.

16 Can the company apply for leniency for itself and its individual officers and employees?

The company applies for leniency for itself through one representative. Leniency only applies to administrative sanctions and, therefore, does not extend to individual officers and employees, who instead face criminal charges, or damages that could be claimed on the basis of the FCA decision.

The Leniency Notice provides that leniency is a legitimate reason for not referring a case to the prosecutor. Therefore, neither the company nor the employees may be subject to criminal proceedings during the leniency proceeding. Under French law, criminal proceedings related to competition infringements are extremely rare.

The name of the applicant is kept confidential throughout the investigation. A company may contact the FCA's leniency officer, who can provide advice on the leniency procedure.

17 Can the company reserve a place in line before a formal leniency application is ready?

The FCA operates a marker system: when an undertaking applies for leniency, the chief general case handler usually allows the applicant one month from registration to provide further evidence in support of its leniency application.

18 If the company blows the whistle on other cartels, can it get any benefit?

There is no benefit when a company blows the whistle on a cartel it is not involved in.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

There are no specific rules on vertical agreements under French law. Vertical agreements that have as their object or effect the restriction of competition are prohibited. In practice, such agreements are assessed on a case-by-case basis by the FCA, in line with guidance issued by the European Commission. As a general rule, restrictions on resale price, territory and customers, sourcing, exports or parallel imports are considered anticompetitive. Selective and exclusive distributions, as well as franchises, are also closely monitored.

Under French law, as under EU law, antitrust rules do not apply to agreements entered into between commercial intermediaries because the principal bears the commercial and financial risks related to the selling or purchasing. All obligations imposed on the agent in relation to the contract concluded or negotiated on behalf of the principal will be considered to form an inherent part of the agency agreement.

Vertical agreements may also be subject to competition enforcement where they facilitate collusion. A hub-and-spoke is the intentional transmission of sensitive information from A to a competitor C, via an intermediary B (client or supplier).

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

The above vertical arrangements are not considered per se illegal.

As under EU law, the FCA distinguishes between agreements that have anticompetitive objects and agreements that have anticompetitive effects. Article L.420-1 FCC prohibits practices that have as their object or effect the prevention, restriction or distortion of competition. Restrictions of competition 'by object' are those that by their very nature have the potential to restrict competition. Their high potential for negative effects on competition obviates the need to demonstrate any actual or likely anticompetitive effect on the market. This is due to the serious nature of the restriction.

For vertical arrangements, the category of restriction by object includes, for instance, imposed fixed minimum resale prices and customer and territorial restrictions. If the vertical arrangement does not have the object of harming competition, the FCA will assess its effect on competition, taking into account the economic and legal context and the competitive comparison of the market with and without the vertical agreement, on a case-by-case basis.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Vertical arrangements are exempted from sanctions, pursuant to EU Regulation 330/2010, if the parties have a market share of less than 30 per cent and there are no hardcore or excluded restrictions.

In addition, as for horizontal arrangements, article L.420-4 FCC provides that arrangements that result either from the implementation of an applicable law or that satisfy certain requirements (namely, if an arrangement creates economic progress and if a fair share of the profit derived from it is allocated to consumers, without enabling the companies concerned to eliminate competition for a substantial part of the products concerned) are exempted.

To that end, the agreement must fulfil some requirements. The most serious restraints, such as price fixing, will not generally meet the conditions set out by article L.420-4.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

As under EU law, a company is deemed to hold a dominant market position when it is in a position that allows it to behave independently from its competitors and customers.

There is no formal dominance threshold set by the FCC. The market share of a company is considered a first useful indication when assessing a possible dominant position. The FCA generally considers that a company is unlikely to be dominant with a market share below 40 per cent, but likely to be dominant with a market share in excess of 50 per cent. However, a number of other factors are also taken into account in assessing whether or a not a company must be regarded as dominant; the structure of the market and strength of competitors, the reputation of the firm, the range of products offered, the presence on related markets and the competitive behaviour of the firm on the market.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

A company that holds a dominant position has a special responsibility not to harm competition. All practices exceeding the limits of healthy competition from a firm holding a dominant position, where the only justification is the elimination of existing or potential competitors, or undue benefit, are generally considered as abusive.

Article L.420-2 FCC sets out a non-exhaustive list of abuses, including refusal to sell, tying, discriminatory sale conditions and range agreements. In practice, the FCA assesses the anticompetitive impact of the practice on the market by using an effect-based and economic approach.

In 2015, the FCA imposed the highest fine ever on an individual company (€350 million), for implementing four anticompetitive practices on markets for telecommunications services for business clients. The company had abused its dominant position on the mobile telecommunications services market, by implementing various mechanisms aimed at ensuring the loyalty of its clients through marketing programmes, anticompetitive discounts and commitments in terms of contract duration. It had also implemented discriminatory practices in the fixed telecommunications services market by not sharing with third parties information it had on the network (as a former monopolist) that was essential to providing satisfactory service to clients .

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Abuses of dominance can benefit from individual exemptions under article L.420-4 FCC: when the practice results from the application of a statute or a regulation, where the abusive practice has the effect of ensuring economic progress, when the undertaking is entrusted with the operation of a service of general economic interest (article 106 TFEU). Moreover, the behaviour is exempt when the abuse has no appreciable effect on competition in the national market.

Such an exemption is, however, rarely granted.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Under article L.430-1 FCC, a concentration is defined as where two or more previously independent undertakings merge, or where one or more persons already holding control of at least one undertaking or one or more undertakings acquires 'control' of all or part of one or more other undertakings. The creation of a joint venture may also constitute a concentration under L.430-1.

Control is conferred through rights, contracts and any other means that confer the possibility of exercising decisive influence on an undertaking. This includes, in particular, the right to use the assets of an undertaking and the rights or contracts that confer decisive influence on the composition, voting or decisions of an undertaking.

Where the following cumulative thresholds are met, French merger control applies, unless the EU thresholds are met: the undertakings achieved in the previous financial year a worldwide combined pre-tax turnover of more than €150 million; and at least two of the undertakings

achieved, in the previous financial year, a pre-tax turnover in France of more than €50 million. Separate threshold criteria apply in the retail sectors and to concentrations in French overseas departments and communities.

Prior notification to the FCA is mandatory for all concentrations that meet the requisite thresholds, and it is the individuals and corporate entities acquiring control that are under an obligation to notify.

Notification has a suspensory effect on transactions, meaning that the transaction cannot be completed before the FCA makes its decision. The suspension obligation may be derogated from in exceptional circumstances, such as the takeover of a firm in insolvency proceedings.

Implementation of the transaction in breach of the standstill obligation (gun jumping) is liable to a fine of up to 5 per cent of the pre-tax turnover of the undertakings concerned in the previous year. In November 2016, the FCA issued a decision clearly meant as a warning to companies that decisive enforcement action will be taken against gun jumping. In its decision, the FCA imposed an €80 million fine, the highest ever for gun jumping, on a company. The fine imposed is representative of a global trend in which competition authorities have shown greater willingness to penalise companies for gun jumping.

26 How long does it normally take to obtain approval?

There are two phases in the statutory timetable for examination of a concentration:

- all concentrations must at least undergo a Phase I review, which requires a maximum of 25 working days (this can be extended by a maximum of 30 working days in certain circumstances); and
- where there are serious doubts following the first phase, the FCA will initiate a second phase, which requires an additional 65 working days (which can be extended by a further 40 working days in certain circumstances).

Both of these timetables are subject to the clock being stopped by the FCA (if the parties fail to provide requested information within the set time frame, for instance).

In the event that there are no competition issues, the parties may obtain clearance within an average of 15 working days following the filing of a complete notification, through the simplified procedure.

The statutory timetable only starts from the formal notification to the FCA. However, it is advisable to pre-notify, by sending the draft application form to the FCA in advance of the formal filing. Pre-notification discussions typically cover the scope and amount of information to be provided, market definition issues and initial competition concerns. They last between two weeks and a few months in more complex cases.

In its final decision, the FCA can authorise the concentration with or without commitments proposed by the parties, or it can prohibit the transaction. It may also take injunctions that impose conditions that were not proposed by the notifying parties.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

There are no specific French law provisions on this. Under EU rules, any decision that declares a merger compatible with the common market is deemed to cover restrictions that are 'directly related and necessary to the implementation of the concentration' (ie, ancillary restraints).

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

Sanctions for failure to file fall on the acquirers and may include the following:

- parties may be directed to either file the concentration or demerge; or
- the FCA may fine corporate entities up to 5 per cent of their pre-tax turnover in France from the previous financial year (plus, where applicable, the turnover in France of the acquired party over the same period) and may fine individuals up to €1.5 million (these are the maximum fines for corporate entities and individuals).

In 2013, a company was subject to a €4 million fine for deliberate failure to notify the acquisition of several companies within a group, though this was reduced ultimately to €3 million, as the company did not intentionally fail to notify, and was cooperating with the authority. This is the highest fine that the FCA has imposed to date. Infringements are subject to a five-year limitation period from the date when the change of control materialises.

Closing before clearance, or gun jumping, is considered as equivalent to an absence of filing and triggers the same sanctions as above. As discussed in question 25, the FCA imposed an €80 million fine on companies in 2016 for starting to implement two transactions that had been notified to the FCA before the clearance decision was issued. Specifically, the company in question had exercised decisive influence over and accessed commercially sensitive information from the targets. This was this first decision of the FCA regarding gun jumping, and the highest fine ever imposed for the offence.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Authorities do not require separate legal representation during certain types of investigations.

As stated in question 16, under French law, where any person is responsible for a personal and decisive part of implementation, the organisation where that anticompetitive practice has taken place can be prosecuted under criminal law.

If the company and the prosecuted employee are represented by the same attorney, this may lead to conflicts of interest that are prohibited under the lawyers' code of ethics.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

According to article L.450-1 FCC, the regulator can launch a dawn raid for anticompetitive practices such as cartels and abuse of dominant position, as well as for mergers. There are two types of dawn raids in France. Under ordinary investigations (article L.450-3 FCC), after explaining the aim of the investigation, officers are allowed to access business premises and computers, request access to pre-identified business documents and conduct interviews. Under the judicial investigation (article L.450-4 FCC), previous legal authorisation from the liberties and detention judge is required. The order must detail the practice for which evidence is sought and the premises that will be searched. Judicial investigations require the presence of a police officer and the representative of the company.

Regarding digital searches, the FCA now implements a procedure whereby it puts a temporary seal on the data it wishes to seize, thus allowing the company to request that the privileged correspondence or out of scope data be deleted before the data is seized (instead of such correspondence being seized and later restored, as was done in the past).

31 What are the company's rights and obligations during a dawn raid?

The company has an obligation to collaborate with the officers and to respect the seal when the investigation lasts several days.

The investigation will only occur in the presence of the occupant or its representative. Moreover, the company has the right to access a lawyer during the investigation; the lawyer has a right of access to all selected documents before they are seized and a right to challenge any document. The company can call upon a judge when it considers that a seized document is unrelated to the investigation or protected by legal privilege. Further, the company must receive an inventory of all documents seized during the dawn raid.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Article L.464-2 FCC sets out the settlement procedure and the possibility of making commitments to regulators during an investigation. This mechanism can be implemented in every case dealt with by the FCA.

A company that has received a statement of objections from the FCA may request to settle the case, namely, agree not to challenge the substance of the objections in exchange for a fine reduction. Under this procedure, the chief case handler will set a maximum and minimum

amount of the fine incurred, which it will present to the board of the FCA. In addition, the company may offer commitments to change its behaviour, which can also be taken into account in its settlement proposal.

On 8 March 2018, the FCA launched a consultation procedure on a draft procedural notice on the settlement procedures (Draft Notice). According to the Draft Notice, the settlement procedure is available to leniency applicants. The Draft Notice also provides that when assessing whether the settlement procedure is appropriate in a case, the chief case handler will take into account the number of undertakings involved that request a settlement, since the expected procedural efficiency gains will be limited if some parties challenge the objections. Finally, the FCA also indicated in the Draft Notice that it will only consider settlements that have been finalised within two months from the receipt of the statement of objections. The final Notice should be published in the coming months.

The commitment procedure applies in situations with ongoing situation concerns, where such situations could be quickly brought to an end by applying the procedure. Commitments are given pursuant to a preliminary assessment of the conduct in question (unlike the settlement procedure, which can be undertaken only when the company has received a statement of objections). The FCA must notify the undertaking concerned as to how the abuse of competition found at this stage of the process is liable to constitute a prohibited practice. After it has been informed of the competition concerns, the undertaking submits commitments to the FCA. Commitments can be structural (accountant division, subsidiarisation, etc) or behavioural (modification of contracts' clauses, of terms and conditions of sale, of pricing schedule, etc). The commitments must be relevant, credible and checkable.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

As indicated in the October 2017 Statement, the FCA will no longer reward the implementation or amendments to compliance programmes with a fine reduction, especially in the context of serious infringements such as agreements and information exchanges on future prices or commercial strategy.

34 Are corporate monitorships used in your jurisdiction?

The FCA generally monitors the implementation of the commitments. The commitments will generally include an obligation on the undertaking to provide regular reports to the FCA on the implementation of the commitments. The report is sent to the legal service of the FCA, which may request any additional information, and investigate.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

According to article L.480-5 FCC, the judge cannot request agreed statements of facts in a settlement. Under article L.480-1 FCC, where conduct has already been sanctioned by the FCA, the anticompetitive practice and its author are irrefutably presumed guilty.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The company can retain business documents that are covered by French legal privilege, namely, correspondence between an external lawyer and the company and communication aimed at giving legal advice or relating to actual or potential litigation. Correspondence with in-house legal counsel is not privileged under French law. The privilege against self-incrimination is also protected.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

A firm can refuse to provide a document protected by legal privilege. During the investigation phase, the employee has one month to ask for protection of business secrecy. For each record or piece of record, the person must explain the purpose and the reasons for confidentiality protection.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

The FCA can fine the firm refusing to cooperate up to 1 per cent of the highest worldwide turnover in the years since the anticompetitive practice began. Moreover, the FCA can fine up to 5 per cent of the average daily turnover for each day that the firm fails to respond within the time limit.

In addition, article L.450-8 FCC sanctions the refusal to cooperate with six months of prison and €300,000.

39 Is there a duty to notify the regulator of competition infringements?

No.

40 What are the limitation periods for competition infringements?

According to article L.462-7 FCC, the limitation period precludes suing a company more than five years after the end of the anticompetitive practice if the FCA did not take any action to investigate or initiate proceedings. In any case, the limitation period shall expire, at the latest, 10 years after the anticompetitive practices have stopped.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

Not applicable.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

Not applicable.

CLIFFORD
CHANCE

Katrin Schallenberg **katrin.schallenberg@cliffordchance.com**
Amélie Lavenir **amelie.lavenir@cliffordchance.com**

1 rue d'Astorg
75008 Paris
France

Tel: +33 144 055 252
Fax: +33 144 055 200
www.cliffordchance.com

Germany

Michael Dallmann and Kim Manuel Künstner
Schulte Riesenkampff

General

1 What is the general attitude of business and the authorities to competition compliance?

While especially larger companies already have compliance management systems (CMS) with (chief) compliance officers (CO) in place, smaller businesses make use of professional advice, eg by using seminars to train their employees or by involving external experts to provide specialised compliance guidelines for high-risk scenarios.

In addition, recent legislation and changes in the decisional practice of the Federal Court of Justice (FCJ) have resulted in considerable incentives to implement and maintain CMS.

The FCJ has, in a recent decision, recognised CMS as a possible mitigating factor when setting administrative fines. Although the decision refers to a breach of tax law, its reasoning applies to cartel infringement, too. It as been found that when CMS has been installed after the infringement this may still have a positive effect.

Also, cartel infringements may now be registered in a centralised register. The law allows companies to go through a process of 'self-cleaning' to achieve deletion of infringements before the ending of the regular period after which all entries are purged. Part of the 'self-cleaning' process are appropriate compliance measures. The legal framework has, therefore, further shifted towards a positive recognition of CMS.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

As of now, there is no generally and officially approved standard for compliance programmes in Germany. Different ministries do, however, hand out guidelines relevant to specific aspects of compliance programmes. Besides these, there is the option of using existing ISO-Standards such as the CMS Standard ISO 19600. Also, various associations provide guidelines on compliance programmes to their members. While not officially endorsed or supported by the federal government, these standards may serve as a reference when designing and implementing a CMS.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

There is no de minimis rule when it comes to compliance or infringements of competition law. The scope of necessary compliance measures depends on the specific risk factors and the structure of a certain company rather than on its size. Nevertheless, it might be argued that a small or medium enterprise (SME) does not have the same resources at its disposal for compliance as a larger company.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The Federal Court of Justice, in October 2017, acknowledged that implementation of a CMS should be considered a factor when setting fines for anticompetitive behaviour. According to the decision, the presence of a (working) CMS may even be considered where such a system is introduced after an infringement. The Federal Cartel Office (FCO) mentions the usefulness of compliance programmes for possible whistle-blowing and as a sign for the effectiveness of enforcement. There have, however, not been any decisions by the FCO yet that take the introduction of a CMS into account when setting fines.

So far, CMS were predominantly important when it came to the question whether the management of companies may be held responsible for violation of organisational and supervisory duties. According to the leading case *Neubürger*, management has an obligation to implement and constantly supervise a working CMS in order to avoid liability for illicit behaviour and damages resulting thereof. With the addition of a likely mitigating effect, there is a significant additional incentive to introduce and manage a working CMS.

5 Implementing a competition compliance programme

How does a company demonstrate its commitment to competition compliance?

Companies demonstrate their commitment externally by publishing own codes of conducts, implementing Compliance Officers, using supplier codes of conduct, by ISO 19600 certification or compliance audits. Another practice that has become increasingly common is to attempt to pass on compliance requirements to business partners or suppliers. Internally, companies use the 'tone from the top' approach to encourage employees to comply with the codex (eg, by issuing a letter from top management addressing competition compliance, holding regular compliance trainings and to provide best practice guidelines). Also, some companies reward employees for outstanding compliance achievements. In case of illicit behaviour, companies dismiss employees or even sue them to seek compensation for fines or damages the company has suffered because of infringements.

6 What are the key features of a compliance programme regarding risk identification?

The compliance programme must take notice of the specific risks a company is exposed to. These risks mainly depend on the business model of the company and the industry characteristics (eg, oligopolistic structure, high transparency, degree of product differentiation). In the first place, companies must identify the (typical) situations in which they get in touch with competitors (ie, at association meetings, due to joint ventures or consortia or even in the course of private events). Identified risks should then be categorised by likelihood of illicit behaviour occurring as well as by its estimated impact upon the company. Finally, it is necessary to identify the employees exposed to probable and severe risks to train their awareness and ability to identify risks in day-to-day business.

7 What are the key features of a compliance programme regarding risk-assessment?

The initial risk assessment is conducted by the employee or company representative that has identified the risk. Of course, such risk assessment is of preliminary nature and must be reviewed by a compliance expert (eg, CO, external adviser). As a consequence, it is necessary to instruct and train employees how, when and to whom to communicate potential risks. Therefore, a good compliance programme provides communication channels and instructions for employees how to deal with identified or potential risks.

8 What are the key features of a compliance programme regarding risk-mitigation?

Early identification and assessment of risks as described above are key features for risk mitigation in order to avoid illicit behaviour. As mentioned before, training and awareness of the key employees is crucial to avoid infringements. Also, risk-mitigation is important to reduce the negative impact in case an infringement has already occurred. Compliance programmes should, therefore, also feature measures and guidance on how to act in order to avoid or lower fines (eg, guidelines/trainings regarding 'dawn raids', leniency programmes, document hold rules) and reduce adverse reputational impact (eg, by guidance on communication or PR).

9 What are the key features of a compliance programme regarding review?

Review should be a firm part of any compliance programme. Key feature is the continuous adjustment of the programme to legal and economic developments, complaints by customers or other market participants, incidents within the company, or official investigations in the industry. In order to avoid 'compliance fatigue' and blind spots it is advisable to work with external experts (eg, for compliance trainings, 'train the trainer' concepts and guidelines for employees). Companies exposed to elevated risks, non-functional CMS or with plans to implement a CMS for the first time should initiate an external compliance audit to enable their compliance programme. Also, successful review requires the collection of accurate data and documentation of past events. It should be stressed that it may be prudent to store relevant information collected during the review with an external adviser benefiting from attorney-client privilege to avoid any possibility of coincidental discoveries.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

Section 1 of the German Law against Restraints of Competition (ARC) is similar to article 101 TFEU, except for the inter-state clause. Therefore, any agreement restricting competition between companies by object or by effect is prohibited. Hardcore restrictions include price-fixing, quota cartels, customer allocation and market-sharing. Certain forms of cooperation between competitors may also be caught (eg, R&D and technology transfer agreements, consortia, joint ventures, etc) if not exempted or justified. Additionally, exchange or sharing of strategic information between competitors may be considered a violation of the ARC.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

Risk identification and assessment regarding agreements with competitors should be part of any compliance programme. Employees involved should be trained and instructed in which cases they need to seek upfront advice from (legal) experts. In case of recurring agreements with competitors companies might provide sample contracts that are in line with competition law requirements. New developments in competition law (enforcement) should be monitored and agreements should be adjusted or even terminated on short notice if necessary. Also, company representatives should not exchange any strategic information with competitors in the event of negotiations without prior consent of the legal department or external advisors.

12 What form must behaviour take to constitute a cartel?

Like article 101 TFEU, section 1 ARC stipulates that any agreement, decisions by associations of undertakings and concerted practices restraining competition is prohibited. Thus, a concerted action is sufficient, a written agreement is not necessary. In a recent decision, the Higher Regional Court of Düsseldorf found that the mere exchange between suppliers of sweets regarding the content and status of negotiations with retailers points to a gentleman's agreement and a common understanding of the participants in the sense of section 1 ARC.

If the prohibited behaviour is a restriction of competition by object, it is not necessary to show that the behaviour actually had an adverse impact on competition. However, a restriction by effect requires a robust test in order to show the negative effects.

Negligent infringements are caught by section 1 ARC, but, in general, mere attempts of collusion do not fall within the scope of section 1 ARC. However, the decisional practice endorses a rather broad approach. For example, the European Court of Justice ruled in a recent decision of 26 January 2017, Rs C-609/13 P, *Badezimmerkartell Duravit* that contacting a competitor and attempting to agree upon prices constituted a behaviour prohibited under article 101 TFEU. This approach is applicable to German competition law, too.

Moreover, section 21 ARC catches unilateral behaviour and stipulates that a company may not threaten or promise advantages to other undertakings in order to induce them to engage in conduct which is, inter alia, unlawful under section 1 ARC.

13 Under what circumstances can cartels be exempted from sanctions?

Until 2005, German competition law included a notification mechanism to initiate proceedings that made it possible for a cartel to be found legal. Nowadays, German competition law has changed towards a system of self-assessment. As a consequence, any cartel that is found to be illegal under section 1 ARC may be subject to sanctions. There is no exemption except for an application for leniency.

However, there are legal stipulations that exempt 'cartels' from being illicit. Section 2 paragraph 1 ARC matches article 101 para 3 TFEU and declares cartels as legal, if they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and as long as they do not impose restrictions on the companies concerned that are not indispensable to the attainment of these objectives, or allow eliminating competition in respect of a substantial part of the products in question. Also, section 2 paragraph 2 ARC makes all EU block exemptions applicable on national level (ie, block exemptions regarding vertical restraints, technology transfer, R&D, and the motor vehicle sector).

In addition, there is a specific German exemption for cartels formed by SMEs, section 3 ARC. It covers agreements between competing SMEs whose subject matter is the rationalisation of economic activities through cooperation, if the agreement does not have significant anticompetitive effects on the market and does increase the ability of SMEs to compete on the market. However, this exemption is applicable only in case the inter-state clause of article 101 paragraph 1 TFEU is not fulfilled.

14 Can the company exchange information with its competitors?

Exchange of strategic information between competitors is caught by section 1 ARC. In general, the assessment in Germany whether or not information is of strategic nature follows the guidance provided by the European Commission in its Horizontal Guidelines (Offical Journal 2011 C 11/01 paragraphs 86 et seq).

The decisional practice is very strict and also punishes unilateral flows of strategic information, if the receiving undertaking does not expressly reject the information. Also, in a recent decision, the Higher Regional Court of Düsseldorf found that the status and the subject of negotiations with grocery retailers are strategic information and, therefore, may not be exchanged by competing suppliers of sweets. Furthermore, the FCO prohibited suppliers of concrete from publishing general price lists, since this was considered as illegal price signalling. Instead, concrete suppliers committed themselves to submit specific price lists to individual customers.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

The FCO has a leniency programme in place that grants immunity from and reduction of fines to cooperating companies in cartel cases (see Notice No. 9/2006 of 7 March 2006).

The leniency programme is limited to horizontal agreements. The FCO has, however, applied the same principles and granted full leniency in cases of vertical resale price maintenance as well.

General requirement for leniency application is that the applicant is willing to fully cooperate on a continuous basis with the FCO, especially by providing verbal and written information and, where available,

evidence that enables the FCO to prove the offence. Also, the applicant must neither be the only ringleader of the cartel nor have coerced others to participate in the cartel.

If these requirements are met, immunity from fines is granted if the applicant is the first participant in a cartel to contact the FCO before it has sufficient evidence to obtain a search warrant, or, in case the FCO already is in a position to obtain a search warrant, if the applicant is the first participant in the cartel to contact the FCO before it has sufficient evidence to prove the offence.

The FCO still may grant a reduction of the fine of up to 50 per cent for applicants that do not receive immunity, either because they are not the first applicant or because their application is submitted after the FCO has sufficient evidence to prove the offence. The percentage of reduction is based on the value of the contributions to uncovering the cartel and the sequence of applications.

The FCO does not disclose the identity of applicants to third parties for the duration of its proceedings. The FCO may, however, disclose the identity of leniency applicants to other cartel members in the course of its investigations. Also, the FCO issues press releases on its website regarding closed cartel proceedings in which the identity of the involved companies and possible leniency applications are usually made public.

16 Can the company apply for leniency for itself and its individual officers and employees?

Yes, leniency is granted to the company and all its individual officers and employees named in the leniency application. In practice, companies depend on their employees to provide information on the cartel to the FCO. In exchange, the company (and the FCO) grant immunity or reduction of fines also to the employees willing to cooperate.

17 Can the company reserve a place in line before a formal leniency application is ready?

Yes, the FCO's marker system is part of its leniency programme described above. Since the sequence of applications is crucial to receive immunity or a high reduction of a fine, leniency applications start with setting a marker at the FCO. The timing of the placement of the marker is decisive for the status of the application.

Setting a marker requires an applicant to contact the head of the Special Unit for Combating Cartels or the chairman of the competent decision division and to declare his willingness to cooperate. The marker may even be set orally and in German or English language. The applicant must give details about the type and duration of the infringement, the product and geographic markets affected, the identity of those involved and with which other competition authorities' applications have been or are intended to be filed.

After receiving a confirmation that the marker is set, the applicant has a total time frame of up to eight weeks to draft a complete leniency application. If the applicant fails to post the complete leniency application timely, the case handler may decide to allow other applicants to take over the marker.

18 If the company blows the whistle on other cartels, can it get any benefit?

There is no specific rule or even reward for blowing the whistle on other cartels than the ones the company is involved in.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

Section 1 ARC catches any possible vertical agreement restraining competition, in particular resale price maintenance, exclusive distribution and non-compete obligations. The legal framework is very similar to the EU, since the vertical block exemption regulation (VBER) is fully applicable to German competition law pursuant to section 2 paragraph 2 ARC. As a consequence, the Vertical Guidelines of the European Commission provide important guidance on vertical restraints in Germany, too.

The FCO is very active in relation to vertical restraints. This is especially true with regards to resale price maintenance between suppliers and retailers. More recent cases include the request of a producer of outdoor jackets towards retailers not to reduce consumer prices and not to include the company's products in any discount sales. In a similar case, manufacturers and retailers of furniture were fined by the FCO for illicit resale price maintenance. Additionally, the FCO recently issued guidelines on price maintenance and common negotiation practices in the food retail industry, providing an introduction to the FCO's assessment of these practices.

The FCO is also very sceptical regarding 'platform bans' (ie, suppliers urging retailers not to distribute products via online platforms such as Amazon, eBay). A recent example is the *ASICS* decision. The FCO's decisional practice on platform bans may not be fully in line with the ECJ's *Coty* decision. Also, the Higher Regional Court of Frankfurt allowed premium backpack manufacturer Deuter to ban online platforms within its selective distribution system since Deuter's aim was to signal a higher product quality.

In another vertical restraints case, the FCO found the practice to prohibit use of price comparison search engines or online marketing tools like AdWords to be anticompetitive. The decision was upheld by the Federal Court of Justice.

Furthermore, the FCO is of the opinion that the practice of online travel agencies (OTAs) prohibiting hotel operators from offering lower rates for rooms on their own websites than on the OTA's platform is illicit. However, the Düsseldorf Higher Regional Court has recently found that the Vertical Block Exemptions Regulation (VBER) was applicable to parity clauses and that these clauses weren't hardcore restrictions. As a consequence, parity clauses may be exempted where the company fulfils all other requirements, especially market share thresholds.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

Other than for horizontal agreements, the distinction between 'by object' and 'by effect' is not very developed in relation to vertical arrangements. However, given the application of the VBER on German competition law the following general lines can be drawn: any vertical arrangement falling within the VBER exemption is 'per se legal'. Any vertical arrangement caught by article 4 of the VBER (hardcore restriction) is 'per se illegal'. Other vertical arrangements need to be examined very carefully. The EC's Vertical Guidelines provide important guidance also for German competition law.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

If a vertical agreement complies with the *Metro* criteria, the agreement is not considered to be anticompetitive and, thus, does not fall within the scope of article 101 para 1 TFEU. The *Metro* criteria are met, if the characteristics of the product require a selective distribution system, resellers are chosen on the basis of objective criteria of a qualitative nature which is determined uniformly for all potential resellers and applied in a non-discriminatory manner, and the restrictions do not go beyond what is necessary.

Also, vertical arrangements are not unlawful, if they fall within the scope of the VBER, or if the exemption for individual arrangements pursuant to section 2 para 1 ARC in conjunction with article 101 para 3 TFEU applies.

As regards leniency, the FCO has not issued a formal leniency programme for vertical restraints. However, it follows from its decisional practice that the FCO grants leniency to companies in cases of vertical restraints under the same conditions as for horizontal agreements.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The most important factor to determine a dominant market position under German competition law is the company's market share. Section 18 paragraph 4 ARC stipulates that an undertaking is presumed to be dominant if it has a market share of at least 40 per cent. While section 18 paragraph 3 ARC contains a non-exhaustive list of various other factors (eg financial strength, entry barriers, links with other undertakings) to determine a dominant market position, the market share assessment prevails. The newly introduced section 18 paragraph 3a ARC lists non-exhaustive factors (eg, networking effects, multi-homing, data access),

which are used to assess a dominant market position on multi-sided markets and networks and thus, aims at digital markets.

As a precaution, companies with an estimated market share of 40 per cent or more on any relevant market should either conduct an in-depth analysis whether they hold a dominant market position or avoid any behaviour that may constitute abusive behaviour.

It is noteworthy that German competition law expands the scope of application regarding abusive behaviour to companies with relative market power (section 20 ARC). A company has relative market power if SMEs as suppliers or purchasers of a certain type of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching to other undertakings do not exist.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

Section 19 ARC prohibits any abuse of a dominant market position. Section 19 paragraph 2 ARC contains a non-exhaustive list of examples of abusive behaviour (eg unfair impediment, discrimination, essential facilities doctrine, etc), similar to article 102 TFEU. More importantly, the decisional practice shaped case groups for abusive behaviour (eg predatory pricing, unfair rebate schemes, margin squeeze, refusal to supply).

Recent cases of the FCO include abusive use of exclusivity clauses by a dominant ticketing-agency and abusive price-setting by district-heating companies. In early 2018, the FCJ confirmed an earlier decision of the FCO in which the FCO had considered certain demands for rebates, inter alia, merger-related rebates (marriage rebates) an abuse of market power. The above-mentioned (see question 19) guidelines on certain forms of conduct in the food retail industry apply in situations of market dominance, too.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Objective justification of certain behaviour of a dominant company is an integral part of the assessment under section 19 ARC. The 'justification test' is, in its very essence, close to the rule-of-reason test known and practiced in other jurisdictions. The court (or the relevant competition authority) will, on this level, weigh any legitimate interests against each other based on the basic principle that the main goal of the ARC is to maintain competition and keep markets open.

If the 'justification test' is negative, no further legal exemption from enforcement or sanction is available. However, it is in the FCO's discretion whether it investigates or even fines certain behaviour. Most investigations of the FCO regarding abusing market dominance are closed by an order to end the infringement. Thus, the FCO will impose fines for abusing market dominance only if the company involved does not follow the order or in very clear cases of severe exploitive abuses.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Mergers and acquisitions require mandatory approval before completion, if:

- the transaction constitutes a concentration within the meaning of section 37 para 1 ARC;
- all companies involved together had a global turnover exceeding €500 million, one company involved a domestic turnover of more than €25 million and another company had a domestic turnover of more than €5 million in the last closed financial year before the decision of the FCO (section 35 paragraph 1 ARC); and
- the transaction is not subject to EU merger control.

The ninth amendment of the ARC, which came into in force on 9 June 2017, introduced a new size-of-transaction-test. The new test aims at catching transactions in digital markets that feature the acquisition of companies with high market relevance and purchase prices, but low (domestic) turnover (eg, acquisition of WhatsApp by Facebook). Under the new test, mergers also require mandatory approval if:

- the transaction constitutes a merger within the meaning of section 37 paragraph 1 ARC;
- the total turnover of all companies involved exceeded €500 million;
- one of the parties to the merger has exceeded domestic turnover of €25 million;
- neither the target nor any other further party (except for the seller!) to the merger has exceeded a domestic turnover of €5 million;
- the value of the consideration for the merger exceeded €400 million; and
- the target has significant business activity in Germany. As a result, the size-of-transaction-test is not met if the target's turnover exceeds €25 million and the seller's turnover exceeds €5 million.

All parties to the merger are responsible to notify the transaction to the FCO including the seller in cases where assets or shares are sold.

26 How long does it normally take to obtain approval?

In the first phase the FCO has to take a decision within a one month period from receipt of the complete notification. If the FCO does not take any decision within this period the merger is automatically cleared. If the FCO needs to further examine the transaction it may initiate a second phase with a total period of four months from receipt of the complete notification. The parties to the merger and the FCO may agree to extend the decision period beyond four months. A fast track procedure is not available. However, depending on the work load of the decision division and the arguments of the parties the FCO may clear cases on short notice.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

The effect of merger clearance by the FCO is limited to merger control stipulations and does not cover other possible compliance concerns. In fact, the FCO usually does not look into any documents containing the terms of the merger in further detail than already included in the application as such (eg, MOU, SPA, etc). As a consequence, the FCO may open investigations, either simultaneously to merger proceedings or at a later stage, to address competition concerns that go beyond the mere concentration process triggered by the merger. For example, the FCO recently analysed a series of regional joint ventures (JVs) between competitors in the German asphalt industry, albeit the fact that a lot of them were cleared by the FCO in merger proceedings in the past. However, since the FCO found some of these JVs to infringe the prohibition of restraining competition pursuant to section 1 ARC it ordered these JVs to be dissolved.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

In case of a failure to notify the FCO may impose a fine on the responsible companies. Any transactions or agreements that aim to implement the concentration before clearance are considered legally void. A company may, in particular, be fined for not notifying at all, but also for implementing a merger after applying but before obtaining clearance by the FCO (gun jumping). The FCO usually does not impose fines in case of incomplete filings. However, incomplete filings lead to extended procedures as the clock does not start to run until the filing is complete.

In the case *Druck- und Verlagshaus Frankfurt/M* the publishing house Druck- und Verlagshaus Frankfurt/M (DuV) acquired its competitor Frankfurter Stadtanzeiger GmbH. The FCO found that DuV had intentionally refused to notify and that the merger could not be cleared under the ARC because of its material adverse effects on competition. DuV was fined €4.13 million and the merger was found illegal.

A more recent example is *Marienhaus/Barmherzige Brüder*. The case is particularly interesting because the parties – both owners of numerous hospitals and social centres – completed multiple mergers that triggered an obligation to notify. The parties founded an association with only few members owning a hospital for the purpose of restructuring. Owing to changes in membership control over the association and over the hospital changed repeatedly. The FCO discovered these events coincidentally as part of different merger control proceedings. Although the FCO did not fine the companies, as a result of negotiations, the parties agreed to significant structural and unbundling measures.

Update and trends

The FCO considers itself a leading competition authority as regards digital markets. It continues its investigations in that respect with the recent announcement of a sector inquiry into online advertising, raising the question of whether some advertisers were implementing closed systems ('walled gardens') that may harm competition. Furthermore, the president of the FCO recently stated that the FCO intends to safeguard open markets necessary for smaller online stores to compete. The FCO has also announced an investigation into price-comparison websites and data collection by smart TVs. The FCO, in December 2017, published its preliminary assessment in the *Facebook* case, dealing with connections between privacy and market power. Proceedings are, however, still ongoing.

The ninth amendment of the ARC included the introduction of changes to the ARC required by the Directive on Antitrust Damages Actions (2014/104/EU). The changes, inter alia, strengthen the position of claimants in and before civil court proceedings for cartel damages significantly. In 2017, a significant increase in cartel damage claims brought to German civil courts could be observed. It is to be expected that this trend will continue in 2018. The FCJ has not yet decided on two significant issues concerning the calculation of the limitation period relevant for cartel damages. These decisions can be expected for 2018 and may very well lead to a further increase in actions for damages, if the position of claimants is further strengthened. It is likely that companies will increase their compliance efforts to deal with the increasing risks posed by a higher probability of successful damage claims after an infringement.

On 29 July 2017, the law establishing a central competition register (*Wettbewerbsregister*) came into force. According to German antitrust law, companies involved in agreements restraining competition may be temporarily debarred from public procurements at the discretion of the public contractor. Companies that have committed certain offences, inter alia, cartel infringements, are registered as offenders in a centralised digital register. The information may be obtained from the register hosted at the FCO by any public contracting body and must be obtained above a contract value of €30,000. A specific registration will be deleted after five years at the latest.

In order to avoid debarment, a company may undergo a 'self-cleaning' process that includes the obligation to proactively cooperate with the investigating authorities and the public contractor in order to comprehensively clarify the facts and circumstances relating to the infringement and the damages caused thereof. The company must pay damages for any harm done by its illegal behaviour. In addition, it is necessary to take concrete technical, organisational and personnel-related measures that must be appropriate to prevent any further infringements. Such measures will, in most cases, include creation or improvement of a CMS. Hence it is likely that the introduction and the management of CMS will become a common follow-up measure after infringements – at least in industries where public contracting is of some importance.

Investigation and settlement

29 Under which circumstances would the company and officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Companies and their officers or employees need separate legal representation if the FCO not only accuses the company of having violated competition law but also certain representatives. Employees which are not listed as suspects do not necessarily require separate legal representation, for example, if they 'speak for the company' as part of a leniency application. However, in case of any conflict of interests between the company and employees providing information to the FCO separate legal representation is indicated.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

Dawn raids are usually used in cartel investigations in order to avoid that companies involved make documents unavailable that may prove tacit collusion with competitors (eg, agendas, travel expense reports, correspondence). The FCO will search any premises in which such information may be available. This includes, in particular, offices and cars of the company's management and sales representatives. In rare cases, the FCO may also search accommodations of employees, if the authority assumes that sensitive documents have been stored in private rooms.

While the FCO may as well conduct dawn raids to investigate any other infringement under the ARC, in these cases the authority tends to issue requests for information in order to collect the necessary information from the companies involved.

The procedural rules for dawn raids conducted by the FCO are identical to those for searches by any other criminal investigation body in Germany as set forth in the German Code of Criminal Procedure. In particular, the FCO requires a specific search warrant issued by a court.

31 What are the company's rights and obligations during a dawn raid?

The company may ask to check the FCO's search warrant and have a company's representative as well as attorneys present during the entire dawn raid. The FCO is required by law to hand over a protocol and a list of all objects seized. Companies may ask to copy (certain) documents seized by the FCO.

Undertakings and their employees are obliged to comply with basic requests (eg, stop blocking doorways, not to hinder the movement of the FCO's personnel) but are not obliged to support the authorities. Employees being suspects in the investigations have the right to remain silent. Other employees that are interviewed or asked questions as witnesses have the right to be assisted or represented by an attorney.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation

It is at the discretion of the FCO whether it initiates administrative or fine proceeding. The former are usually closed by an order to end (possible) illicit behaviour, the latter by imposing a fine. The FCO may switch from one to another in the course of the proceedings at its own discretion.

In the course of an administrative procedure a company may offer remedies to avoid a final order. Remedies must be appropriate to resolve the competition concerns of the FCO.

Apart from leniency applications, fine proceedings may be closed by reaching a settlement. Settlement talks can be initiated by the FCO or by the undertakings investigated. If both, the FCO and the company, agree, the FCO will outline the relevant conduct that is the basis of the investigation and provide a range of the potential fine as well as information about other possible measures. If both sides agree on the fine the FCO will issue a settlement decision, which is a 'shortened infringement decision' containing only limited information as regards the facts of the case and the assessment of the infringement.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

The FCO may recognise (future) compliance programmes as a mitigating factor when setting a fine. A recent decision by the Federal Court of Justice suggest that establishing a (functioning) CMS may be considered a mitigating factor when determining fines. However, it cannot be derived from the decisional practice of the FCO that such announcements by companies have led to (considerably) lower cartel fines yet.

34 Are corporate monitorships used in your jurisdiction?

No, corporate monitorships are not used.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class-actions or representative claims?

Claimants may use such statements in case they are available to them. Moreover, in civil damage claim proceedings courts are bound by a

finding that an infringement has occurred to the extent that such finding was made in a final and non-appealable decision by the competition authority. The shortened fine notice issued by the FCO to close settlement proceedings is such a final and, after the period of appeal has expired, non-appealable decision. Therefore, the agreed statements are crucial for claimants. However, the FCO does not publish settlement decisions. Therefore, claimants either have to apply for access to the files or demand a copy from the defendants.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The privilege against self-incrimination fully applies in fine proceedings (ie, employees and company representatives treated as suspects have the right to remain silent). Correspondence with external legal advisors is privileged only to the extent to which the correspondence specifically serves to defend the client against criminal accusations. Other correspondence with external attorneys can be seized if it is found in the custody of the suspect or third parties. Correspondence of the company with in-house legal staff is, in general, not privileged.

37 What confidentiality protection is afforded to the company and/or individual involved in competition investigations?

Within few days after dawn raids in cartel cases the FCO may publish a press release stating the date of the dawn raids as well as the affected branch and the alleged infringement. However, the FCO will not disclose the names of the involved companies during its investigations. If the FCO finds a breach of antitrust law, it is obliged, once the investigation has been closed, to publish information via its website regarding the facts of the case, the nature and the time period of the infringement, the companies involved in the infringement and the affected goods or services. This newly introduced obligation serves to help potential cartel damage claimants.

In order to obtain more information, eg to seek damages, third parties must apply for access to the files. The FCO will release documents from the file in redacted form only, ie usually any business secrets and personal information is redacted.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

In fine proceedings the mere non-cooperation is not punishable by any means as far as the privilege against self-incrimination applies. Where the privilege does not apply, the FCO may issue a formal request for information in order to make companies disclose certain information. A company that fails to answer the request for information properly (ie, correctly, completely and in time) may be fined with up to €100,000.

39 Is there a duty to notify the regulator of competition infringements?

No, neither companies or individuals involved in infringements nor third parties are obliged to notify infringements they are aware of.

40 What are the limitation periods for competition infringements?

The limitation period for infringements regarding the prohibition of agreements restraining competition and abusive behaviour of dominant market positions is five years. Other infringements (eg, failure to properly answer a request for information) have a limitation period of three years. Continued violations are considered as single infringements. Therefore, for example, the limitation period for a continued cartel does not start before the cartel has been expressly abandoned. As a consequence, a failure to notify a merger never becomes time-barred.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

German competition law contains special provisions in relation to unilateral behaviour restraining competition. For example, section 20 ARC expands the scope of the prohibition of abusive behaviour to market participants that do not have a dominant, but a strong market position. Under these provisions the FCO found it to be unlawful that a German grocery retailer with an overall market share of approximately 25 per cent asked its suppliers to pay one-offs and to accept less favourable conditions after the retailer acquired a competitor without offering suppliers adequate consideration in exchange.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

There are no concrete proposals pending at this time. However, the political parties that have formed the next majority coalition in the parliament have recently addressed a number of competition-policy related topics in their agenda for the upcoming four-year term. According to the document, they intend to modernise antitrust law, to speed up proceedings and to increase market monitoring. Another goal is the creation of a digitalisation-friendly environment; however, plans are still quite vague in that respect.

SCHULTERIESENKAMPFF.

Michael Dallmann **michael.dallmann@schulte-lawyers.com**
Kim Manuel Künstner **kim.kuenstner@schulte-lawyers.com**

Neue Mainzer Strasse 28 Tel: +49 69 900 26 838
60311 Frankfurt am Main Fax: +49 69 900 26 999
Germany www.schulte-lawyers.com

Greece

Eleni Papaconstantinou and George Risvas

Law Offices Papaconstantinou

General

1 What is the general attitude of business and the authorities to competition compliance?

The Hellenic Competition Commission (HCC) takes various steps to diversify and expand its advocacy efforts. In this context it has published compliance and awareness guides and information bulletins and has organised training seminars and conferences in order to promote awareness on competition law issues.

Many large undertakings, particularly those belonging to international groups, conduct antitrust audits and implement compliance programmes.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

There is no government-approved standard for compliance programmes in Greece.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

In the absence of a government-approved standard for compliance programmes, best practice and obligations depend on company size and the sector of the economy the company operates in.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The existence of a competition compliance programme is not included among the attenuating circumstances giving rise to fine reduction under the guidelines for setting fines issued by the HCC in 2006. Although many undertakings have invoked the implementation of such programmes in proceedings before the HCC in order to claim fine reduction, to the best of our knowledge there have not been any HCC decisions mentioning this as a reason for fine reduction.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

The company's commitment to competition compliance can be demonstrated, among others, through:

- setting out clear compliance policies, appropriately documented and made available to all company staff; asking staff for written acknowledgement of receipt thereof;
- designating a member of senior management to take overall responsibility for competition compliance;
- putting in place incentives for compliance with and penalties for breach of compliance policies;
- putting in place reporting, monitoring and auditing mechanisms; and
- taking immediate action in case any situation of conflict with competition rules is detected.

6 What are the key features of a compliance programme regarding risk identification?

In the absence of government-approved standards or other official guidelines, taking into account the fact that Greek law is largely based on EU law, the key features of a compliance programme regarding risk identification, risk assessment, risk mitigation and review would largely follow best practices at EU level.

7 What are the key features of a compliance programme regarding risk assessment?

See question 6.

8 What are the key features of a compliance programme regarding risk mitigation?

See question 6.

9 What are the key features of a compliance programme regarding review?

See question 6.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

The company should avoid entering into any kind of agreement or concerted practice having as its object or effect the prevention, restriction or distortion of competition in the Greek market. Article 1(1) of Law 3959/2011 (the Competition Law), which is almost identical to article 101(1) of TFEU, provides indicative examples of such restrictive agreements or practices, which include those that:

- directly or indirectly fix prices or other trading conditions;
- limit or control production, supply, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions, making the operation of competition difficult (such as, unjustifiably refusing to sell, purchase or conclude any other transaction); and
- make contracts subject to the other parties accepting supplementary obligations that, by their nature or according to commercial use, have no connection with the subject of the contracts.

Article 101 of TFEU also applies directly in Greece with respect to agreements or concerted practices that may affect trade between EU member states.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

Appropriate training and documented competition policies are very useful in order to make clear in what type of arrangement the company may enter into with a competitor.

In case of meetings with competitors, including meetings in the framework of trade associations, the agenda should be carefully checked in advance. The company participants should make sure that the discussion does not get into issues raising competition law concerns

and, if it does, they should leave the meeting at once. Detailed minutes should be kept.

An additional precaution would be to put in place effective competition law sign-off procedures allowing the company's lawyers to review issues that may give rise to competition law concerns.

12 What form must behaviour take to constitute a cartel?

The prohibition of cartels catches all types of agreements, decisions by associations of undertakings or concerted practices.

The concept of 'agreement' is broad and encompasses oral and written, explicit or tacit agreements. It is not necessary for an agreement to be intended as legally binding or to be supported by enforcement mechanisms. Gentlemen's agreements and simple understandings fall within the concept of an 'agreement'. The concept of 'concerted practice' is also very broad and encompasses all cases where practical coordination between undertakings is knowingly substituted for competition.

An unsuccessful attempt is not covered by the above prohibition.

13 Under what circumstances can cartels be exempted from sanctions?

Cartels are exempted from sanctions if they benefit from a block exemption or an individual exemption.

The Competition Law provides that the HCC can issue block exemptions, however, no such block exemptions have been issued until this date. On the other hand, according to the Competition Law EU block exemption regulations are applicable by analogy in Greece to agreements, decisions or concerted practices with a purely national effect.

Agreements, decisions or concerted practices falling under article 1(1) of the Competition Law are valid, in whole or in part, if they meet all of the following criteria set out in article 1(3) of the Competition Law (which are identical to those of article 101(3) TFEU):

- they contribute to improving production or distribution of goods, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit;
- they do not impose restrictions on the undertakings concerned beyond those necessary for attaining these objectives; and
- they do not give the undertakings the possibility of eliminating competition in a substantial part of the relevant market.

There is no prior notification mechanism. The undertakings are responsible for assessing and ensuring compliance with competition rules.

14 Can the company exchange information with its competitors?

Information exchange is not specifically regulated. It is examined under the general rules prohibiting agreements or concerted practices with the object or effect of restricting competition. Information exchange must be closely scrutinised since it may be viewed as an instrument of coordination between competitors. As a general rule, 'the exchange of information between competitors is liable to be incompatible with the competition rules, if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted' (ECJ Judgment of 4 June 2009 in case C-8/08, *T-Mobile Netherlands BV*, Recital 35). The risk depends on a variety of factors.

Exchanging information on intentions of future conduct, including information on current conduct that reveals intentions on future behaviour, is considered as a restriction of competition by object falling within the ambit of article 101(1) of TFEU and article 1(1) of the Competition Law. In the absence of a restriction of competition by object, the exchange of information may still contravene competition rules if it is likely to have an appreciable adverse impact on competition. This depends on both the economic conditions on the relevant market and the characteristics of information exchanged and it must be analysed on a case-by-case basis taking account of a combination of factors such as:

- the part of the relevant market that is covered by the information exchange;
- market characteristics;
- whether the information is exchanged directly between competitors or through a third party;
- the frequency of the exchange and the length of the reference period;
- whether the exchange refers to commercially sensitive information, namely, strategically useful data such as prices, discounts, profit margins, quantities, turnover and sales;
- whether the data exchanged are publicly available or not;
- the age and the level of aggregation or individualisation of the data: the exchange of genuinely historic and aggregated data is unlikely to have an anticompetitive outcome; and
- whether the exchange of information is public or not and the data reported are also available to non-participants.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

HCC decision No 526/VI/2011 sets out the terms and conditions for full immunity or reduction of fines in case of infringement of article 1(1) of the Competition Law or article 101(1) of TFEU (the leniency programme). The leniency programme is harmonised with EU rules and standards.

The leniency programme applies to prohibited cartels. It does not apply to vertical agreements or abuse of dominance.

All leniency applications must fulfil the following general requirements:

- The applicant must cooperate with the HCC genuinely, fully and on a continuous basis until completion of the administrative procedure for the investigation of the case. Unless otherwise agreed with the HCC, the applicant must not disclose to any third party, except to other competition authorities, the fact or the content of its application before an HCC recommendation is issued.
- If the application is filed by an undertaking, the undertaking must end its involvement in the alleged cartel at the latest on filing of the application, except for what would in the HCC's view be necessary to facilitate investigations relating to the alleged infringement.
- Before filing the application for leniency, the applicant must not have destroyed, falsified or concealed evidence of the alleged cartel or disclosed the fact or the content of its contemplated application, except to other competition authorities.

The leniency programme provides for full immunity from fines (type 1A or type 1B) or reduction of fines (type 2).

Type 1A immunity is granted where:

- the applicant is the first to submit evidence, which, in the HCC's view, will enable it to carry out a targeted inspection in connection with the alleged cartel; and
- the HCC did not have sufficient evidence to enable it to carry out a targeted site inspection or to take any other measure of investigation in connection with the alleged cartel and had not yet carried out any such inspection or taken any other measure of investigation.

If type 1A immunity is not available, type 1B immunity can be granted where:

- the applicant is the first to submit evidence, which, in the HCC's view, will enable it to find an infringement of article 1 of the Competition Law or article 101 TFEU in connection with the alleged cartel; and
- the HCC did not have sufficient evidence to enable it to find an infringement.

An undertaking that took steps to coerce other undertakings to join the cartel is not eligible for type 1A or type 1B immunity. This exception does not apply to the individual officers or employees of that undertaking.

If the conditions for granting type 1A or type 1B immunity are not fulfilled, the applicant may benefit from a reduction of fines, provided that it gives the HCC evidence of the alleged cartel that represents significant added value with respect to the evidence already in the HCC's possession.

The identity of the applicant is kept confidential until the issuance of the recommendation (statement of objections) by the HCC's rapporteur and the initiation of proceedings against the alleged infringers.

16 Can the company apply for leniency for itself and its individual officers and employees?

A leniency application filed by an undertaking extends automatically to the natural persons (officers and employees) who would be liable for fines.

17 Can the company reserve a place in line before a formal leniency application is ready?

An applicant wishing to apply for leniency can obtain a marker reserving a place in line to allow for the gathering of the necessary information and evidence. The duration of the marker is specified by the HCC Chairman on a case-by-case basis.

The applicant must justify its request for a marker and provide the HCC with information regarding its name and address, the parties to the alleged cartel, the affected products and territories, the duration, nature and operation of the alleged cartel and information on other past or possible future leniency applications to other authorities in relation to the alleged cartel.

A marker is granted at the HCC's discretion. If the applicant perfects the marker within the period set, the information and evidence provided is deemed to have been submitted when the marker was granted.

18 If the company blows the whistle on other cartels, can it get any benefit?

The company cannot get any benefit if it blows the whistle on other cartels.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

Greek competition rules apply to both horizontal and vertical agreements.

As a general rule, for most vertical agreements (single branding, exclusive or selective distribution, franchising, exclusive supply etc) competition concerns arise if they contain hardcore restrictions or if there is insufficient competition at one or more levels of trade. The cumulative effect of similar vertical agreements is also taken into account. As a general rule, vertical restraints are considered less harmful than horizontal restraints.

EU Block Exemption Regulations apply in Greece by analogy to agreements with purely national effect. Among others, the general Block Exemption Regulation 330/2010 on vertical restraints applies to vertical agreements that do not contain a 'hardcore restraint' (leading to the exclusion of the whole agreement from the scope of the Block Exemption Regulation) or other excluded restrictions (leading to the exclusion of the specific clause from the scope of the Block Exemption Regulation), provided that the market share of both the supplier and the buyer is below 30 per cent. Above this market share threshold, vertical agreements are assessed on an individual basis.

Greek competition law does not contain specific rules on agency agreements. The HCC and the courts largely follow the precedents and principles set at EU level, including, in particular, the rules set out in the European Commission Guidelines on Vertical Restraints. In principle, a genuine agency agreement, where the agent does not bear any, or bears only insignificant risks in relation to contracts concluded and/or negotiated on behalf of its principal, does not fall within the ambit of article 1(1) of the Competition Law. In decision No. 1833/2010 the Athens Administrative Court of Appeal upheld HCC decision No. 307/2007 by making explicit reference to the European Commission Guidelines on Vertical Restraints. In particular, the Court held that the relationship between an authorised repairer – member of a motor vehicle distribution network and its principal with respect to the sale of spare parts and the provision of repair services by the repairer to the clients was that of a non-genuine agency agreement, taking into account that the repairer undertook significant financial and commercial risks, such as maintenance of stock on a permanent basis at the repairer's cost and risk, and had made important investments regarding premises, installations, personnel, training and equipment, etc.

The HCC's has issued De Minimis Notice of 2 March 2006 (which largely follows the European Commission's De Minimis Notice of 2001). According to the HCC De Minimis Notice, vertical agreements between undertakings whose aggregate market share does not exceed certain thresholds (5 per cent for agreements between competitors and 10 per cent for agreements between non-competitors) are considered to fall outside the scope of article 1(1) of the Competition Law, unless they contain hardcore restrictions.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

In assessing vertical restraints, the HCC and the courts largely follow the precedents and principles set at EU level. Hardcore restrictions, such as resale price maintenance or market partitioning, are considered as restrictions by object and they give rise to the presumption that the agreement falls under article 1(1) of the Competition Law. Otherwise, an individual assessment of the likely effects of the agreement is required.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Vertical agreements can be exempted from sanctions if they fall within the scope of a block exemption regulation or if they fulfil the conditions for individual exemption.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

Market share is an important but not conclusive criterion to determine if a company holds a dominant position. Market shares above 50 per cent generally constitute a strong indication of dominance. Dominance is not likely if the market share is below 40 per cent. Other factors to be taken into account are market structure, the economic strength of competitors, the existence of potential competitors, barriers to market entry or expansion, countervailing buyer power, technological, capital and infrastructure requirements, the existence of distribution networks, etc.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

Article 2 of the Competition Law (which is almost identical to article 102 of TFEU), provides indicative examples of abuse of dominance including:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, supply or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions, such as unjustifiably refusing to sell, purchase or conclude any other transaction, thereby placing undertakings at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 102 of TFEU also applies directly in Greece with respect to abuse of dominance that may affect trade between EU member states.

In 2016 the HCC imposed fines of €31 million for abuse of dominance against Athenian Brewery (a subsidiary of Heineken), which was active in the production and distribution of beer in Greece. The HCC held that over a period of 15 years Athenian Brewery's commercial policy aimed at foreclosing competitors from the on-trade consumption market (HORECA (hotel, restaurant, café) chains and other retail outlets) through various practices (such as significant bonuses conditional on exclusivity, loyalty and target rebates). Athenian Brewery was also held to have engaged in restrictive practices at the wholesale level, by providing wholesalers with significant incentives for promoting exclusivity and foreclosing competitors.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Abuse of dominance cannot be exempted from sanctions or excluded from enforcement.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

If certain thresholds are met, mergers and acquisitions are subject to mandatory filing and they cannot be implemented until the HCC issues its decision.

A concentration is subject to mandatory filing if:

- the participating undertakings have a total worldwide turnover of at least €150 million; and
- each of at least two participating undertakings has a total turnover of at least €15 million in Greece.

For concentrations in the four mass media markets (newspapers, magazines, TV and radio), the above thresholds are reduced to €50 million and €5 million respectively.

If the concentration takes the form of a merger or acquisition of joint control, the obligation to notify falls upon the parties to the merger or the undertakings acquiring joint control. In all other cases, the obligation to notify falls upon the undertaking acquiring control.

By way of exception, a concentration can be implemented prior to the issuance of the HCC's decision in either of the following circumstances:

- On the basis of a special decision of the HCC, possibly subject to conditions, if this is necessary to prevent serious damage to one or more undertakings concerned or to a third party.
- If the concentration concerns a public bid or the acquisition of a controlling interest in a company listed on the Stock Exchange, provided that the acquirer does not exercise the voting rights of the acquired securities and the transaction has been duly notified to the HCC. At the acquirer's request, the HCC can allow it to exercise the voting rights before clearance, to maintain the full value of its investment.

26 How long does it normally take to obtain approval?

Concentrations subject to premerger notification must be notified to the HCC within 30 days from conclusion of the relevant agreement, announcement of a public bid or assumption of an obligation to acquire a controlling interest.

Within one month from notification (provided that this is complete and accurate):

- the chairman of the HCC issues an act confirming that the concentration does not fall within the ambit of the Competition Law;
- the HCC issues a decision clearing the concentration; or
- the chairman refers the concentration to the HCC for further investigation, if it raises serious doubts as to its compatibility with competition in the relevant market (Phase II).

In the latter case, within 45 days from the Phase II referral, the HCC rapporteur must issue a reasoned recommendation, which is notified to the parties. A date of hearing before the HCC is set and the HCC's decision must be issued within 90 days from the Phase II referral. If no decision is issued within the above deadline, the concentration is deemed cleared.

The parties may notify amendments or propose commitments within 20 days from submission of the rapporteur's reasoned recommendation. In exceptional circumstances this deadline can be extended by the HCC, in which case the HCC decision must be issued within 105 days from the Phase II referral.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

A decision clearing a concentration covers ancillary restraints that are directly related to and necessary for the concentration. The principles in the European Commission Notice on restrictions directly related and necessary to concentrations (OJ 2005 C56/03) apply.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

In case of failure to file or late filing the HCC can impose fines on each undertaking which is under the obligation to notify. The fines range between €30,000 and 10 per cent of the undertaking's aggregate national turnover. The legal representatives of the undertakings are personally and jointly liable for paying all fines imposed against the undertaking. In addition, the HCC can impose personal fines ranging between €200,000 and €2 million, if they took part in preparing, organising or committing the infringement and they may also be subject to criminal liability.

If filing is incomplete or inaccurate, the HCC will request submission of any missing information within a deadline set by it. In such case, the deadlines for the issuance of a decision mentioned in question 23 do not start until all necessary information has been provided. To the best of our knowledge, there have not been any decisions imposing fines for failure to notify correctly.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

The authorities do not require separate legal representation of the company and its officers or employees. Whether separate legal representation is necessary depends on the particular circumstances of each case.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The HCC would decide to launch a dawn raid for the investigation of cases that have been prioritised on the basis of the criteria that have been established by the HCC. Such criteria include the gravity of the alleged infringement (such as price fixing or market sharing), the type of the agreement (priority being given to horizontal over vertical agreements), the geographical scope of the infringement, the power of the undertakings concerned, the importance for the consumers of the products or services concerned, existing evidence, etc). In 2017, the HCC conducted dawn raids on 25 undertakings in the context of the investigation of four cartel cases.

For conducting a dawn raid the HCC officials must obtain written authorisation from the chairman or another official appointed by him or her specifying with sufficient clarity the subject matter and purpose of the inspection and the penalties provided in the Competition Law for impeding or obstructing the inspection or refusing to present requested books, information or documents.

The HCC officials have the powers of tax inspectors and they can, among other things:

- inspect and take copies or extracts of any kind of books, records, documents and electronic business correspondence, irrespective of the place where they are stored;
- seize books, records, documents and electronic means of storage and transport of business data;
- examine and collect information and data from mobile terminals, portable devices and their servers;
- conduct searches at the business premises and means of transport of the undertakings concerned;
- seal business premises and books or records for the period and to the extent necessary for the inspection;
- conduct searches at the homes of managers, directors and staff of the undertakings concerned;
- take sworn or unsworn testimonies; and
- ask for explanations of facts or documents and record the answers.

There are no published rules on digital searches. In practice, HCC officials largely follow the rules and procedure followed by the European Commission. All documents or data copied during an inspection are listed in relevant minutes signed by the HCC officials and the company representatives. Copies of any hard documents taken are attached in the minutes. Electronic data and their digital signatures (MD5 Hashes) are copied in a data carrier, a copy of which is left with the company

Update and trends

The recent implementation in Greece of EU Antitrust Damages Directive 2014/104/EU through Law 4529/2018 is expected to enhance private enforcement of competition rules.

Since the adoption of HCC decision No. 628/2016 regarding settlement, the HCC has already issued two settlement decisions: The first was issued in January 2017 (decision No. 636/2017) imposing fines of approximately €1 million in a case of retail price fixing in the beauty and broader cosmetics sector. The second was issued in March 2017 imposing record fines of approximately €80 million in a complex case of bid rigging in tenders for public works (metro rail projects, public-private partnerships and infrastructure works) from 2005 to 2012. One of the participating undertakings was granted Type 1B full immunity from fines, this being the first HCC decision applying the current leniency programme.

while the data carrier itself is put in an envelope that is closed, signed and sealed with the company's seal. This data carrier is taken by the HCC officials and it is opened at the HCC premises in the presence of company representatives.

Following completion of the dawn raid the HCC prepares a relevant report containing a description of the procedure together with any objections or remarks made by the company, which is notified to the company.

31 What are the company's rights and obligations during a dawn raid?

The company has the obligation to cooperate fully and actively with the inspection within the scope of the inspection order. It must provide appropriate representatives or staff to assist the inspectors and provide access to the areas, offices and computers, as requested. The company must not hinder the conduct of the investigation or conceal any material and it must inform all employees accordingly.

Before submitting to the inspection, the company has the right to request the inspectors to produce their identification documents and the relevant written authorisation. The company's external lawyers may be present at all stages of the inspection; however, this is not a legal condition for the validity of the inspection. HCC inspectors are normally willing to accept a reasonable delay for the consultation with the arrival of an external lawyer. The company may invoke legal privilege or privilege against self-incrimination within the limits set out in question 36. It also has the right to raise objections or make remarks that must be recorded in the relevant minutes.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

The possibility of settlement in cases of horizontal agreements infringing article 1(1) of the Competition Law was introduced in 2016 (Law 4386/2016). The settlement procedure is set out in HCC decision 628/2016 and it largely follows the relevant European Commission Notice, with the main difference that it applies also in cases where a statement of objections has been issued.

Settlement discussions commence on the parties' initiative at any stage of the investigation. If a statement of objections has been issued, the parties must express their interest not later than 35 days before the hearing of the case.

The settlement procedure is initiated by decision of the HCC. The HCC enjoys full discretion in determining whether a case is suitable for settlement, taking into account various factors, such as the number of undertakings involved in the investigation and the number of undertakings potentially and genuinely interested in settlement, the number and nature of the alleged infringements, whether procedural efficiencies and resource savings can be achieved and any aggravating circumstances. The HCC may discontinue the settlement procedure at any time.

Following the initiation of the settlement procedure bilateral discussions take place between the undertakings that expressed their interest in settling and the HCC rapporteur. If a statement of objections has been issued, the bilateral discussions take place with the HCC in plenary session. The purpose of the bilateral discussions is to provide each undertaking with the necessary information regarding the case and the range of the likely fines. Each undertaking is also given the opportunity to present its views on the alleged infringement and make legal and factual assertions. The HCC does not negotiate the existence of an infringement or the appropriate sanctions.

After completion of the bilateral discussions, if the rapporteur (or the HCC) considers that there is room for settlement, a deadline for the filing of settlement submissions by the parties is set. Settlement submissions must contain, among other things:

- a clear and unequivocal acknowledgement of the party's participation in the infringement and the party's liability;
- an acceptance of the maximum amount of fine that may be imposed by the HCC; and
- a waiver by the party of its right to request further or full access to the file of the case.

If the settlement submissions reflect the content of the bilateral discussions, the rapporteur issues a settlement recommendation. This is served to the parties who are invited to confirm unequivocally, unconditionally and clearly through a settlement declaration that the settlement recommendation reflects their settlement submission. If a party does not do this, the settlement procedure is discontinued as regards such party.

The settlement recommendation is not binding upon the HCC. If the HCC decides to settle, a settlement decision is issued.

A party having expressed its interest in exploring settlement may withdraw from the settlement procedure at any time. In that case, as regards such party the ordinary procedure will be resumed following completion of the settlement procedure. In the event that some of the parties involved do not participate in the settlement procedure, the HCC issues two decisions: one decision for the parties joining the settlement and another decision for the other parties.

If the settlement procedure is discontinued (either by the HCC or by a party), the settlement submission or settlement declaration are deemed to have been automatically revoked, they are not binding upon the party and they cannot be relied upon before the HCC or any competent Court.

Settlement leads to a 15 per cent reduction of the fines that would normally have been imposed. Leniency and settlement are not mutually exclusive. Where applicable, the reduction of a fine under the settlement procedure will be cumulative with the reduction of the fine under the leniency programme.

According to Greek law penal liability for relevant crimes based on the infringement that has been acknowledged by a party in the framework of the settlement procedure is extinguished, provided that any fines imposed are paid in full. However, the parties may be subject to civil claims for damages resulting from the infringement being acknowledged.

The settlement procedure is distinct from the commitments procedure. The terms, conditions and procedure for offering and accepting commitments in cases of possible infringements of competition law are set out in HCC decision 588/2014, which is largely inspired by the ECN Recommendation on Commitment Procedures.

The HCC enjoys wide discretion in accepting commitments. According to the above decision, commitments are, in principle, not acceptable in the following cases:

- in the case of cartels or serious cases of abuse of dominance or horizontal agreements that have been subject to a leniency programme;
- if the proposed commitments are vague, dilatory, subject to conditions or dependent on the will of a third party; and
- in cases where the HCC intends to impose fines.

Commitments can be structural, behavioural or both and they can be proposed at any stage of the investigation. If the HCC decides to open commitment proceedings, the rapporteur invites the undertakings concerned to submit their commitments in writing within 30 days. The offering of commitments does not mean that the undertakings concerned admit the infringements of competition law under investigation.

If the proposed commitments are efficient and meet the competition concerns identified, the rapporteur issues a recommendation on the proposed commitments and refers the case to the HCC for a hearing, otherwise, the investigation continues.

If a statement of objections has already been issued, the parties can propose commitments with their written memo, which must be filed not later than 20 days prior to the hearing before the HCC. Any commitments proposed at a later stage are inadmissible. The rapporteur issues a recommendation on the proposed commitments not later than two days before the hearing.

If the proposed commitments are accepted by the HCC, they are included in a binding and enforceable decision concluding that there are no longer grounds for action without finding an infringement. It is at the discretion of the HCC to decide at any stage to continue proceedings with a view to taking a decision on the infringement.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

HCC decision 628/2016 on settlement procedure does not include any reference to compliance programmes.

34 Are corporate monitorships used in your jurisdiction?

A 'monitoring trustee' would be used to ensure compliance with divestiture commitments in the context of mergers. The HCC has published a model trustee mandate based on the relevant European Commission Best Practice Guidelines.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

Any documents submitted by the parties in the framework of the settlement procedure (memoranda, minutes, settlement submission, settlement declaration, etc) are strictly confidential. They may not be used in the context of any other court or administrative procedure and they are inadmissible as evidence in the context of claims for damages. In addition, according to Law 4529/2018 implementing EU Antitrust Damages Directive 2014/104/EU, the person who has submitted such documents as evidence is subject to fines up to €100,000.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Legal privilege covers all communication between the client and external lawyers, before, during or after the conduct of the investigation. Legal privilege does not extend to communication between the client and in-house lawyers. The HCC has accepted that legal privilege extends to communication with in-house lawyers, when the latter simply report on or reproduce communication by external lawyers.

The privilege against self-incrimination is limited. The company or an individual may refuse to answer questions that would entail admission of the very infringement under investigation. However, there is no absolute right to silence in competition proceedings and a company or an individual may not refuse to answer questions on facts or provide documents that may be used as evidence for the establishment of the infringement.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

The HCC officials are under a duty of confidentiality. Breach of this duty can lead to criminal liability and fines. Trade and industry secrets are kept confidential. Third parties do not have access to the documents included in the case file.

Confidential data are not, in principle, included in official documents (such as the rapporteur's statement of objections and HCC decisions). As an exception, confidential data can be included in the rapporteur's statement of objections, following a decision of the HCC chairman, if this is deemed necessary. On completion of the statement of objections, the parties can access the file's non-confidential data and any confidential data that have been included in the statement of objections. Persons who have proceedings pending against them can access the file's confidential data, if this access is necessary for their defence, following a decision of the chairman.

The parties are required to indicate information that they consider confidential, stating the reasons for confidentiality, by also submitting the relevant documents in a non-confidential version. If they fail to do so, all documents are considered non-confidential.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

The HCC can impose administrative fines of between €15,000 and 1 per cent of the national turnover of the undertaking for failure to provide the information requested or hindering the conduct of investigations. These fines can be imposed on the undertaking and the natural persons that failed to provide the information requested or hindered the conduct of investigations.

Hindering the conduct of investigations or knowingly providing false information or concealing information are also criminal offences punishable with imprisonment of between six months and five years.

39 Is there a duty to notify the regulator of competition infringements?

There is no duty to notify the regulator of competition infringements.

40 What are the limitation periods for competition infringements?

The HCC's power to impose sanctions is subject to a five-year limitation period starting from the day on which the infringement was committed or, in the case of continuing or repeated infringements, from the day on which the infringement ceased.

The above limitation period is interrupted by any action taken by the HCC, the European Commission or the competition authority of any member state relating to the infringement. The interruption is effected from the date of notification of any such action to at least

LAW OFFICES
PAPACONSTANTINOU

Eleni Papaconstantinou **eleni.papaconstantinou@papaconstantinou-law.gr**
George Risvas **george.risvas@papaconstantinou-law.gr**

4 Vasilissis Sofias Avenue
10674 Athens
Greece

Tel: +30 210 72 95 750
Fax: +30 210 72 95 756
www.papaconstantinou-law.gr

one of the participating undertakings and it applies to all participating undertakings. Following each interruption, the limitation period starts running afresh. However, the limitation period expires on the lapse of 10 years without the HCC imposing a fine. This period is extended by any time during which the limitation period is suspended, that is, for as long as the HCC decision or any other act relating to the infringement is subject to any court proceedings.

According to the Competition Law, the limitation period also applies to infringements that took place before its entry into force (20 April 2011) and have not been the subject of a complaint, an ex officio investigation by the HCC or a request for investigation by the Minister of Economy.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

The Competition Law is the main legal instrument for the protection of free competition. Unfair competition practices fall within the scope of Law 146/1914, as amended.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

Directive 2014/104/EU on actions for damages for infringements of competition law was implemented in Greece by Law 4529/2018.

India

Suhail Nathani and Ravisekhar Nair

Economic Laws Practice

General

1 What is the general attitude of business and the authorities to competition compliance?

Since commencing its enforcement mandate in 2009, the Competition Commission of India (CCI) has emerged as one of the most active regulatory authorities in India and has adopted various measures to create awareness among the Indian businesses and legal fraternity. As a part of its advocacy efforts, the CCI publishes guidance material and regularly organises seminars and conferences, and conducts market and sectoral research. The CCI also provides consultations on issues relating to competition law to help businesses understand the scheme of the Competition Act, 2002 (Act) and has recently released a Compliance Manual for Enterprises to promote a culture of competition compliance among various market participants. The enforcement trend over the past nine years also points towards progressive improvement in choice of investigations by the CCI and an increased understanding of competition law issues. The CCI, through its advocacy and enforcement mechanisms has been able to create some level of awareness and deterrence among businesses in various sectors. While the more sophisticated and organised businesses have proactively started to adopt competition compliance programmes, the smaller and less organised businesses still lack complete awareness about the significance of competition law and consequences of non-compliance.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

While there is no government approved standard for compliance, the CCI has released a Compliance Manual for Enterprises, which contains a separate chapter on Building a Compliance Framework offering guidance on what a competition compliance programme should contain.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

Except for ensuring adherence to the underlying principles of competition law, a competition compliance programme will need to be custom-made for each enterprise, keeping in view the operations, dealings, and the relevant sector, etc, of the enterprise.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The Act does not contain any provisions dealing with effect of having a compliance programme in place. However, in the event of a scrutiny, the CCI is likely to take into account a sound and effective compliance programme as an indicator of the company's commitment towards competition compliance. While a compliance programme may not completely exonerate the company and its officers from liability under the Act, but it may have some bearing in quantum of penalty imposed and may also help in avoiding potential claim for compensation.

Implementing a competition compliance programme

5 How does a company demonstrate its commitment to competition compliance?

The CCI through its advocacy tools provides guidance in this regard. Specifically, the Compliance Manual provides detailed guidance on various aspects of competition compliance. It provides an illustrative list of dos and don'ts for executives or employees of any enterprise with respect to their dealings with competitors or trade associations. It recommends that the senior management of enterprises be involved in and committed to the implementation of competition compliance programmes. Further, it recommends constituting a competition compliance committee to drive the compliance agenda in companies.

6 What are the key features of a compliance programme regarding risk identification?

For active risk identification or management, the Compliance Manual recommends the following activities:

- periodic internal audit of procedures and documents;
- periodic internal audit of commercial agreements or arrangements; and
- a whistle-blower policy to ensure timely escalation and effective resolution of competition law breaches.

7 What are the key features of a compliance programme regarding risk assessment?

- Determination of relevant product and relevant geographic market;
- determination of the market position or dominance of the enterprise in the relevant market;
- determination of liability exposure in case of a likely scrutiny;
- nature of the records evidencing discussions concerning prices, production, etc, with competing firms or other communication showing conduct that may be considered as abuse of dominance;
- analyse the terms of the agreements to understand the level of exposure from a competition scrutiny perspective;
- internal and external audits and periodic self-assessment to check the effectiveness of the programme; and
- regular interaction with personnel and lawyers of the enterprise, especially during antitrust trainings and special assessments.

8 What are the key features of a compliance programme regarding risk mitigation?

- Abstinence from any communication with the competitors regarding prices, production, market division, bid participation, etc;
- abstinence from incorporating and enforcing terms in agreements that may be considered as anticompetitive under the Act;
- immediate and complete exit from arrangements that may have already raised or may raise potential cartel concerns, based on advice received from legal counsel;
- disclosure (in appropriate cases) to the CCI of any participation in a cartel-like arrangement, under the guidance of legal counsels;
- periodic review of policies and agreements to ensure compliance with competition law and reduce the risk of a potential scrutiny;
- the marketing, sales or procurement department should liaise with the legal department and or the external counsels to receive timely advice on existing or potential competition concerns; and

- periodical review of the commercial agreements from competition law perspective.

9 What are the key features of a compliance programme regarding review?

As per the Compliance Manual, a periodic review of the compliance programme should be undertaken in order to assess and re-evaluate:

- compliance with policies, procedures, and guidelines through internal and external audits, as well as periodic self-assessments;
- risk assessment processes as may be applicable to new or growing business divisions or emerging areas of competition law risk; and
- effectiveness of the compliance programme, and (the expected results) through ongoing interactions with personnel and lawyers of the enterprise, especially during antitrust training and special assessments.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

A company must not enter into arrangements or agreements with competitors (both actual or potential) that are expressly prohibited under section 3(3) of the Act. These include agreements:

- regarding prices that directly or indirectly fix purchase or sale price;
- regarding quantities aimed at limiting or controlling production, supply, markets, technical development and investment;
- regarding market sharing of markets by geographical area, types of goods or services and number of customers; and
- regarding bids (collusive tendering and bid rigging), tenders submitted as a result of joint activity or agreements.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The scope and nature of the agreement or arrangement should not be as prohibited under section 3(3) of the Act (discussed in response to question 10). For instance, as per the Compliance Manual, one should avoid arrangements in respect of prices or quantities of goods or provision of services.

The communication at different stages such as negotiations, execution, etc, should not contain any language that may suggest anticompetitive objective behind entering into the agreement.

Executives of the parties to the agreement should maintain the engagement with each other strictly within the scope of the agreement (ie, avoid discussions on topics that might be considered objectionable under the Act).

Although, there is no exhaustive list on this aspect on dos and don'ts, there should be abstinence from discussions on the following among the competitors:

- cost of manufacturing products or providing services;
- quantity proposed to be provided;
- credit, sale, purchase, billing terms;
- discounts;
- profits, margins or profitability;
- transportation, cartage, freight, distribution charges (or any other charges incurred in the course of provision of services or production of goods);
- commissions, rebates or surcharges (or any other such monetary terms);
- fares, rates, tariffs or any other direct or indirect charges; and
- any other business sensitive information.

Consultation must take place with in-house counsel or external legal counsels concerning issues on which there is lack of clarity from a competition issue perspective.

12 What form must behaviour take to constitute a cartel?

Section 3(3) of the Act deals with horizontal agreements, which includes cartels. Section 2(c) of the Act defines 'cartel' to include an actual or even an attempted move by way of an agreement among entities) to limit, control or attempt to control the production, distribution, sale, price or trade in goods or provision of services.

The term 'agreement' has been defined under section 2(b) of the Act, as any arrangement or understanding or action in concert, notwithstanding that it is in writing, or legally binding. Accordingly, an agreement does not have to be in writing for the purposes of section 3 of the Act, and concerted action would also fall within the scope of section 3(3) of the Act.

The CCI acknowledged that for an agreement to exist there has to be an act in nature of an agreement, understanding or action in concert including existence of an identifiable practice or decision taken by an association of enterprises or persons (*Neeraj Malhotra v Deutsche Bank Home Finance and Ors*, Case No 5 of 2009).

As of today, there is no case law to suggest that attempts to cartelise or invitation to collude are covered within section 3(3) of the Act.

13 Under what circumstances can cartels be exempted from sanctions?

The Act does not provide any exemption to cartels, as such. However, the following exemptions or defences are available to horizontal agreements:

- JV efficiency defence: If the agreement has been entered into by way of joint venture, which in turn increases efficiency in production, supply, distribution, storage, acquisition or control of goods and provision of services (*Association of Third Party Administrators v General Insurers' Public Sector Insurance and Ors*, Case No 107 of 2013).
- VSA Exemption: As per Notification SO 646 (E) dated 2 March 2016 all vessel sharing agreements of the shipping industry were exempted from the application of the provisions of section 3 of the Act until 1 March 2017. The exemption applied to the carriers of all nationalities operating ships of any nationality from any Indian port, provided that these agreements did not include concerted practices involving price fixing, limiting capacity or sales and allocation of markets or customers. The exemption has been extended for three more months, effective from 21 March 2017, vide Notification SO 950(E) dated 21 March 2017. The exemption was further extended for a period of one year, effective from 20 June 2017 to 19 June 2018.

Currently, in India there is no prior notification regime in place with respect to cartels.

14 Can the company exchange information with its competitors?

While there are no specific provisions or guidelines regulating exchange of information unlike some other jurisdictions, information exchange between competitors is generally governed by section 3(3) of the Act. Companies can exchange information with its competitors, provided that the information exchange is not for the purposes and result in activities prohibited under section 3(3) of the Act that are presumed to cause an appreciable adverse effect on competition (AAEC). As per precedent, the CCI considers information exchange between competitors that concerns pricing information and provide details of production and dispatch as commercially sensitive. This kind of information facilitates coordination (*Builders Association of India v Cement Manufacturers Association and Ors*, Case No 29 of 2010). See also question 11.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

The provisions related to leniency are contained in Competition Commission of India (Lesser Penalty) Regulations 2009 (Lesser Penalty Regulations) and section 46 of the Act and both individuals and company can avail leniency. These provisions govern the manner and the extent to which the CCI, if satisfied, may grant leniency (viz lesser penalties) to applicants who make full and true disclosure that is vital and who continue to cooperate in relation to the alleged cartel. A vital disclosure means information that enables the CCI to form a prima facie opinion of the existence of a cartel. The quantum of reduction in penalties that may be awarded by the CCI also depends on the time the disclosure is made.

To seek benefit of the Lesser Penalty Regulations, the applicant shall in addition to making a full and true disclosure:

- cease to have further participation in the cartel from the time of disclosure;
- provide vital disclosure;

- provide all relevant information, documents, evidence, as may be required by the CCI;
- cooperate genuinely, fully, continuously and expeditiously throughout the investigation other proceedings before the CCI; and
- not conceal, destroy, manipulate or remove the relevant documents in any manner that may contribute to the establishment of cartel.

The confidentiality provisions require that the identity of the applicant shall not be disclosed by the CCI unless the disclosure is required by law or the applicant has agreed to such disclosure or the applicant has disclosed it publicly. To date, the CCI is known to have invoked the Lesser Penalty Regulations only on one occasion wherein it held the disclosure of the modus operandi of the cartel by the applicant was vital to the case and strengthened the CCI's investigation, thereby lessening the penalty on the applicant by 75 per cent (cartelisation in respect of tenders floated by Indian Railways for supply of *Brushless DC Fans and other electrical items, Suo Moto* Case No. 03 of 2014). The CCI has vide its notification dated 8 August 2017 implemented amendments to the Lesser Penalty Regulations.

The Lesser Penalty Regulations are applicable to the conduct of cartels only and do not extend to other forms of prohibited conduct.

16 Can the company apply for leniency for itself and its individual officers and employees?

Yes, the company can apply for leniency for itself as well as its individual officers and employees. As per Regulation 3(1A) of the Lesser Penalty Regulations, which clarifies that if an applicant is a company it shall, in its application seeking leniency, also provide the names of the individuals involved in the cartel on its behalf and for whom leniency has been sought. Notably, this provision was introduced by an amendment on 8 August 2017.

17 Can the company reserve a place in line before a formal leniency application is ready?

As per the Lesser Penalty Regulations, for the grant of lesser penalty, the applicant may either make an application containing all relevant information as prescribed or contact the CCI orally, by fax or email for furnishing information on the existence of a cartel. Upon receiving an application or information for leniency, the CCI marks a 'priority status' on such application. Where the priority status has been marked on the basis of information provided orally or through fax or mail the CCI directs the applicant to submit a written application. On failure to submit the required information along with the application within 15 days (or within the extended timeline) from the date of first communication with the CCI, the priority status may be forfeited.

Further, other applicants are not considered until and unless the CCI has evaluated the evidence submitted by the first applicant. Where the benefit of the priority is not granted to the first applicant, subsequent applicants will move up in order of priority for grant of priority status and procedure prescribed for the priority applicant will apply mutatis mutandis.

18 If the company blows the whistle on other cartels, can it get any benefit?

As per the provisions in section 46 of the Act and the Lesser Penalty Regulations, only a producer, seller, distributor, trader or service provider (basically an entity) included in a cartel may get the benefit of Lesser Penalty Regulations. Thus, an applicant must be a member of the cartel or an individual acting on behalf of a member of the cartel, to apply for leniency. No policy for providing an incentive to a whistleblower presently exists.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

The Act provides an illustrative list of vertical agreements, which if proven to cause AAEC in India, are prohibited (ie, any vertical agreement in respect of, inter alia, provision of services), including (i) tie–in arrangements; (ii) exclusive supply agreements; (iii) exclusive distribution agreements; (iv) refusal to deal; and (v) resale price maintenance, are prohibited under the Act if it is shown that such agreement causes or is likely to cause an AAEC in India.

The jurisprudence regarding vertical agreements has been limited since the CCI has dealt with vertical agreements only in a handful of cases. The CCI ruled on the validity of various clauses in a distribution agreement between Hyundai and its authorised dealers providing some clarity on assessment of vertical agreements. The CCI has noted that a clause requiring an authorised distributor to take prior permission from the original equipment manufacturer (OEM) before taking on a dealership of any other car manufacturer, is not per se anticompetitive. The CCI has differentiated between de jure and de facto exclusivity, recognising that in the absence of de jure exclusivity, it would have to be seen if in practice, exclusivity is imposed. The CCI thereafter, on the basis of the evidence, concluded that no exclusivity was being imposed. The CCI also highlighted the harmful effects of clauses on 'resale price maintenance', noting, however, that it was not per se prohibited under the Act. The CCI, however, held that a discount control mechanism implemented by Hyundai through, inter alia, a mystery shopping agency and imposition of a penalty, resulted in AAEC as defined under section 19(3) of the Act, contravening provisions of section 3(4) of the Act. The CCI in its order also accepted objective justifications and legitimate business interests for denial of warranty where CNG kits were installed by a non-authorised dealer as well as use of non-recommended oils or lubricants (*Fx Enterprise Solutions India Pvt Ltd v Hyundai Motor India Limited*, Case No. 36/2014).

In another case, the erstwhile Competition Appellate Tribunal (COMPAT) concurred with the CCI's findings that the agreements or letters of intent entered into between the OEMs and the Original Equipment Suppliers (OESs) had clauses that restricted the OESs from supplying spare parts of automobiles directly to the third parties or in the aftermarket (spare parts market), without the consent of the OEMs. Such clauses were as such found to be in contravention of section 3(4)(c) and (d) of the Act and it was found that none of the opposite parties held any valid IPRs for any of their spare parts in India that would attract exemption under section 3(5) of the Act. Moreover, the agreements between the OEMs and their authorised dealers had clauses that restricted the sale of spare parts over the counter to third parties, contravened section 3(4)(c) and (d). The COMPAT also agreed with the CCI that these practices foreclosed the market for repairer services for independent repairers (*Nissan Motor India Private Limited v CCI and Ors*, Appeal No. 62/2014).

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

Section 3(4) of the Act specifically states that vertical agreements mentioned under this provision shall be in contravention of section 3 of the Act if there is an AAEC or likelihood of AAEC. As such the CCI analyses vertical agreements under the rule of reason standard. The CCI in its inquiry under the 'rule of reason,' is required to consider all or any of factors under section 19(3) of the Act and would try to strike a balance between the negative (1–3) and positive factors (4–6) AAEC.

Further, objective justifications and legitimate business interest may be provided to justify vertical arrangements and the CCI would take the same into consideration before concluding on the illegality of the agreement. Notably, Indian competition law does not provide for any market share-based threshold or safe harbour for such agreements. However, the CCI in at least one case has recognised that the doctrine of de minimis, it would militate against existence of AAEC (*Shri Ghanshyam Das Vij v M/s Bajaj Corp Ltd & Others*, Case No. 68/2013). It can be said that in addition to the factors listed in section 19(3) of the Act, objective justifications, legitimate business interests and doctrine of de minimis are also taken into account by the CCI during assessment of vertical arrangements.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Section 3(5) of the Act carves out exceptions in favour of the holders of an intellectual property right (IPR) and exporters. Section 3(5)(i), which relates to the IPR exception, enables the holder of the IP right to impose reasonable conditions as may be necessary to protect their IP rights under statues as provided under section 3(5) of the Act. However, as has been noted by the CCI in the *Shamsher Kataria* case (mentioned

above), such restrictions must be 'reasonable' in order for them to be eligible for the said exception. The assessment of reasonability of such restrictions is specific to the facts of each case. In the aforementioned case, the CCI in determining whether the agreement falls within the ambit of section 3(5)(i) of the Act, considered whether the requirements of the statutes mentioned under section 3(5) of the Act, granting the IPRs are in fact being satisfied. The COMPAT and the CCI both noted that the IP rights are territorial in nature and unless registered and recognised under the relevant law in India, no protection would be available under section 3(5)(i) of the Act.

Section 3(5)(ii) affords protection to the agreements entered into by exporters provided that such agreement relates exclusively to the production, supply, distribution or control of goods or provision of services of such export.

The CCI's position in previous cases suggests that vertical arrangements that can be justified on the basis of objective justification or legitimate business interests, such arrangements, are likely to be exempted from sanctions.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

In terms of explanation (a) to section 4 of the Act, 'dominant position' means 'a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.' Section 19(4) of the Act lists out factors relevant for determining dominance that, inter alia, include market share of the enterprise, size and importance of the competitors, dependence of consumers on the enterprise and entry barriers. As such, there is no presumption of dominant position based on market shares alone (*Belaire Owner Association v DLF Limited*, Case No. 19/2011). This was emphasised by the CCI in a case wherein the CCI held that a market share of more than 50 per cent cannot be determinant factor for dominance and all factors under section 19 (4) need to be considered. It was further highlighted that high market shares in case of new technologies may be fleeting and the presence of competitive constraints must be considered (*Fast Track Call Cab Private Limited and Anr v ANI Technologies Private Limited*, Case Nos. 06 and 74 of 2015).

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

As per section 4(2) of the Act, any of the following conduct by a dominant enterprise would constitute an abuse of dominance:

- directly or indirectly imposing unfair or discriminatory condition or price (including predatory price) in purchase or sale of goods or service.
- limiting or restricting:
  - production of goods or services or markets thereof; or
  - technical or scientific development relating to goods or services;
- indulging in practices resulting in denial of market access in any manner;
- making conclusion of contracts subject to unrelated supplementary obligations; and
- leveraging (ie, using dominance in one relevant market to enter into or protect another relevant market).

Recently, while assessing the terms of a coal supply agreement between the only coal supplier in India and thermal power producers, etc, the CCI found the forced execution of memoranda of understanding in addition to the contractual arrangements to be indicative of abuse of market power. Conditions such as restriction in supply of indigenous coal by the coal supplier allowed the supplier to dilute its obligation towards supply commitments, in contravention of section 4(2)(a)(i) of the Act (*Madhya Pradesh Power Generating Company Limited and Ors v South Eastern Coalfields Limited and Ors*, Case Nos. 05, 07, 37 and 44 of 2013).

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Under the Act, a dominant enterprise may adopt discriminatory condition or price in order to meet the competition. Also, while the Act is silent on any other justifications, the COMPAT (*Indian Trade Promotion Organisation v CCI and others*, Appeal No. 36 of 2014) as well as the CCI (*Shri Saurabh Tripathy v Great Eastern Energy Corporation Ltd*, Case No. 63/2014) have, in certain cases recognised existence of commercial reasons that could justify conduct that may be otherwise found to be abusive.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Section 6 of the Act mandates that any acquisition of control, shares, voting rights or assets (acquisitions) and mergers and amalgamations (collectively referred to as 'combination(s)') that cross the jurisdictional thresholds specified in section 5 of the Act must be mandatorily notified to the CCI. The Act adopts a suspensory regime and as such obtaining an approval from the CCI is compulsory.

In case of acquisitions (including hostile acquisitions), it is the responsibility of the acquiring entity to file the details of the proposed transaction with the CCI. In case of a merger or an amalgamation, the parties must file a joint notice.

A notification is required to be filed within sufficient time of:

- passing of a final board proposal in relation to a merger or amalgamation; or
- execution of any binding definitive document or binding agreement conveying the decision to acquire control, shares, voting rights or assets in the case of acquisitions.

A public announcement made regarding acquisitions in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, shall also be deemed to be a document triggering notification to the CCI. The central government, vide notification dated 29 June 2017, exempted parties to a combination from notifying within 30 days of the trigger event until 29 June 2022.

Any acquisitions or mergers or amalgamations that meet any one of the following thresholds as prescribed under section 5 of the Act and subsequent notifications by the central government must be notified to the CCI:

Companies party to a combination			**Groups (2 or more enterprises) party to a combination**		
In India			**In India**		
Assets	OR	Turnover	Assets	OR	Turnover
> 20 billion rupees		> 60 billion rupees	> 80 billion rupees		> 240 billion rupees
In India and outside India (aggregate)			**In India and outside India (aggregate)**		
Assets (US$)	OR	Turnover (US$)	Assets (US$)	OR	Turnover (US$)
> 1 billion (including minimum 10 billion rupees (in India)		> 3 billion (including minimum 30 billion rupees in India)	> 4 billion (including minimum 10 billion rupees in India)		> 12 billion (including minimum 30 billion rupees in India)

Note: Approximate current conversation rate US$1= 65 rupees.

In case when a portion, division or business of an enterprise is the subject matter of a combination, then only the value of assets and the turnover attributed to the said portion, division or business shall be relevant for the purposes of calculating the thresholds under the Act. There are no sector specific thresholds applicable in India.

Furthermore, the CCI has exempted notification of certain combinations that, in its view, are ordinarily not likely to cause an AAEC in India. The central government has also exempted enterprises being parties to a combination from notification, where the value of assets being acquired, taken control of, merged or amalgamated is not more than 3.5 billion rupees or has a turnover of more than 10 billion rupees. This exemption is applicable until 27 March 2022.

In line with its ease of doing business policy, the central government in August 2017, exempted all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalised banks from the application of sections 5 and 6 of the Act. This exemption is valid for 10 years (ie, until 30 August 2027). The central government has also exempted regional banks vide its notification dated 10 August 2017 under sub-section (1) of section 23 A of the Regional Rural Banks Act, 1976 from the application of provisions of section 5 and 6 of the Act for a period of five years (ie, until 10 August 2022).

To streamline the consolidation process in the oil and gas sector in India, the central government exempted combinations involving central public-sector enterprises operating in the oil and gas sectors under the Petroleum Act, 1934 and its relevant regulations from the application of the provisions of sections 5 and 6 of the Act. This exemption is applicable for a period of five years (ie, until 22 November 2022).

26 How long does it normally take to obtain approval?

The CCI is required to assess whether a combination will cause an AAEC in India and pass a prima facie opinion within a period of 30 working days of receipt of the notification. If the CCI is of the opinion that a combination will cause an AAEC in India, it may refer the combination for a detailed investigation, which may extend up to 210 days from the date of filing of the notification. During the review period, the CCI can ask for additional information from the parties, third parties, public stakeholders, customers, suppliers and the time taken by the parties to provide such information is deducted from this review period. As such, the timelines provided by the CCI are not absolute and are subject to clock stops.

In practice, the CCI has cleared most of the combinations notified to it within the initial 30-working day review period itself (excluding clock stops). Combinations that have involved remedial measures (*PVR/DT* C-2015-07-288; *Holcim/Lafarge* C-2014/07/190 and *Dow/DuPont* C-2016/05/400) have been approved within a period of 8 to 11 months.

There are no fast-track procedures available under the Act or the Competition Commission of India (Procedure in Regard to the Transaction of Business relating to Combinations) Regulations, 2011 (Combination Regulations). However, to aid the central government's efforts to fine-tune the bankruptcy resolution process under the Insolvency and Bankruptcy Code, 2016 (IBC), CCI has recently approved two resolution plan backed acquisitions in under 15 working days (*Ultratech/Binani* C-2018/02/558 and *RPPL/Binani* C-2018/02/557). A quick approval is important for acquisitions emerging from the IBC since a resolution process under the IBC is required to be completed within 180 days.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

The CCI, while approving a combination, may propose changes to the deal terms. For example, it may require removal of certain restrictive clauses (viz, cooperation clauses) or reducing the duration of non-compete obligations (*PVR/DT* C-2015-07-288; *Advent/MacRitchie* C-2015/05/270).

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

The CCI generally imposes a penalty on either the acquiring entity or both the acquiring entity and the target entity in the cases of non-notification or giving effect to a transaction prior to obtaining CCI's approval. The CCI imposes these penalties according to the provisions of section 43A of the Act, which contemplates imposition of a penalty of not more than 1 per cent of the turnover or assets of the combination, whichever is higher.

As per Regulation 14 of the Combination Regulations, the CCI can invalidate a combination notice if the notice is not in conformity with the Regulations. Where the information or documents contained in the notice has any defect or is incomplete in any respect, the parties to the combination are asked to remove such defects or furnish the required information or documents within the time specified by the CCI. In practice, the CCI often gives the parties an opportunity to cure any defects in the filings by communicating the same to them. Investigation into the combination is suspended till the defects are rectified.

The CCI has in the recent past, imposed penalties on several parties for non-notification of combinations. In December 2017, the CCI imposed a penalty of 0.5 million rupees on ITC Limited for non-notification of its acquisition of Savlon and Shower to Shower trademarks from Johnson and Johnson Private Limited and Johnson and Johnson Pte Limited. The CCI relied on the explanation to section 5(c) of the Act and held that acquisition even of trademarks will be an acquisition of assets as they provide economic value to their owners.

In January 2017, the CCI imposed a penalty of 2.5 million rupees on Schulke and Mayr GmbH for delayed filing of notice (*Schulke/Ethicon* C-2015/12/349). However, the CCI is no longer scrutinising belated filings as the 30-day time limit for filing a notification has been suspended until 29 June 2022.

Update and trends

In a move to consolidate sectoral tribunals and streamline legal processes, on 26 May 2017 the central government notified that all appeals being heard or to be heard by the COMPAT would be transferred to the National Company Law Appellate Tribunal (NCLAT) along with all appellate functions under the Act. These amendments were brought about under the provisions of Part XIV of Chapter VI of the Finance Act 2017. To simplify the process, the Ministry of Finance notified the Tribunal, Appellate Tribunal and other Authorities (Qualifications, Experience and other Conditions of Service of Members) Rules, 2017, which are applicable to NCLAT as well.

While the COMPAT's constitution was capped at one chairperson and two additional members, the NCLAT may have up to one chairperson and 11 judicial and technical members. Currently, the NCLAT has three benches constituted by chairperson Justice (Retd.) SJ Mukhopadhaya; Member (Technical) Balvinder Singh, Member (Judicial) Justice (Retd.) AIS Cheema and Member (Judicial) Justice (Retd) Bansi Lal Bhat. The NCLAT is yet to pass an order ruling on the substantive issues of competition law as laid down in the Act.

CCI has recently issued a Diagnostic Tool for Procurement Officers, which has been developed to help departments or organisations in reviewing their tender processes with regard to competitiveness and to take appropriate remedial actions. It is aimed at functioning as a practical guide for procurement officials who can use it for review of the public procurement system. The guide has drawn from national and international policy documents, as well as practical experience in cases dealt with by the CCI.

Investigation and settlement

29 Under which circumstances would the company and officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Section 48 of the Act provides for liability of officers or employees of the Company. In a situation where such person is being proceeded against under section 48 of the Act, it may be advisable that such person is represented separately (more so if such person asserts that the contravention was committed without his or her knowledge or that he or she had exercised all due diligence to prevent the commission of the contravention of the Act). The Act, however, does not provide for mandatory separate legal representation for any or certain types of investigations.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

A dawn raid may be conducted for any alleged infringement under the Act.

The Act itself does not set out the any procedural rules for dawn raids. The Director General (DG) may conduct a dawn raid pursuant to its powers under section 41 of the Act read with sections 240 and

240A of the Companies Act, 1956 (equivalent provisions in the new Companies Act, 2013 are sections 217 and 220). Briefly put, where the DG has reason to believe that the relevant books and papers of or relating to a company or body corporate may be destroyed, mutilated, altered, falsified or secreted during the course of investigation, it may make an application to a magistrate First Class for search and seizure. The Magistrate may authorise the DG by issuing a warrant, to enter and search specific places identified in the warrant to inspect or seize books and papers necessary for the purpose of its investigation. The search and seizure have to be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (CrPC).

Dawn raids are not frequently resorted to in India. In fact, the DG has conducted dawn raids in only two investigations so far. There are no specific rules for digital searches.

31 What are the company's rights and obligations during a dawn raid?

The Act does not expressly set out any rights and obligations of a company while a dawn raid is under way. That said, since dawn raids are to be carried out in accordance with the provision of the CrPC, the usual rights of person subject to search and seizure under the CrPC would apply to dawn raids as well. Notably, the rights of an enterprise subject to dawn raid would include: right to ask for the judicial warrant, right to ask for the identity of the person who can conduct the search; right to object to search or seizure of documents protected by attorney–client privilege; and right to object to any search or seizure outside the scope of the warrant.

In terms of section 217 of the Companies Act, 1956, the officer, employees and the agents of an enterprise subject to dawn raid are obliged to cooperate and provide full assistance to the DG during a dawn raid. Importantly, they are bound to preserve and produce to the DG all such books and papers that are in their custody or power.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

There exists no mechanism that enables parties to reach settlement with the CCI or make commitments to it during an investigation or inquiry.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

See response to question 32.

34 Are corporate monitorships used in your jurisdiction?

There is no provision for corporate monitorships under the Act.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class-actions or representative claims?

See response to question 32.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The privilege against self-incrimination is not available in the investigations by the DG as the investigation before the DG is not a criminal proceeding. Legal privilege in respect of communication with counsel would be available.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

The Act prohibits the disclosure of information relating to any enterprise obtained by or on behalf of the CCI or the National Company Law Appellate Tribunal without the prior written approval of the said enterprise otherwise than in compliance with or for the purposes of the Act or any other law for the time being in force. Further, a party may through a written request, addressed either to the CCI or the DG, as the case may be, claim for confidential treatment for any document or part thereof, if the disclosure of the document or part thereof would result in revealing of trade secrets or destruction or appreciable diminution of commercial value of any information or can be reasonably expected to cause serious injury to the enterprise. The written request for confidentiality must be accompanied with a statement setting out cogent reasons for such treatment and the time period for which the confidentiality is requested. On the receipt of an application seeking confidential treatment, the CCI or the DG on being satisfied of the reasons, would direct that the document(s) be kept confidential. While determining whether a document merits confidential treatment, the CCI/DG may consider the following factors: (i) extent to which the information is known to public; (ii) extent to which it is known to the employees, suppliers or distributors and others involved in the enterprise's business; (iii) the measures taken by the enterprise to guard the information; and (iv) the ease or difficulty with which the information could be acquired or duplicated by others.

Further, as per Regulation 6 of the Lesser Penalty Regulations, CCI and the DG are required to maintain confidentiality concerning:

- identity of the applicant of the leniency; and
- information, documents and evidence furnished by the applicant of leniency.

However, these details may be disclosed if the disclosure is required by Law if the applicant has agreed to such disclosure in writing or if there has been a public disclosure by the applicant.

ELP ECONOMIC LAWS PRACTICE ADVOCATES & SOLICITORS

Suhail Nathani **suhailnathani@elp-in.com**
Ravisekhar Nair **ravisekharnair@elp-in.com**

109A, First floor, Dalamal Towers
Free Press Journal Road
Nariman Point
Mumbai 400021
India
Tel: +91 22 6636 7000
Fax: +91 22 6636 7172

801 A, Eighth floor, Konnectus Tower
Bhavbhuti Marg, Opp Ajmeri Gate Railway Station
Nr Minto Bridge
New Delhi 110 002
India
Tel: +91 11 43542 8400
Fax: +91 11 4353 8436

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38 What are the penalties for refusing to cooperate with the authorities in an investigation?

Act of non-cooperation	Penalty
Failure to comply, without any reasonable cause, with the orders or directions of the CCI issued under the provisions of the Act.	Fine that may extend up to 100,000 rupees for each day of such continued non-compliance, subject to a maximum of 10 million rupees. In case of failure to pay aforementioned penalty, the result may be imprisonment for a maximum term of three years or imposition of a maximum fine of 250 million rupees or both, as determined by the Chief Metropolitan Magistrate of Delhi.
Failure to comply, without any reasonable cause with the directions of the CCI issued under sections 36(2) and 36(4) of the Act or the directions issued by the DG under section 41(2) of the Act.	Fine that may extend to 100,000 rupees for each day of such continued non-compliance, subject to a maximum of 10 million rupees.
A person being a party to the combination makes a false statement or omits to state any material particular.	Minimum penalty of 5 million rupees, which may extend up to 10 million rupees.
Any person who is required to furnish any document or information under the Act, provides any document or information knowing the same to be false, or; omits to state any material fact, or wilfully destroys or suppresses any such document.	Fine that may extend up to 10 million rupees.

39 Is there a duty to notify the regulator of competition infringements?

The Act does not cast a duty to notify the CCI of any infringements under the provisions of the Act.

40 What are the limitation periods for competition infringements?

The Act does not stipulate any period of limitation for investigating anticompetitive agreements under section 3 or abuse of dominance under section 4 of the Act. However, the CCI cannot initiate any inquiry into a combination after the expiry of one year from the date on which the combination took effect.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

No, the Act only deals with anticompetitive agreements, abuse of dominance and mergers and acquisitions.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

Currently, there are no proposals for competition law reform in India.

Ireland

Richard Ryan and Patrick Horan

Arthur Cox

General

1 What is the general attitude of business and the authorities to competition compliance?

Compliance with competition law is an important issue for businesses operating in Ireland today. This is particularly the case given the active role the Competition and Consumer Protection Commission (CCPC) has taken in respect of competition enforcement since its establishment in 2014. According to its most recent annual report, the CCPC received 80 allegations of competition breaches in 2016 (the most recent year for which data is available). The CCPC also recently initiated a number of investigations across a wide range of industry sectors, including private motor insurance, concert and event ticketing, bagged cement and rural transport among others. In addition to the CCPC's enforcement remit, the Irish Competition Act 2002 (the 2002 Act) provides for criminal penalties for infringements of competition law, so there is a strong incentive for businesses to ensure that their conduct and compliance programmes are in order.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

There is no government-approved standard for competition compliance programmes in Ireland – essentially it is a matter for individual businesses to decide how best to structure and manage their own compliance programmes. However, the CCPC strongly encourages businesses to have in place robust compliance programmes and, to assist in that aim, has published guidance for businesses and trade associations on complying with competition law. This guidance outlines steps for designing competition law compliance programmes and suggests topics that a compliance programme should cover.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

Irish competition law applies across all sectors, irrespective of the size of individual businesses or the overall scale of relevant markets. The CCPC has recently conducted investigations into some of the largest companies in the state (eg, in relation to bagged cement) as well as small local operators of public transport services. As the CCPC can investigate any area of commerce in Ireland to ensure protection of consumer welfare, it is important for all businesses, irrespective of scale, to be aware of their obligations under applicable competition rules and have in place an appropriate compliance policy.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The existence of a competition compliance programme may be a mitigating factor in relation to sanctions were a criminal prosecution to be successfully brought. The importance of a compliance programme has recently been demonstrated in the cases of the *Irish Property Owners Association* (2017) and *Nursing Homes Ireland* (2018), where the CCPC closed its investigations on receipt of a commitment, among others, from the relevant association to put in place a competition compliance programme, in particular relating to matters that may and may not be discussed by its members.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

The 'tone from the top' is important for a successful compliance programme – it is vital that senior managers adopt a clear policy of compliance for their company in relation to competition law, and apply that policy rigorously and consistently in their business dealings, commercial contracts, interactions with competitors and customers and their internal review and audit procedures. Businesses that adopt the correct tone and follow through on compliance policies are likely to be able to identify and minimise competition risks, while at the same time demonstrating commitment to compliance.

6 What are the key features of a compliance programme regarding risk identification?

A successful compliance programme will ensure that company employees are aware of their obligations under competition law, can identify when issues are likely to arise (or when an issue has arisen) and have a clear and effective way of reporting concerns to the legal team (or other function within the business) designated to deal with the issue.

It is, therefore, very important for companies to have an effective and tailored competition compliance programme in place, which focuses on the areas of potentially higher risk for the company (eg, sales personnel who are involved in pricing or personnel that interact on a regular basis with competitors) and sets out in clear practical terms what employees can and cannot do in relation to competition. Regular training sessions for relevant staff that are tailored to address how the rules apply in practice to their day-to-day activities are also an important means of maintaining awareness of the relevance of competition law to the business and, overall, to nurturing a culture of competition law compliance.

7 What are the key features of a compliance programme regarding risk assessment?

Compliance programmes can feature greater or lesser degrees of sophistication when it comes to identifying risk within the business. The key thing is that compliance checks are done regularly, recorded accurately and that compliance monitoring is tailored to the particular features and areas of risk of the business, if necessary in conjunction with external lawyers. It is also important that key decision makers within the business are familiar with the company's compliance obligations, so that risks can be assessed and decisions taken at the appropriate level in an efficient manner.

Companies can choose many different ways to test compliance, such as via audits by in-house compliance specialists or external counsel. Internal reviews and audits are an effective way for a business to 'look under the bonnet' and check whether the business is operating in a manner that does not give rise to antitrust risk. Similarly, simulation dawn raids provide an insight into how the business would cope with a real dawn raid and allows the business to test run its procedures in practice. We see increasing use of these compliance tools by clients across all industry sectors.

8 What are the key features of a compliance programme regarding risk mitigation?

Generally speaking, the features of the compliance programme relevant for risk identification will be important in mitigating substantive risk. In particular, a tailored and effective compliance programme with appropriate training is essential to mitigating competition risks arising within the business. Of equal importance is the ability for the company to identify problems and react quickly and appropriately (including by putting an end to the relevant conduct in advance of an investigation by a regulatory authority, or by assisting in considering what further steps to take with the CCPC or another authority, such as the European Commission).

9 What are the key features of a compliance programme regarding review?

The basic principles relevant to ensuring effective risk assessment will also be highly relevant to review. It is important that the results of compliance programmes and reviews are made available to relevant decision makers and that any recommended actions are acted upon promptly and their implementation reviewed on a regular basis.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

Section 4 of the 2002 Act, which is based on Article 101 of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements and concerted practices that have as their object or effect the prevention, restriction or distortion of competition in the state (ie, the Republic of Ireland), or any part of the state. Section 4 contains a non-exhaustive list of agreements that are prohibited in particular, namely those that (i) directly or indirectly fix purchase or selling prices or any other trading conditions; (ii) limit or control production, markets, technical development or investment; (iii) share markets or sources of supply; (iv) apply dissimilar conditions to equivalent transactions with other trading partners (thereby placing them at a competitive disadvantage); and (v) make the conclusion of contracts subject to acceptance by other parties of supplementary obligations that have no connection with the subject matter of the contracts.

While certain forms of collaboration between industry players (such as in relation to research and development) may lead to more efficient use of resources, or benefits for consumers, businesses operating in Ireland need to exercise caution when entering into agreements with competitors. As such, they should review carefully with their legal advisers any agreements with competitors to ensure the agreements are compatible with competition law.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

As noted above, companies should obtain legal advice before entering into any form of agreement with a competitor to ensure that the terms of the agreement are in compliance with applicable competition rules. This is the clearest means of avoiding difficulties at a later stage.

Even in circumstances where the agreement raises no issues under competition law, businesses need to be careful to ensure that interactions with competitors (either under the guise of the agreement or more generally) do not stray beyond acceptable boundaries. They therefore need to be kept under careful review. In addition, there are a number of practical precautions that can be taken – for example, by ensuring that (i) appropriate training and guidance is in place for employees that may be required to interact with competitors; and (ii) any interactions between the company and its competitors are fully documented with the terms of any interaction clearly set out and keeping clear of any discussions relating to areas such as pricing and sales strategy.

12 What form must behaviour take to constitute a cartel?

Section 6(1) of the 2002 Act provides that a company that enters into, or implements an agreement or decision, or engages in a concerted practice that is prohibited by section 4(1) (or by article 101 TFEU) is guilty of an offence. Section 6(2) of the 2002 Act provides for a presumption that an agreement, decision or concerted practice between competing undertakings the purpose of which is to directly or indirectly fix prices, limit output or sales or share markets or customers has as its object the prevention, restriction or distortion of competition in the state (or the EU as the case may be).

There is no requirement under the 2002 Act for an anticompetitive agreement to be documented in writing in order to be prosecuted as a cartel. Section 4 applies equally to concerted practices and decisions by associations of undertakings as it does to more formal agreements between competitors. While the 2002 Act requires that the parties involved have actually entered into an agreement that infringes section 4, this is not a 'bright line test' and the exchange of competitively sensitive information between competitors can be sufficient to give rise to a finding of a breach of section 4 of the 2002 Act.

13 Under what circumstances can cartels be exempted from sanctions?

Membership of a cartel is regarded as a hardcore breach of competition law and a serious criminal offence. Potential sanctions include substantial fines, potential imprisonment for individuals and disqualification as a company director. With the exception of the Cartel Immunity Programme (described in more detail below), there are no general exemptions or derogations available under Irish law to allow companies to participate in an otherwise unlawful cartel.

However, a number of defences are available to companies prosecuted under the cartel offence in the 2002 Act, namely where the defendant can prove that:

- the agreement, decision or concerted practice did not contravene the prohibition set out in section 4(1) because the 'efficiency' criteria set out in section 4(5) were met. These criteria, which are identical to those set out in article 101(3) TFEU, apply to agreements that contribute to improving the production or distribution of goods or services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and do not;
  - impose on the undertakings concerned terms that are not indispensable to attaining these objectives; and
  - afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question;
- the agreement did not contravene article 101(1);
- there was in force, at the time of the alleged infringement, an exemption for the relevant agreement granted by the European Commission under article 101(3) TFEU; or
- the relevant agreement benefited from the terms of an exemption granted provided for by, or granted under, a regulation made by the European Commission or Council under article 101(3) (ie, a block exemption).

In practice, these defences are of limited benefit, as hardcore breaches of competition law (eg, with respect to price fixing among competitors) are highly unlikely to benefit from the 'efficiency defence' under section 4(5) of the 2002 Act or article 101(3) TFEU. Likewise, hardcore infringements are expressly excluded from the scope of the various European block exemption regulations and their Irish equivalents.

The 2002 Act was recently amended by the Competition (Amendment) Act 2017 to provide that section 4 of the 2002 Act does not apply to collective bargaining and agreements in respect of certain categories of self-employed worker.

14 Can the company exchange information with its competitors?

The exchange of commercially confidential and competitively sensitive information between competitors has been found to infringe section 4 of the 2002 Act. There is no hard and fast rule as to what comprises competitively sensitive information, but generally any information regarding current or future pricing intentions, current or future commercial strategies or detailed breakdowns of sales, suppliers or customers would be regarded as highly inappropriate to share between competitors.

The issue of direct and indirect information exchange between competitors has been the focus of a number of recent investigations by the CCPC, with price signalling and other forms of tacit information exchange an area of particular focus.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

In conjunction with Ireland's Director of Public Prosecutions (DPP), the CCPC operates a Cartel Immunity Programme (CIP). Under the CIP, the CCPC and DPP will consider applications for immunity from prosecution for criminal cartel offences from the first participant in a cartel to come forward that satisfies the CIP requirements. Companies that have taken steps to coerce another party into participating in a cartel are not eligible for immunity under the CIP.

16 Can the company apply for leniency for itself and its individual officers and employees?

A company may apply on its own behalf and on behalf of its employees, directors and officers who agreed to or were directed on the part of the applicant to enter into the cartel. However, the CIP states that CCPC will not recommend blanket requests for personal immunity to the DPP, so the company should identify a core list of individuals who may require individual immunity as part of its full application for immunity. Individuals who are not identified in the application but are subsequently identified as requiring immunity may be added to the list.

17 Can the company reserve a place in line before a formal leniency application is ready?

The CIP includes a marker system, which holds the applicant's place pending submission of its full application for immunity. An application for a marker can be made anonymously and orally. The company will be given a short period of time to prepare its full application and 'perfect' the marker. If this period expires before the application is made or if the CCPC or DPP refuses the application, the company will lose its place in the queue to any other party that has made a subsequent application.

18 If the company blows the whistle on other cartels, can it get any benefit?

The CIP is available only to the first cartel member to blow the whistle on the cartel. Given the nature of the enforcement regime in Ireland, the CIP does not provide for a reduction in the scope of fines to subsequent applicants, as is the case with leniency programmes in other countries. This is obviously an important factor to be taken into account when deciding whether or not to come forward, as is the fact (mentioned already) that immunity is not available to a party that coerced other parties to participate in the illegal cartel activity. A further factor is the requirement to reveal any and all cartel offences in which the applicant may have been involved and of which it is aware and not just the activity that it is blowing the whistle on.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

Section 4 of the 2002 Act applies to agreements between parties at different levels of the supply chain. Distribution agreements which have as their object or effect the prevention, restriction or distortion of competition in Ireland are prohibited by section 4.

In practice, the CCPC's approach to the enforcement of competition rules regarding vertical agreements is very similar to that of the European Commission. In particular, the provisions of the Vertical Agreements Block Exemption Regulation (VABER) and related guidelines are of general application in Ireland, and are, in effect, restated in a Declaration on Vertical Agreements and Concerted Practices (the Declaration) issued by the CCPC's predecessor, the Competition Authority, in 2010. The Declaration and its associated Notice sets out guidelines for the assessment under Irish law of exclusive and non-exclusive distribution agreements, selective distribution, agency, single branding, exclusive purchasing and non-compete restrictions.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

As is the case under article 101 TFEU and VABER (which can also apply to anticompetitive agreements in Ireland), certain restrictions are regarded as 'hardcore' infringements of the 2002 Act and do not benefit from the exemption set out in the Declaration, irrespective of the market shares of the participants involved. In particular, restrictions on the buyer party's ability to determine its own sales price (ie, resale price maintenance); and subject to certain limited exceptions, the territory into which, or the customers to whom, the buyer party to the agreement may sell the contract goods or services, will not benefit from the exemption and are highly unlikely to be justifiable as a matter of Irish competition law.

The CCPC has taken a strict approach to the issue of resale price maintenance in particular in a number of cases over the past several years, notably Determination E/03/002 *Statoil* (concerning price support agreements in the motor fuels sector), E/03/003 *Independent Newspapers* and Determinations E/03/004 *Irish Times* (concerning the distribution of newspapers) and E/13/001 *FitFlop* (concerning the distribution of footwear in Ireland). In each case, the CCPC obtained commitments from the parties involved to bring the relevant practices to an end. In *FitFlop*, the CCPC also required territorial restrictions set out in relevant distribution agreement (including a ban on sales outside Ireland) to be brought to an end.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

The Declaration is equivalent to the European Commission's block exemption as set out in the VABER. The exemption set out in the Declaration applies to agreements in circumstances when the market shares of the supplier and the buyer do not exceed 30 per cent. For buyers and sellers falling outside this 'safe harbour', the agreements in question need to be examined on their individual merits, to determine whether they give rise to any anticompetitive effects.

However, as noted above, 'hardcore' restrictions of competition law, such as price fixing and certain types of sales restrictions, do not benefit from the exemption. In addition, section 4(3) of the 2002 Act (which is in equivalent terms to article 101(3) TFEU) is highly unlikely to apply to these agreements, as their anticompetitive effects outweigh any alleged efficiencies that may arise. However, unlike the VABER, there is no specific exemption for retailer buyer pools in the Declaration and there is no de minimis exemption for so-called agreements of minor importance under Irish law.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The assessment of dominance under section 5 of the 2002 Act necessitates as a first step the defining of the relevant product and geographic market, by examining both demand-side and supply-side substitutability. The form of analysis is, in all material respects, identical to the assessment of dominance under article 102 TFEU.

A number of factors must be taken into account in assessing whether a particular company has a dominant position on a relevant product or geographic market. While not determinative, the CCPC and the courts will take into account the company's market shares. In general, dominance is unlikely where the company in question has a share of 40 per cent or less of the relevant market. Above that level, the higher the market share the greater the likelihood of being held to be dominant. However, the CCPC and the courts will also look at market share trends over time and the strength of the other players in the relevant market. Other relevant factors include evidence of low barriers to entry and expansion (with recent actual examples of such entry or expansion being particularly persuasive), as well as the countervailing bargaining strength of the company's customers.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

Section 5 of the 2002 Act prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in the state. Section 5(2) sets out a non-exhaustive list of abuses that the 2002 Act prohibits in particular. These comprise: directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions

with other trading parties (thereby placing them at a competitive disadvantage); and making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations that by their nature or according to commercial usage have no connection with the subject of such contracts. The abuse of a dominant position is a criminal offence pursuant to section 7 of the 2002 Act.

While the CCPC has not pursued the prosecution of any companies for abuse of a dominant position under criminal enforcement powers to date, it has been very active in the area of civil enforcement with respect to such abuses. The CCPC (and its predecessor the Competition Authority) has taken action in cases involving tying and bundling, margin squeeze, predatory pricing, rebates and discounts leading to foreclosure of rivals and refusal to supply, among others.

In general terms, the CCPC adopts a similar approach to investigations to the European Commission and will typically focus its attention on the economic effect of particular behaviours by dominant companies. The CCPC has also examined in some detail allegations of abuse of dominance against state bodies (such as the Health Service Executive) and semi-state companies (such as the national public service broadcaster RTÉ and the state postal service provider An Post), and taken civil enforcement actions against these bodies in certain cases.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

While there are no blanket exemptions applicable to section 5 of the 2002 Act, the CCPC will examine the object and effect of an alleged abuse in order to determine whether a breach of section 5 has arisen. In undertaking this assessment, the CCPC will look to develop a coherent 'theory of harm' as to whether the behaviour in question damages consumer welfare. Consistent with the approach adopted by the European Commission, the CCPC will also consider whether there is an objective justification – such as enhanced efficiency – underlying the behaviour in question (other than being commercially advantageous for the dominant company), but it is for the company itself to establish evidence of this objective justification, which the CCPC can then balance against the potential harm arising.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Where the relevant thresholds are met, approval of the CCPC must be obtained prior to completing any of the following transactions:

- a merger of two or more previously independent undertakings;
- the acquisition of (direct or indirect) control over the whole or part of one or more undertakings by another undertaking or by one or more individuals who already control one or more other undertakings;
- the acquisition of assets (including goodwill) that constitute a business to which turnover can be attributed (which can include a property generating rent); or
- the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity.

The relevant thresholds under Irish law are met if, in the last financial year:

- the aggregate turnover in the state of all of the undertakings involved is not less than €50 million; and
- the turnover in the state of each of two or more of the undertakings involved is not less than €3 million.

All 'media mergers' that fall under the scope of the 2002 Act must be notified to the CCPC, whether or not the financial thresholds are met. Following approval by the CCPC, 'media mergers' must also be notified to the Minister for Communications, Climate Action and Environment for approval under a plurality of media test.

Each of the undertakings involved bears a responsibility for making a filing, but they can choose to submit a joint filing and usually do so. A filing can be made when one of the undertakings involved has publicly announced an intention to make a public bid or a public bid is made but not yet accepted; when the undertakings involved demonstrate a good faith intention to conclude an agreement or a merger or acquisition is agreed; or in relation to a scheme of arrangement, when a scheme document is posted to shareholders.

26 How long does it normally take to obtain approval?

At Phase I, the CCPC has up to 30 working days from the 'appropriate date' in which to review the notified transaction, which can be extended to 45 working days if the notifying parties offer commitments. If the CCPC decides to open a full Phase II investigation, it has up to 120 working days from the appropriate date to issue its determination, which can be extended to 135 working days if the notifying parties offer commitments.

Generally speaking, the 'appropriate date' for the purposes of the review timetable will be the date of notification of the completed Merger Notification Form. However, during Phase I, the CCPC has the ability to issue a formal 'requirement to produce information' (RFI), which has the effect of resetting the appropriate date (and thus the review timetable) to the date on which the RFI has been complied with. The CCPC generally uses this tool sparingly, in cases where it requires more time to assess the competitive effects of a transaction, without necessarily resorting to a full Phase II review. The CCPC can also issue an RFI during the early part of Phase II, which suspends the running of the clock until the RFI is complied with.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

Where a transaction, and any ancillary restraints, has been approved under Irish merger control rules, putting the transaction, and the ancillary restraints as the case may be, into effect cannot be held to breach sections 4(1) or 5 of the 2002 Act.

Notifying parties are required to give details of any ancillary restraints as part of the Merger Notification Form. The CCPC will assess these contractual provisions as part of its review of the overall merger, and will generally speaking adopt the same approach in relation to this review as set down in the European Commission's Notice on Ancillary Restraints.

To the extent any contractual provisions (such as non-compete or non-solicitation clauses) go beyond what is necessary for the implementation of the notified transaction, the CCPC can require the parties to modify the relevant provision before granting its approval. There are a number of examples of the CCPC doing this in recent years. For example, in Determination M/12/023 *DSM/Fortitech*, the CCPC did not accept the parties' submission that a five year non-compete period was an ancillary restraint necessary for the implementation of the proposed transaction. The parties agreed to reduce the period of the non-compete to three years. On that revised basis, the CCPC considered the restriction to be directly related and necessary to the implementation of the proposed transaction.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

Failure to notify the CCPC of a notifiable transaction before it is put into effect (or failure to supply information required by the CCPC within the specified period) is a criminal offence under the 2002 Act. A company or individual found guilty of an offence is liable on summary conviction to a fine not exceeding €3,000, or on conviction on indictment, to a fine not exceeding €250,000. The 2002 Act also provides that for each subsequent day that the offence continues, the parties are liable to a fine not exceeding €300 on summary conviction or up to €25,000 on conviction on indictment.

Closing a transaction prior to receipt of clearance from the CCPC is not in itself a criminal offence. However, a notifiable merger or acquisition put into effect prior to clearance is void as a matter of Irish law, meaning it is legally unenforceable.

In terms of recent cases, in August 2017, the CCPC became aware that Armalou Holdings Limited, through Spirit Ford Limited, may have acquired Lillis O'Donnell Motor Company Limited without notifying the acquisition to the CCPC. The CCPC opened an investigation into a suspected breach of the notification requirements under section 18(1) of the Act in relation to this acquisition, which was put into effect in December 2015. The CCPC accepted a notification of the transaction in February 2018 under section 18(12A) of the 2002 Act, which provides

that the CCPC may accept notification of a merger or acquisition that is required to be notified to the CCPC pursuant to section 18(1) of the 2002 Act but which was purported to have been put into effect without having been notified to the CCPC. The transaction was cleared by the CCPC in March 2018 but the CCPC's investigation into the alleged breach of the notification requirements remains ongoing.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Both companies and individual directors can be prosecuted for infringements of the 2002 Act, and there have been a number of cases in which individual company directors were prosecuted for their role in cartels. While the High Court has previously held that an absolute ban imposed by the Competition Authority on lawyers representing multiple parties in cartel proceedings was unconstitutional, there are no specific rules (other than the usual rules in relation to lawyer conflicts of interest) regarding the circumstances in which companies and their officers or employees require separate representation. It is for individual companies and officers or employees to establish whether their interests are aligned or not, and whether separate representation may be appropriate. This assessment may evolve as the CCPC's investigation moves forward.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

As can be seen from the wide variety of sectors in which the CCPC (and its predecessor) has initiated dawn raids, there are no restrictions as to either the type of infringement or the industry sector in which the CCPC can conduct unannounced inspections. While dawn raids have not been used as frequently in recent years (potentially due in part to a legal challenge to the CCPC's inspection of the premises of Irish Cement Limited in May 2015, which has been successfully upheld by the Irish Supreme Court), dawn raids remain an important part of the CCPC's regulatory enforcement toolkit. Some 20 unannounced inspections took place in April 2017, all in connection with the CCPC's investigation into the procurement of public transport services in the Munster and Leinster regions of Ireland. CCPC officials also assisted the European Commission in carrying out unannounced inspections at the premises of companies active in motor insurance in Ireland in July 2017.

31 What are the company's rights and obligations during a dawn raid?

Section 37 of the Competition and Consumer Protection Act 2014 (the 2014 Act) sets out the legal basis for dawn raids. Section 37 provides that pursuant to a valid warrant issued by a district court judge, authorised officers of the CCPC may conduct searches of, and seize evidence from, companies and individuals at business premises or, if authorised to do so, in private homes. Dawn raids can only be conducted on foot of a warrant. Before issuing a warrant, a district court judge must be satisfied by information on oath from an authorised officer that there are reasonable grounds for suspecting that evidence of, or relating to, the commission of an offence under the 2002 Act is to be found in the target location of the raid. The sworn evidence of the authorised officer, therefore, has to set out the factual basis underpinning the request for the warrant (although it should be noted that the CCPC's stated position is that companies that are the subject of a raid do not have the right to see this sworn evidence at any point prior to, or during, the dawn raid itself).

The CCPC may be accompanied by members of the Irish police force (An Garda Síochána) during the dawn raid, and may use reasonable force if necessary to enter premises. The scope of the raid is circumscribed by the terms of the search warrant; however, these will usually be issued in relatively broad terms. The 2014 Act provides that authorised officers are permitted to:

- seize and retain any books, documents or records (including electronic data) relating to an activity found at premises under inspection and take any other steps that appear to the officer to be necessary for preserving, or preventing interference with such material;
- require any person engaged in the carrying on of business at the premises under inspection to state his or her name, home address and occupation, and provide to the authorised officer any books, documents or records relating to that activity that are in that person's power or control, and to give to the officer such information as he or she may reasonably require in regard to any entries in such books, documents or records, and where such books, documents or records are kept in a non-legible form to reproduce them in a legible form;
- to inspect and take copies of or extracts from any such books, documents or records, including in the case of information in a non-legible form, copies of or extracts from such information in a permanent legible form; and
- to require a person to provide any information the authorised officer may require about individuals carrying on business at the premises or any other information about the activities being carried on at the premises that the authorised officer may reasonably require.

Companies and individuals that are the subject of a dawn raid are required not to obstruct the CCPC (see question 38), and can be compelled to answer questions legitimately put to them by authorised officers. However, the CCPC cannot compel the disclosure of legally privileged material and cannot use in evidence any information obtained by way of a self-incriminating statement.

On 29 May 2017, the Supreme Court gave judgment in relation to an appeal by the CCPC of a successful High Court challenge brought by CRH plc and others in relation to the exercise by the CCPC of its search and seizure powers during a dawn raid at Irish Cement Limited in May 2015. The Supreme Court unanimously rejected the CCPC's appeal. The Court held that the CCPC's proposed approach to reviewing documents seized during the dawn raid, including irrelevant and private material, would contribute to a breach of article 8 of the European Court of Human Rights (ECHR) if it were to proceed. The Supreme Court ordered that the CCPC be restrained from reviewing unrelated electronic documents other than in accordance with agreement between the parties and in accordance with article 8 of the ECHR. The case was the first challenge to the exercise by the CCPC of its powers under section 37 of the 2014 Act, and the outcome provides welcome guidance on the scope of those powers.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Unlike many other competition authorities across the EU, the CCPC does not have the power to impose sanctions (such as fines) for infringements of competition law. Sanctions can only be imposed by the Irish courts following successful criminal prosecution; civil fines are not available in Ireland.

For that reason, the CCPC has, in many cases, sought undertakings or commitments from parties that address competition concerns arising from an investigation. From the CCPC's perspective, the acceptance of commitments has the benefit of addressing market behaviour without having to go to court, in particular where the conduct under investigation does not involve alleged cartel behaviour and is therefore not likely to be subject to criminal prosecution. From a company's perspective, agreeing commitments is a way of bringing a swift and clear conclusion to the CCPC's investigation (which is otherwise not time-limited).

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

As noted in the response to question 4, the existence of a competition compliance programme may be a mitigating factor in relation to sanctions were a criminal prosecution to be successfully brought. In addition, it may be taken into account by the CCPC in the context of agreeing commitments to address particular competition concerns raised by the CCPC. As we previously noted, the closure of the CCPC's recent investigations into the Irish Property Owners Association and Nursing Homes Ireland was in part due to commitments by the relevant associations to put in place a competition compliance programme.

34 Are corporate monitorships used in your jurisdiction?

Owing to the structure of the enforcement regime in Ireland, corporate monitorships are not a feature of the system. Commitments given by companies to address competition concerns raised by the CCPC can be made an order of Court; companies are therefore under a duty to comply with the terms of the commitments or face the risk of further sanction from the High Court. In practice, the monitoring of commitments offered by parties is handled directly by the CCPC, which has the power to pursue enforcement through the High Court for non-compliance.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

The rules on disclosure in competition law cases in Ireland are founded on the traditional rules of discovery, a process whereby a litigant in civil proceedings may obtain prior to the trial disclosure of documents in the possession, custody or power of another party, or occasionally from a non-party, which are both relevant to the matters in dispute and necessary to dispose fairly of the case or to save costs. While there is no definition of 'document' set out in court rules, the term 'document' is broadly defined in case law as meaning anything that contains information.

There are no specific rules regarding the admissibility of an agreed statement of facts, but it is not the case that any such statement would automatically be admissible as evidence in actions for private damages.

While there are no class action mechanisms available to potential litigants in Ireland, the Irish courts have recently seen a significant surge in private enforcement litigation, most notably following the European Commission's decision in the *Trucks* cartel.

The European Commission's Damages Directive was recently transposed into Irish law by means of statutory instrument and provides for greater clarity on the admissibility of leniency and settlement materials in the context of follow-on damages actions. However, the regulations apply only in respect of infringements that occurred after 27 December 2016 and, for that reason, are unlikely to apply directly to any cases for at least several years to come.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Legal privilege may be asserted over certain types of documents, including confidential communications passing between a lawyer and client created for the purpose of providing legal advice and documents produced in contemplation of or during legal proceedings for the sole or dominant purpose of those proceedings. The 2014 Act sets out the general principle that no person or company can be compelled to disclose privileged legal material, and the CCPC is not generally authorised to take privileged legal material. Under Irish law, communications between in-house counsel as well as external legal advisers and their clients are legally privileged.

Section 33 of the 2014 Act sets out a specific procedure for dealing with legally privileged material that may come into the possession of the CCPC during a dawn raid. This section provides that the disclosure of information generally may be compelled, or possession of it taken under the provisions of the 2014 Act, notwithstanding that the information contains privileged legal material, provided that the compelling of its disclosure or the taking of its possession is done by means whereby the confidentiality of the information can be maintained (as against the person compelling such disclosure or taking such possession) pending the determination by the High Court of the issue as to whether the information is legally privileged. As such, the 2014 Act stipulates that there be a process by which legally privileged material is identified and kept confidential with disputes settled by the High Court if necessary.

As noted in question 31, companies and individuals can be compelled to answer questions legitimately put to them by authorised officers of the CCPC. However, self-incriminating statements cannot be used by the CCPC in evidence in relation to any prosecution of an offence under the 2002 Act. It is clear from case law that the privilege against self-incrimination is protected by the Irish Constitution for individuals (ie, natural persons) in certain circumstances. Whether a corporate entity can also assert the privilege under Irish law is currently unclear. Certain legislative amendments suggest that the Irish parliament has taken the view that companies cannot avail of the privilege. The courts have not to date dealt directly with this question, but some statements by the courts suggest that they are unlikely to take an expansive view of the rights of companies in this context.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

Section 25 of the 2014 Act prohibits the unauthorised disclosure by any person of confidential information obtained by him or her in their capacity as, or while performing duties as, a member of the CCPC, a member of the CCPC staff, an authorised officer or otherwise engaged by the CCPC in any other capacity. However, there are a wide range of exceptions to this general rule, notably permitting disclosure where it is authorised by the CCPC or by a member of the staff of the CCPC duly authorised to permit the disclosure; it is required by law; the disclosure is a communication made by such persons 'in the performance of any of his or her functions under [the 2014 Act], being a communication the making of which was necessary for the performance by [such person] of any such function'; or the disclosure constitutes information, provided to any person or body listed in section 24(1), which in the opinion of the CCPC member, staff member or authorised officer, may relate to the commission of an offence whether under the 2014 Act or not.

Information obtained by the CCPC during a dawn raid may be subject to further onward disclosure in two circumstances in particular.

First, section 24 lists 16 other agencies within the Republic of Ireland, including the police, the Office of the Director of Corporate Enforcement, the Revenue Commissioners, and the Central Bank of Ireland, to whom confidential information in the possession of the CCPC may be disclosed. While the 2014 Act does not impose a positive duty on the CCPC members, staff or authorised officers to disclose such information, it authorises them to do so where they believe it may relate to the commission of an offence unrelated to competition law. Section 24(2) provides 'notwithstanding any other law' for reciprocal disclosure to the CCPC of confidential information held by the agencies listed in section 24 where they consider the information may relate to an offence under the Competition Acts.

Second, section 23 of the 2014 Act provides the CCPC may, with the consent of the Minister for Jobs, Enterprise and Innovation, enter into arrangements with a 'foreign competition or consumer body' whereby the CCPC may furnish to the other agency 'information in its possession' if the information is 'required by that agency for the purpose of performance by it of any of its functions'. The CCPC is a member of the European Competition Network and cooperates closely with other competition agencies across the EU. Article 12 of EC Regulation 1/2003 provides that, for the purposes of applying articles 101 and 102 TFEU, the European Commission and national competition authorities (including the CCPC) shall have the power to provide one another with and use in evidence 'any matter of fact or of law, including confidential information'. However, with regard to the use in evidence of that information, this power is expressly limited to being 'for the purpose of applying articles 101 or 102 TFEU and in respect of the subject matter for which it was collected by the transmitting authority'.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

Failure or refusal to cooperate with a CCPC investigation is a serious matter and can result in criminal sanctions being imposed. Section 35 of the 2014 Act makes it a criminal offence for any person to: obstruct or impede an authorised officer (of the CCPC) in the exercise of his or her powers under the 2014 Act in relation to an investigation; without reasonable excuse, fail to comply with a request or requirement of an authorised officer under the 2014 Act; or give information that is false or misleading in any material respect in purported compliance with a request or requirement from an authorised officer. A person found guilty of an offence under this section is liable to potential fines and, on indictment, to imprisonment for a term not exceeding three years.

39 Is there a duty to notify the regulator of competition infringements?

As noted in the response to question 15, the CIP allows for a mechanism by which a participant in a cartel can blow the whistle on a cartel in order to avail of potential immunity from prosecution.

While there is no general duty under Irish law to report or notify the CCPC of a competition infringement, it should be noted that the offence under section 6 of the 2002 Act of engaging in an agreement to fix prices, limit output or share markets (ie, a serious cartel offence) is designated a relevant offence under the Criminal Justice Act 2011. This means that it is a criminal offence for any person to fail to disclose to An Garda Síochána, as soon as practicable, information that he or she knows or believes might be of material assistance to An Garda Síochána in relation to the prevention of the commission or investigation of a serious cartel offence by another party or parties. This offence is punishable by fines of up to €5 million or imprisonment, or both.

40 What are the limitation periods for competition infringements?

There is no limitation on the CCPC's ability to initiate an investigation into alleged anticompetitive conduct and there is no statutory time frame in which the CCPC must complete an investigation. In respect of private enforcement actions, in general a six-year limitation period starts to run from the date of accrual of the cause of action. The regulations implementing the EU Damages Directive in Ireland have introduced new rules on limitation periods, including when these begin to run and when they can be suspended. However, as noted above, the regulations apply only in respect of infringements that occurred after 27 December 2016.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

Companies operating in regulated industries (such as telecoms, aviation, energy, broadcasting etc) in Ireland are subject to sectorial regulation. The competent sectorial regulators take competition law principles into account in their assessment, for example, in relation to whether particular operators have significant market power, and have substantial enforcement powers in their own right. Companies operating in these sectors should be conscious of their obligations.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

Competition law in Ireland was substantially overhauled as a result of the 2014 Act, with the amalgamation of the then Competition Authority and National Consumer Agency into a single authority, the CCPC. While the CCPC continues to keep its activities under review, and press for legislative changes where appropriate, at the time of writing there are no firm plans for further reform in Ireland in the near future.

In relation to competition investigations, the Supreme Court's decision in *CRH plc and Others v CCPC* is likely to have significant implications for the way in which the CCPC exercises its powers of search and seizure in the context of a dawn raid. In light of the Supreme Court finding against the CCPC in its decision, we would expect to see additional guidance from the CCPC in setting out its approach to the exercise of its powers under the 2014 Act, although no such guidance has been issued as at the time of writing. Any such guidance, in turn, will have implications for companies in relation to their response to dawn raids and competition compliance programmes generally.

As noted in question 35, the EU Damages Directive was transposed into Irish law in 2017. The overall impact of the Directive is likely to be limited, as most of the key provisions relating to disclosure and limitation periods in particular were already provided for under Irish law. Moreover, while the provisions of the Directive have largely been transposed verbatim, an interesting feature of the implementing regulations is that they apply only in respect of infringements that occur after 27 December 2016. Given the length of time it is likely to take for such infringements to come to light and be determined, it is likely to be several years before the regulations take effect in practice in Ireland.

As regards proposals for reform, in September 2017, the Department of Business, Enterprise and Innovation launched a public consultation on a review of certain provisions under the 2002 Act relating to mergers and acquisitions. The consultation closed in November 2017. While the consultation focused on specific aspects of the merger control regime, in particular the financial thresholds, respondents were also invited to comment on any other aspects of the merger control provisions of the 2002 Act that they wished to raise. The outcome of this consultation could generate proposals for further reform of the Irish merger control regime.

ARTHUR COX

Richard Ryan **richard.ryan@arthurcox.com**
Patrick Horan **patrick.horan@arthurcox.com**

10 Earlsfort Terrace
Dublin 2
D02 T380
Ireland

Tel: +353 1 920 1000
Fax: +353 1 920 1020
www.arthurcox.com

Italy

Elisa Teti and Alessandro Raffaelli
Rucellai&Raffaelli

General

1 What is the general attitude of business and the authorities to competition compliance?

Compliance with competition law is an important issue for businesses operating in Italy as well as for the Italian Antitrust Authority (IAA). On the one hand, several companies have, in recent years, realised and implemented antitrust compliance programmes (ACPs). On the other hand, the IAA takes a positive stance regarding the antitrust compliance issue, as a preventive and proactive tool as well as a mitigating circumstance pursuant to its Guidelines on the application of the quantification criteria of sanctions ex article 15, paragraph 1, of Italian Competition Law No. 287/90 (Guidelines on Sanctions – see infra).

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

Even though the IAA encourages companies to establish ACPs, there is no official government-approved standard for compliance programmes in Italy so far. On 20 April 2018, the IAA issued a draft version of new Guidelines on Antitrust Compliance, opening a public consultation, which will be closed within 30 days starting from the publication of the said draft version on the official bulletin of the Authority.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

ACPs respond to a 'one size does not fit all' logic. Said programmes must be differentiated depending on the case, qualifying as success factors for the companies, especially in the regulatory context following the Modernization Regulation (EC) No. 1/2003, which has revealed that a mere static self-assessment activity of the individual business conduct is not the best tool for managing risks. Therefore, antitrust compliance cannot be standardised, since it must reflect the peculiarities and respond to the needs of each company, allowing the development of an effective compliance policy.

Any tailor-made model will be indicated by common phases that must be articulated in different ways according to the distinctive characteristics of each company, such as the size, the sector, the peculiarities of the market, the organisation, the governance, the knowledge of competition rules and the degree of interaction with competitors. Even small and medium-sized enterprises (SMEs) need an antitrust compliance programme, since the risk of enforcement for breaches of competition law applies to both large and small firms.

The scope and general structure could be different. ACPs of SMEs are undoubtedly less structured than those of large companies, and mainly focused on preventing restrictive competition agreements. Large companies will focus the ACP not only on the prevention of restrictive agreements but also on the assessment of any dominant position.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

In addition to the benefits for companies deriving from the ACPs in terms of awareness of competition and preventing the risks of infringement of the law, the adoption and implementation of effective and concrete ACPs could be relevant in the sanctions policy of the IAA. As established in the IAA Guidelines on Sanctions of 22 October 2014 – the implementation of ACPs is recognised as a possible mitigating circumstance in the assessment of the seriousness of violations of competition rules and, consequently, in determining the relative sanctions.

The mere existence of an ACP is not sufficient to constitute a mitigating circumstance to get a reduction of a fine. Very broad requirements must be met. As specified in paragraph 23 of the aforementioned IAA Guidelines, a strict commitment of the undertaking to respect the programme itself is necessary, by means of: the full involvement of the management; the identification of the personnel referees of the programme; the identification and assessment of risks on the basis of the business sector and the operating context; the organisation of training activities reflecting the economic size of the company; the provision of incentives for employees to comply with the programme as well as penalties in terms of disciplinary sanctions for the violation of the content of the ACP; and the implementation of efficient monitoring and auditing systems.

Considering the above-mentioned conditions, reduction of fines may be granted to companies implementing effective and concrete ACPs.

In recent cases, the IAA has affirmed the existence of a mitigation circumstance deriving from the adoption and implementation of a concrete and appropriate ACP, granting to the parties the following reductions of penalties:

- 5 per cent of the fine (Decision No. 25801 of 22 December 2015; Decision No. 26316 of 21 December 2016; Decision No. 26815 of 8 October 2017); and
- 10 per cent of the fine (Decision No. 25882 of 24 February 2016; Decision No. 26064 of 8 June 2016; Decision No. 26705 of 25 July 2017).

More specific guidance on ACP's implementation and design, also in view of obtaining a reduction of a fine, is provided in the draft Guidelines on Antitrust Compliance issued by the IAA on 20 April 2018, which, however, are not yet definitive.

Implementing a competition compliance programme

5 How does a company demonstrate its commitment to competition compliance?

For the time being, in the absence of specific guidance to demonstrate the company's commitment to competition compliance, evidence of such commitment may be deduced from a board resolution affirming the adoption of an ACP, including an antitrust compliance manual and guidelines for employees and messages from senior management to staff (tone from the top) confirming the need to comply with competition law as a prerogative for the improvement of the business. In short, taking a public and strong position stressing that competition compliance is a key feature of the undertaking, putting in place training activities to ensure that employees are aware of antitrust issues and setting up internal controls as an effective oversight system (ie, referees for the ACP), as well as disciplinary sanctions for the breach of the pertinent rules, constitute effective measures to prove the commitment of the company to competition compliance.

6 What are the key features of a compliance programme regarding risk identification?

The key features of a compliance programme regarding risk identification regards internal processes aimed at detecting any possible competition law infringement. The risks faced by companies may be identified in:

- contacts with competitors (directly or through trade associations);
- contract structures imposing specific price mechanisms, partnerships or joint selling or purchasing arrangements;
- managing confidential information; and
- having large market shares in the relevant markets wherein the company operates.

Regular audits of specific functions of the company, which are exposed to antitrust risks (ie, marketing, sales, etc) as well as mock dawn raids, in terms of simulation of antitrust authorities' investigations, are recommended. Moreover, a well-established whistle-blower system helps employees to report the antitrust risks they identify on an anonymous basis, allowing the company to take a prompt and efficient measure to solve the problem, with the participation of the referees of the compliance programme.

7 What are the key features of a compliance programme regarding risk-assessment?

The assessment of the risks depends on the seriousness of the risks themselves considering also the potential consequences in case of risk materialising. For a correct assessment, the market contest in which the undertaking operates must be evaluated, as well as the size of the company and the impact of its conduct on competition.

If informing and instructing the employees on how, to whom and when to communicate potential risks is sufficient to alert them, the intervention of external lawyers with specific expertise in competition law permits the company to conduct a global and effective assessment. In collaboration with the in-house lawyer, interviews with company personnel help to identify what prima facie does not seem a proper antitrust risk and permits the company to assess the problems and react appropriately to them through the planning of several activities, part of the risk-mitigation phase of a compliance policy.

8 What are the key features of a compliance programme regarding risk-mitigation?

To reduce the risk of infringement of competition law, companies should ensure that employees are informed, trained and aware of the antitrust rules and internal policies to comply with them. Regular training sessions for employees dealing with antitrust issues, tailored on how the rules apply in practice to their day-by-day activities, are fundamental means of maintaining awareness of the relevance of competition law to the business and to improve the knowledge of competition compliance. Compliance codes, guidelines and checklists, collected in handbooks available for the company personnel, allow a continuous update on competition law. For better efficiency, ACPs must foresee disciplinary sanctions for employees not respecting the rules. Such sanctions must be drafted according to labour law provisions, in collaboration with the human resources department, and must reflect the commitment taken by the company to comply with competition law. Any disciplinary sanction must be applied after a necessary assessment of the infringement and according to the seriousness of the same, as well as the level of involvement of the employee in the infringement itself.

9 What are the key features of a compliance programme regarding review?

A key feature is the continuous adjustment of ACPs to legal and economic developments. In fact, the update must consider any changes in business needs, the evolution of the company's business, the market environment, as well as the constantly evolving industry regulations and the related practice and jurisprudence called to interpret the antitrust principles.

Monitoring and reviewing involves internal company audit personnel and should be carried out especially during events creating potential risks for the company (ie, acquisition or constitution of joint ventures).

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

Article 2 of the Law No. 287/90 (the Law) prohibits the same conduct indicated in article 101 Treaty on the Functioning of the European Union (TFEU), namely agreements or concerted practices between undertakings, and any decisions taken by consortia, associations of undertakings and other similar entities, which have as their object or effect an appreciable prevention, restriction or distortion of competition. Article 2 of the Law also contains a list of prohibited conduct – clearly not exhaustive – that is identical to the one laid down in article 101 TFEU.

The main difference between the national and the EU provisions concerns, obviously, the scope of application ratione loci, provided that article 2 of the Law applies to agreements affecting competition within the national market or within a substantial part of it.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

Several precautions may be taken to manage competition law risk, ranging from information firewalls to protection of data rooms, in case of transactions between competitors. Attention should be paid to the possible exchange of sensitive information.

12 What form must behaviour take to constitute a cartel?

While the concept of 'cartel' generally indicates, in the strict sense, the most serious conduct infringing the competition rules, both article 101 TFEU and article 2 of the Law refer to three different types of conduct: agreements between undertakings, decisions by association of undertakings, and concerted practices.

These notions have been interpreted broadly both at EU and at national level, so that in principle any kind of concerted activity between independent undertakings may result in a conduct infringing article 101 TFEU or article 2 of the Law, provided that such activity has as its object or effect the prevention, restriction or distortion of competition.

To establish an infringement of article 101 TFEU or of article 2 of the Law, the core element is the behaviour of the parties, and not the form of the agreement or practice adopted by the undertakings concerned.

13 Under what circumstances can cartels be exempted from sanctions?

The circumstances under which an agreement, a decision of an association of undertakings, or a concerted practice can be exempted from sanctions, at national level (article 4 Law), are the same as those laid down in article 101(3) TFEU.

In practice, exemptions from sanctions are very rare with reference to the agreements and concerted practices that are restrictive by object.

As is well known, the entry into force of Regulation (EC) No. 1/2003 determined the abolition of the prior notification and authorisation system at EU level. Such mechanism is still admitted in the Law, with reference to conduct falling exclusively within the scope of the Law, but it has an extremely limited application. Therefore, undertakings are called upon to carry out a self-assessment of the compatibility of their conduct with article 101 TFEU and article 2 of the Law.

14 Can the company exchange information with its competitors?

The admissibility of the exchange of information between competitors is evaluated by the IAA in accordance with the European Commission Horizontal Guidelines (OJEU, C 11 of 14 January 2011, p. 1).

In general terms, the exchange of information is admitted, unless it constitutes the undermining of the necessary autonomy and independence of each undertaking in determining its conduct on the market. As stated in the Commission's Guidelines (section 58), the competitive outcome of information exchange varies according to the characteristics of the market concerned, as well as on the kind of information that is exchanged.

Among the types of information considered competitively sensitive, mention can be made of information concerning, inter alia: prices

charged, contractual terms, quantities sold, number of customers served, and export.

An exchange of information can also take the form of a public announcement or statement (see, for instance, the recent IAA decision No. 26733 of 2017 in the *RC Auto* case).

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

Since February 2007, the IAA has adopted a Leniency Programme based on the European Leniency Notice model, to contribute to the effectiveness of public antitrust enforcement in Italy.

The Italian legal order provides, on the one hand, full leniency, namely the granting of the non-application of sanctions, for the undertaking that first decisively cooperates with the IAA in finding a secret cartel; on the other hand, partial leniency, namely the reduction of fines, which shall be granted to companies that later provide a significant contribution to this end. Immunity from fines will be granted to the undertaking that first submits information or evidence on a voluntary basis, provided that the IAA considers such evidence or information decisive for the finding of an infringement, or had not already gained sufficient information or evidence to prove the alleged infringement.

To obtain full leniency, the applicant must end its participation in the alleged cartel immediately following its application, except for the fact that, in the Authority's view, its continued involvement would be reasonably necessary to preserve the integrity of the Authority's investigations. Moreover, the applicant shall cooperate genuinely, fully and on a continuous basis from the time of its application with the authority until the conclusion of the case. Finally, the applicant is obliged not to reveal the fact or any of the content of its leniency application prior to the IAA's notification of its statement of objections to the parties.

As to the requirements for partial leniency application, on the other hand, the fine may be reduced for undertakings that provide evidence that represents, in the IAA's opinion, a significant added value for the investigation.

16 Can the company apply for leniency for itself and its individual officers and employees?

Only undertakings may benefit from a leniency programme, not individuals as such.

17 Can the company reserve a place in line before a formal leniency application is ready?

The IAA Leniency Programme provides for a marker system that protects the applicant's place in the queue for a given period, allows it to gather necessary information and evidence to qualify for immunity. The IAA may decide in what situation to grant a marker.

Where a marker is granted, the IAA determines the period within which the applicant must conclude the marker, namely to submit the information and evidence required to meet the relevant evidential threshold for immunity. The period in question is usually that of two or four weeks.

18 If the company blows the whistle on other cartels, can it get any benefit?

The disclosure of information about participation in another cartel, distinct from the one that is the subject of its first leniency application, does not provide any benefit for the disclosing infringer.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

There are no specific rules on vertical restraints under Italian law. The European Block Exemption regulation on vertical agreements (BER 330/2010) applies to agreements that do not contain the hardcore restrictions or other excluded obligations, provided that market share of both the parties involved is below 30 per cent.

As a general rule, restrictions on resale price, territory and customers, sourcing, exports and parallel imports are considered anticompetitive. Selective and exclusive distribution, as well as franchises, are also monitored.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

Vertical agreements are considered less harmful than horizontal agreements. However, such agreements violate article 101(1) TFEU and article 2 of the Law if they contain hardcore restrictions.

Every restraint needs a case-by-case assessment.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Vertical agreements can be exempted if they fall within the scope of the De Minimis Notice or BER, or other specific BERs. The exemption set out in the De Minimis Notice applies to agreements in circumstances when the market shares of the parties do not exceed 15 per cent of any affected market; the Verticals BER applies if the market shares of the supplier and buyer do not exceed 30 per cent on the respective markets of the parties.

Such exemptions apply in the absence of the aforesaid hardcore restraints.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The IAA relies on the traditional notion of dominance applied at European level and therefore acts in accordance with the European Law and case law.

A dominant position pursuant to article 3 of the Law, featuring the same content of article 102 TFEU, is a position of economic strength enjoyed by a company; such position enables said company to prevent effective competition on the relevant market, as it gives the company the power to behave independently with respect to its competitors, customers and ultimately, the final consumers.

To evaluate the dominant position of a company, the IAA usually carries out a comprehensive analysis of different elements, such as market shares, structure of the market, existence of barriers to entry, characteristics of the product, level of production and countervailing buyer power of customers.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

Article 3 of the Law does not define the concept of abuse of dominance but only lists examples of abusive behaviour that relate to both exploitative and exclusionary practices.

Said rule provides a non-exhaustive list of some examples of abuse, stating that it is prohibited:

- to directly or indirectly impose unfair purchase or selling prices or other unfair contractual conditions;
- to limit or restrict production, market outlets or market access, investment, technical development or technological progress;
- to apply to other trading partners objectively dissimilar conditions for equivalent transactions, thereby placing them at an unjustifiable competitive disadvantage; or
- to conclude contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Abuse of dominance occurs when an undertaking in a dominant position engages in practices that influence the structure of a relevant market by reducing, hampering or eliminating competition. The simple dominant position on a relevant market does not constitute an abuse, but the dominant firm holds a 'special responsibility' not to allow distorting effects on the competitive structure of the market.

Abuse of dominance is defined more in terms of the effects of a conduct on the market rather than in relation to the form or type of conduct.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

From a subjective point of view, the only exemption regards undertakings that, by law, are entrusted with the operation of services of general economic interest, or operate on the market in a monopolistic situation, only so far as this is indispensable to perform the specific tasks assigned to them (see article 8, paragraphs 1 and 2, of the Law).

From an objective point of view, following the EU principles, the IAA could consider, as justification, efficiencies that are sufficient to guarantee that no real harm to consumers is likely to arise. In this context, the dominant undertaking shall demonstrate that:

- the efficiencies have been, or are likely to be realised as a result of the conduct;
- the conduct is indispensable to the realisation of those efficiencies;
- the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; and
- the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

In any event, when exclusionary intent is shown, efficiencies may not be used as a defence.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Should mergers and acquisitions meet the relevant jurisdictional thresholds, provided by article 16 of the Law, the notification to the IAA is mandatory, even if transactions have little or no effects on the relevant market.

The Italian Antitrust Law (recently modified with Law No. 124/2017) provides that a concentration must be prior notified to the IAA when: (i) the aggregated turnover, achieved at national level by all the companies involved in the operation, is more than €495 million; and (ii) the turnover achieved individually at national level by at least two of the companies involved in the operation is more than €30 million. It should be noted that these thresholds are exclusively based on nationwide revenues realised by the parties involved in the transaction.

The jurisdictional thresholds are revised yearly by the IAA to reflect the gross domestic product (GPD) deflator index.

In case of acquisition of joint control and of a joint venture notification, the notification is up to the undertaking that acquires control; in case of mergers, it is up to each merger party; and in case of public takeover bids, it is up to the bidder.

The transactions shall be notified prior to their implementation. Under the Italian law, there is no so-called standstill obligation: parties to a transaction may theoretically implement the transaction after they have notified the operation to the Authority without waiting for the IAA's clearance (the parties face the risk of a possible prohibition decision by the Authority). In exceptional cases, the IAA may order the suspension of implementation of the transaction pending its assessment.

26 How long does it normally take to obtain approval?

The IAA has a 30-day term from the notification for the clearance (the said term is reduced to 15 days in case of public takeover bids).

Should the IAA deem that an in-depth investigation is needed, the Authority does not issue a decision of inapplicability of the law or a decision to clear the transaction, the second (investigation) phase is started with a formal decision served upon the parties.

The IAA must adopt the final decision within 45 days from the said decision; this term may be extended for no more than 30 further days in the event that the parties have failed to provide information that has been requested by the Authority. Therefore, in the case of opening of the second phase, the overall timeline for clearance is generally 75 calendar days from receipt of the formal notification.

To speed up the proceedings, the parties can engage in pre-notification discussions with the IAA by contacting the Authority at least 15 days prior to the formal notification of the transaction and providing the relevant information.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

The applicable law does not include express provisions relating to ancillary restraints.

However, the standard notification form contains a specific section where the notifying parties have to indicate if ancillary restraints are included in the operation's agreements and, if yes, they have to explain why they are to be considered to be directly related to, and strictly necessary for, the implementation of the concentration.

The IAA assesses such ancillary restraints based on the principles laid down by the European Commission. In the final decision, it will be indicated whether (and to what extent) the notified restrictions can be considered ancillary to the concentration.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

Article 19 of the Law lays down two kinds of administrative fines in case of implementation of a prohibited transaction (paragraph 1) and of failure to file a relevant transaction (paragraph 2).

The failure to file a transaction may lead to imposition of an administrative fine to the undertakings responsible for notification, up to 1 per cent of the undertaking's turnover in the financial year preceding the missing notification.

The IAA can also decide to revoke its decision to clear the transaction and to impose fines for any failure to observe the prescribed measures.

With reference to the failure to notify, the IAA has recently applied fines in a few cases: three in 2013, two in 2015 and one in 2016 (C11742 – *Puma/Dobotex*; C11808 – *Marfin-Acosta/Investment Services*; C11913 – Esselunga/Co.Ge.Man; C11960 – *Cooperativa Esercenti Farmacia/ Farfin-Socrefarma*; C11961 – *Cooperativa Esercenti Farmacia/Al-Pharma*; C11072B - *Moby/Toremar*).

It has to be recalled that sanctions may be imposed also in case of false information provided by the parties, as well as in case of refusal or failure to provide the required information.

Investigation and settlement

29 Under which circumstances would the company and officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

The IAA does not require a separate legal representation of the company and its officers or employees. The IAA counterparty is the undertaking itself and not its personnel materially putting in place the antitrust infringement.

Individual employees of the company can be prosecuted if the antitrust infringement constitutes a violation of criminal law (ie, bid rigging). In such cases, a separate legal representation is needed for said employees before the criminal courts.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

Pursuant to article 14(2) of the Law as well as article 10 of Decree of the President of the Republic 217/1998, the IAA may – at any stage in the investigation – conduct inspections of the undertaking's books and records and make copies of them, with the cooperation of other government agencies where necessary.

During a dawn raid, the IAA officials may:

- inspect business premises and means of transport of the undertaking concerned;
- seize and make copies of all documents (on legal privilege see below) located in the companies' premises;
- require anyone on the premises to produce documents that the officers consider relevant for the investigation;
- provide an explanation of documents;
- ask for information on facts related to the object of the investigation; and
- examine and collect information and data from mobile terminals, portable devices and relative servers.

On the companies' side, there are no specific and approved rules for facing a dawn raid.

31 What are the company's rights and obligations during a dawn raid?

Undertakings under inspection are obliged to comply with basic requests, as – for instance – blocking the business activities, not hindering the movement of the IAA officials. Companies must cooperate during an inspection. However, they are not obliged to support the IAA investigation, in the sense that employees may decide to remain silent in case they are not sure about the questions asked. In any case, extreme collaboration with the officials of the Authority is advisable, to avoid possible administrative fines.

Private or legally privileged documents may not be seized by the IAA. Attorney–client privilege applies only to correspondence between clients and external counsel, but not to correspondence between in-house counsel and staff. It is the duty of the company personnel under inspection to identify personal and privileged documents, also with the help of the (EU) external lawyer assisting at the dawn raid. To establish that a document is privileged, the IAA may want to see at least the letterhead (or sender email address) as well as the subject line of the email.

In short, three conditions need to be met for denying IAA access to information of the company:

- the information must be confidential advice;
- the advice must have been provided by external legal counsel; and
- the external legal counsel must be from an EU member state.

Moreover, companies have the right to legal advice. The IAA officials can wait for a 'reasonable time' to enable the external lawyer to come to the companies' premises to assist the company during the dawn raid procedure.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Italian law does not provide for a mechanism to settle during an investigation conducted by the IAA.

Pursuant to article 14-ter of the Law, introduced in 2006, within three months from the notification of the launch of an investigation, undertakings may offer commitments aimed to correct the anticompetitive conduct that is the subject of the investigation. The Authority may, after having assessed the suitability of such commitments, make them binding for those undertakings and close the proceeding without ascertaining the infringements.

If commitments are not apt to avoid the offences inquired into, the Authority rejects them. If the commitments are not ungrounded, within 45 days of the expiration of the above-mentioned term of three months, they are published on the Authority's website. Within 30 days of the publication, third parties may present observations; within a further term of 30 days, the undertakings may reply or modify their commitments, based on the observations of third parties. Except for specific inquiry needs, the whole proceedings must be closed within three months of the publication of the commitments.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

Not applicable.

34 Are corporate monitorships used in your jurisdiction?

According to Italian law, corporate monitorships are not governed by any specific rule.

Nevertheless, in some cases, the IAA has accepted the appointment of a monitoring trustee, characterised by high-level professional qualifications and independence, with the purpose of implementing (and, rarely, monitoring) some or all the commitments offered by the parties during the proceedings (see IAA, 13 July 2011, No. 22590; IAA, 13 July 2012, No. 23739; IAA, 21 June 2012, No. 23670; IAA, 3 September 2015, No. 25609). In other cases, a monitoring trustee was appointed by the parties in the proceedings with the purpose of evaluating, from a technical point of view, the result of the implementation of the commitments undertaken during the proceeding (see IAA, 28 October 2014, No. 25160).

Update and trends

Over the past few years, an increasing number of companies have implemented ACPs, in particular after the introduction, in the IAA's Guidelines on sanctions, of the above-mentioned possibility of benefiting from a reduction of sanctions if a company has implemented an ACP in line with the European and national best practices.

This trend, which is encouraged also by the recent practice of the IAA, has to be welcomed, as it ensures the dissemination of an 'antitrust culture', while effectively preventing and reducing the antitrust risk.

On the other hand, companies increasingly express the need for legal certainty regarding the proper conditions for implementation and design of ACPs. Recently, this stance has been duly considered by the IAA, which, as anticipated, on 20 April 2018 issued a draft version of the Guidelines on Antitrust Compliance, providing specific and detailed guidance on the structure of ACPs. Following the conclusion of the public consultation, within 30 days starting from the publication of the draft Guidelines on the IAA's bulletin, the Authority will adopt the final version of the Guidelines, thus significantly increasing legal certainty and uniformity of application with reference to ACPs.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class-actions or representative claims?

As anticipated, the Italian system does not provide or regulate a settlement procedure.

In any case, follow-on actions, promoted before Italian courts, may concern settlement decisions issued by the EU Commission or by another National Antitrust Authority.

Settlement decisions, being issued after simplified and accelerated proceedings, are not characterised by the same analysis of the facts and of all the other evaluative elements as the decisions issued after ordinary proceedings. Moreover, settlement decisions do not contain any statement about the effects of the infringement and detailed description of the infringement's factual background.

These characteristics have some relevant consequences in terms of burden of proof in the subsequent follow-on actions: future plaintiffs are not aware of important factual circumstances necessary to obtain damage compensation and they will have to demonstrate the existence of the alleged damages deriving from the infringement.

In view of the above, the statements contained in settlement decisions cannot be automatically admitted as evidence in different and separate civil proceedings; on the contrary, a case-by-case assessment is necessary.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The IAA right to require factual explanations of documents or facts cannot compel a company to provide answers that would involve the admission of an infringement of competition law. For this purpose, any legally privileged documents cannot be seized by the IAA, and an employee requested to provide relevant information attesting the full involvement of the company in the infringement may remain silent or ask the IAA to postpone the answer, which will be given in writing.

37 What confidentiality protection is afforded to the company and/or individual involved in competition investigations?

The IAA has established that confidential data or documents (collected during an IAA inspection or attached to a reply of an IAA request for information) may be ordered to be kept secret at the request of a party. Companies involved in IAA proceedings and wishing to safeguard the confidentiality or secrecy of information supplied shall submit a specific request to this end to the Authority's offices, specifying the reasons for the request.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

Pursuant to article 14, paragraph 5, of the Law, the IAA may sanction anyone who refuses or fails to provide information or documents

during an investigation without a valid justification. The fine can be up to €25,822, and can be increased up to €51,645 in the event that untruthful and inaccurate information or documents are submitted, in addition to any other penalties provided by the law.

39 Is there a duty to notify the regulator of competition infringements?

No.

40 What are the limitation periods for competition infringements?

The limitation period is five years, starting from the day on which the infringement was committed or, in case of continuous infringements, from the day on which the infringement has ceased.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

Not applicable.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

There are currently no proposals for competition law reform under discussion.

RUCELLAI & RAFFAELLI
STUDIO LEGALE

Elisa Teti **e.teti@rucellaieraffaelli.it**
Alessandro Raffaelli **a.raffaelli@rucellaieraffaelli.it**

Via Monte Napoleone 18
20121 Milan
Italy
Tel: +39 02 76 45 771
Fax: +39 02 78 35 24

Via Cesare Battisti 33
40123 Bologna
Italy
Tel: +39 051 644 0604
Fax: +39 051 333 126

Via Sardegna, 38
00187 Rome
Italy
Tel: +39 06 678 4778
Fax: +39 06 678 3915

www.rucellaieraffaelli.it

Japan

Kenji Ito, Hideki Utsunomiya and Yusuke Takamiya
Mori Hamada & Matsumoto

General

1 What is the general attitude of business and the authorities to competition compliance?

The Japan Fair Trade Commission (JFTC) is keen on competition compliance, describing its strict and active enforcement and its support and advocacy of competition compliance efforts as 'a pair of wheels' in competition policy. It has often conducted surveys on efforts in business of competition compliance from various viewpoints and made those results, along with its comments, available on its dedicated webpage, titled 'corporate compliance.' Since 2006, the surveys have covered competition compliance by companies (2006, 2009, 2010, 2012), compliance with foreign competition laws by companies (2015), competition compliance by trade associations (2016), compliance by foreign-affiliated companies (2008), and compliance in construction business (2007). The general attitude of business to competition compliance is very positive. The JFTC's 2012 survey conducted on companies listed on the first section of the Tokyo Stock Exchange showed that 68.8 per cent of the companies had established an Antimonopoly Law (the AMA) compliance manual and that more than 80 per cent of the companies had conducted AMA compliance training internally.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

There is no government-approved standard for compliance programmes. However, in the survey reports, the JFTC has identified the '3Ds' as essential measures to be included in corporate compliance programmes so as to ensure the effectiveness of compliance as a 'tool for controlling and avoiding risks.' The 3Ds are:

- deterrence: preventing violations of the AMA through training and other measures;
- detection: early discovery of AMA violations through audits; and
- damage control: appropriate responses to violations of the AMA.

Further, the JFTC states that to share an AMA compliance programme across the whole company and to operate it in a unified manner, it should be written and made easily accessible to personnel by listing it as such on the corporate intranet or similar.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on company size and the sector of the economy it operates in?

The JFTC states in its survey report that '[s]pecific risks of individual companies concerning AMA violations differ significantly according to the business content, market environment, and other factors', and that a model compliance programme is not sufficiently effective. The JFTC suggests that to establish an effective compliance programme, a company should focus on its unique antitrust risks, taking account of 'the business size, business content, and organisational climate, and external factors including the actual state of the industry, the market situation, and relevant legal systems.'

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The sanctions against a violation of the AMA are the JFTC's cease and desist order, the JFTC's administrative surcharge order, and a court's criminal fine or jail sentence (only applicable where the JFTC makes a criminal accusation, considering the violation to be serious). The fact that a company has a competition compliance programme in place will be considered in the context of the JFTC's cease and desist order and as a general mitigating factor in the sentencing by court. On the other hand, it will not be considered in calculating the amount of the administrative surcharge imposed by the JFTC.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

There is no standard practice, but it is common for a Japanese company to provide a clause about its commitment to competition compliance in its code of conduct, and to provide detailed rules of competition compliance in its competition compliance manual. In addition, the JFTC states in its survey report that the top management's commitment to and initiative on competition compliance is the most important element in ensuring the effectiveness of a competition compliance programme.

6 What are the key features of a compliance programme regarding risk identification?

There are two ways to detect and identify antitrust risks. The first way is to obtain information directly from employees. In doing so, the JFTC recommends employing an internal reporting system and in-house leniency policy. The second way is to detect antitrust risks through internal audits by personnel in charge of legal or compliance departments.

7 What are the key features of a compliance programme regarding risk assessment?

The legal and compliance department generally takes a key role in risk assessment. The JFTC stresses in its survey report the importance of establishing and utilising a system to consult with the legal and compliance department, stating that it is 'necessary not only for deterring acts in violation of the AMA but also for preventing sales activities from being excessively hampered due to concern regarding possible AMA violations.'

8 What are the key features of a compliance programme regarding risk mitigation?

To mitigate antitrust risks when an actual or potential violation is detected, a company should conduct an internal investigation and consider making a leniency application. As it requires special expertise and resources, the JFTC recommends a company have a contingency manual that describes necessary actions to be taken in case of detection of antitrust risks. Many Japanese companies have established such contingency manuals. In addition, an increasing number of Japanese companies have additionally established manuals that addresses a situation where the JFTC conducts a dawn raid on a company's premises, covering how to observe and cooperate with the raid, how to preserve documents, how to maintain a legal privilege (note that Japan does not recognise attorney–client privilege, but it is important to maintain a legal privilege to deal with possible foreign procedures).

9 What are the key features of a compliance programme regarding review?

There is no standard for the review, but periodical review of a compliance programme is necessary as the legal standards of antitrust violations change from time to time (note also that Japanese companies are exposed to antitrust risks not only in but broadly outside of Japan, and the number of countries implementing competition laws are increasing) and the quality of Japanese companies' compliance programmes has been improved accordingly.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

Article 3 of the AMA prohibits a company from causing an unreasonable restraint of trade and article 2, paragraph (6) of the AMA provides the meaning of 'unreasonable restraint of trade'.

In accordance with these rules, a company must avoid entering into any contract, agreement or any other means (irrespective of what it is called), in concert with other companies, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

A company should conduct thorough analysis on the market where it plans to enter into an agreement with a competitor. The competition law risk of the arrangement may become substantial if there are certain market conditions including, among others, the number of players being relatively small, the consolidated market share after the arrangement with the competitor being relatively high, or the competition pressure from customers in the market being relatively weak. In order to make the above-mentioned analysis, consultation with professionals may be a prudent option.

A company can also make a prior consultation with the JFTC to discuss whether the possible arrangement with the competitor contains a risk of unreasonable restraint of trade. The prior consultation is held under one of JFTC's guidelines 'Prior Consultation System for Activities of Business' and the JFTC must give a response in writing within 30 days of the official receipt of an application for prior consultation. When a response confirms that there is no conflict between the action and the AMA, no legal measure will be taken against the act covered in the consultation on the basis of a conflict with the AMA.

12 What form must behaviour take to constitute a cartel?

No specific requirement exists as for a form of behaviour constituting a cartel. Pursuant to article 2, paragraph (6) of the AMA, any type of contract, agreement or any other means (irrespective of what it is called) can be regarded as a cartel.

With respect to attempts at prohibited behaviour, pursuant to a decision of the Supreme Court as of 24 February 1984 (Oil Cartel (Price-Fixing)), neither the implementation of an agreement nor an increase in price are required for a violation under the AMA.

13 Under what circumstances can cartels be exempted from sanctions?

Cartels can be exempted from sanctions when statutes (the AMA and other statutes) have specific exemptions. Such exemptions include exercise of intellectual property rights (article 21 of the AMA) and certain types of conduct in the transportation sector (pursuant to, among others, the Aviation Law and the Road Transportation Law).

Japan has no prior notification mechanism for cartels to be exempted from sanctions.

14 Can the company exchange information with its competitors?

Information exchange is regulated in a framework of cartel prohibition in Japan. If a company engages in information exchanges with its competitors that may cause an unreasonable restraint of competition in any particular field of trade through mutually restricting or conducting their business activities, such information exchange may constitute a cartel.

Because Japan has no specific rule for the criteria as to what constitutes competitively sensitive information, case-specific analysis is required to determine what kind of information is considered competitively sensitive. In general, factors that may substantially affect competition among market participants (eg, price, volume and capacity) are likely to be considered competitively sensitive.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

Japan has a leniency programme applicable to unreasonable restraints of trade (ie, cartel and bid rigging). The programme is only available for companies and offers full immunity or reduction of the surcharges pursuant to article 7-2, paragraph (10) of the AMA. As to criminal accusations, the JFTC has a policy not to file accusations to the public prosecutors' office against the first company that submitted qualified reports and materials before the start date of the investigation, nor against the officers, employees and the other persons of the company that engaged in the behaviour.

The requirements for full immunity from the surcharges are described in article 7-2, paragraph (10) of the AMA as:

- the company is the first among the companies that committed the violation to individually submit reports and materials regarding the facts of the said violation to the JFTC; and
- the company did not commit further acts on or after the investigation start date in connection with violation under investigation.

Pursuant to article 7-2, paragraph (11) and (12) of the AMA, a reduction of the surcharges is to be granted when the following requirements are met (the total number of companies that may apply to the leniency programme is no more than five (up to three applicants on or after the investigation start date)).

Requirements when the leniency application was made prior to the investigation start date:

- the company is the second (reduction of 50 per cent), the third, the fourth or the fifth (reduction of 30 per cent) among the companies that committed the violation to individually submit reports and materials regarding the facts of said violation to the JFTC;
- the company is not one that committed the said violation on or after the investigation start date in regard to the said violation; and
- the fourth and the fifth applicants should submit reports and materials including the facts other than those already ascertained by the JFTC.

Requirements when the leniency application was made on or after the investigation start date (reduction of 30 per cent):

- the company, in accordance to the JFTC's Rules, individually submitted reports and materials of the facts regarding the violation (excluding materials related to the facts already ascertained by the JFTC) to the JFTC by the deadline set in the JFTC's Rules after the investigation start date for the case of the said violation;
- the company is not one that committed the said violation on or after the day when the reports and materials were submitted; and
- the applicants on or after the investigation start date should submit reports and materials including the facts other than those already ascertained by the JFTC.

In addition to above, the following requirements in article 7-2, paragraph (17) of the AMA and section 8 of the Rules on Reporting and Submission of Material regarding Immunity from Reduction of Surcharges must be complied with by the applicant to make a determination of applicability of the leniency programme:

- the report or materials submitted by the applicant should not contain false information;
- the applicant must submit the requested reports or materials and must not submit false reports or false materials responding to the JFTC's additional requests;
- the applicant should not coerce other enterprises to commit the violation or block other enterprises from ceasing to commit the said violation in the same case; and

- the applicant must not disclose the fact of application to third parties without justifiable reasons.

As for the confidentiality of the identification of the applicants, the JFTC will not disclose the name of the applicants during the investigation process. Once the leniency programme is officially applied, however, the JFTC shall announce the name of the applicants in its press release.

16 Can the company apply for leniency for itself and its individual officers and employees?

Only companies may apply for the immunity from or reduction of surcharges. There is no leniency programme applicable to individuals. As to criminal charges, the JFTC has a policy that it will not file accusations to the public prosecutors' office against the officers, employees and other persons of the first company that submitted qualified reports and materials before the start date of the investigation.

17 Can the company reserve a place in line before a formal leniency application is ready?

A company may reserve a place in line before submitting detailed facts of the violation. In the case of a leniency application prior to the investigation start date, a company that is going to report and submit materials must submit a written report containing a summary of the violation by facsimile. Based on the order of the receipt of these reports, the JFTC identifies and notifies a provisional place in line for each applicant. When all the requirements for leniency applications are confirmed to be fulfilled, the JFTC will make a formal decision as for the eligibility of the leniency programme and the 'place in line' of each applicant.

18 If the company blows the whistle on other cartels, can it get any benefit?

No. Even if a company intends to be a whistle-blower on other cartels in the course of an investigation on a cartel, the company cannot receive any extra benefit for the original case. The benefit that a company may obtain from a leniency application is only relevant to the case for which it has submitted reports and materials.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

The AMA regulates vertical arrangements primarily through its prohibition of 'unfair trade practices' and 'private monopolisation'. While a company requires a substantial restraint of competition to constitute a private monopolisation infringement, it requires a finding of only the likelihood of impeding fair competition to establish an infringement of unfair trade practices. However, when assessing many types of unfair trade practices, the JFTC needs to consider the possible effect of the act on competition and thus the market shares of the parties are still relevant.

The types of conduct classified as unfair trade practices are as follows:

- refusal to trade;
- discriminatory pricing or treatment;
- unjust low price selling;
- unjust high price purchasing;
- resale price maintenance;
- customer inducement through deception or unjust benefits;
- tie-in;
- exclusive trading;
- trading on restrictive terms;
- unjust interference with the appointment of an officer;
- interference with a competitor's transactions;
- interference with the internal operation of a competitor; and
- abuse of superior bargaining position.

Resale price maintenance is, in principle, illegal unless it has a justifiable reason. However, it is usually not illegal, if a direct purchaser to which a supplier instructed a resale price only functions as a commission agent and the sale is in substance being done between the supplier and its ultimate purchasers.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

There is no per se concept under the AMA. However, the JFTC considers certain price restrictions, including resale price maintenance, as being in principle illegal unless they are supported by a justifiable reason. As it is practically difficult to persuade the JFTC in terms of a justifiable reason, a company needs to be careful when considering the legality of price restrictions.

On the other hand, the JFTC normally assesses non-price restrictions in terms of whether they have the effect of market foreclosure or price maintenance by taking into account various factors, such as: inter-brand competition, intra-brand competition, the market share of the acting company, and the number or presence of the companies subject to the restrictions. This is a similar approach to 'rule of reason' in other jurisdictions.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Intra-group vertical arrangements can be exempted from the application of unfair trade practices.

A transaction between a parent and its wholly owned subsidiary or between sister companies wholly owned by the same parent is usually not subject to the regulation of unfair trade practices. Even a transaction between a parent and its subsidiary or between sister companies, in which less than 100 per cent of the shares (in principle, more than 50 per cent) are held by the parent, are not in principle subject to the regulation of 'unfair trade practices', assuming the transactions are in substance equivalent to intra-company transactions. Whether or not a transaction is in substance equivalent to an intra-company transaction is to be determined on a case-by-case basis by taking into account various factors, including:

- the stock holding ratio of the parent;
- executives sent from the parent to its subsidiary;
- the involvement of the parent in financial matters and business policy of its subsidiary; and
- the business relationship between the parent and its subsidiary (eg, percentage of trade with the parent in the total trade of the subsidiary)

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

Under the AMA, a company is not required to have dominance to engage in unfair trade practices or private monopolisation. In order to engage in private monopolisation, which is equivalent to an abuse of dominant position in other jurisdictions, a company must cause a 'substantial restraint of competition' in the relevant market. In order to assess whether there is a substantial restraint of competition, the JFTC generally takes into account various factors, including:

- market share and ranking of an infringing company;
- status of competition in the relevant market;
- status of its competitors;
- potential competitive pressure of entry (including entry barriers);
- customer's bargaining power;
- efficiency; and
- other justifiable reasons to benefit consumers (eg, safety and health).

The Exclusionary Private Monopolisation Guidelines (Monopolisation Guidelines) provide that a market share in excess of 50 per cent is generally considered by the JFTC in setting its enforcement priorities.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

There are two types of conduct that constitute 'private monopolisation' under the AMA: exclusionary conduct by exclusion and exploitative conduct by control.

Exclusion is interpreted as making it difficult for other companies to continue their business activities or preventing them from entering

Update and trends

On 15 February 2018, the Competition Policy Research Centre of the JFTC published a Report of Study Group on Human Resource and Competition Policy. The Study Group was established to sort out the views on applications of the AMA to competition for human resources to facilitate a pleasant environment for individual workers. The report discusses applications of the AMA to concerted practice and unilateral conduct of contracting parties (employers) and shows some examples of activities that are undesirable from a viewpoint of competition policy. Though the report has not induced any enforcement actions so far, it may trigger the JFTC's detailed review on anticompetitive practices relevant to human resource matters.

the market. The Monopolisation Guidelines refer to the following types of conduct as typical examples:

- below-cost pricing;
- exclusive dealing;
- tying; and
- a refusal to supply and discriminatory treatment.

Control is interpreted as depriving other companies of their freedom to make decisions on their business activities and forcing them to follow the controlling company.

In the past 20 years, there have been only 11 enforcement cases against private monopolisation. One recent high-profile case is the case against the Japanese Society of Authors, Composers and Publishers (JASRAC), a dominant copyright collective association in Japan, in which the JFTC issued a cease-and-desist order against JASRAC to stop its pricing policy for copyright licensing fees in 2009. JASRAC was alleged to have taken advantage of its dominant position in the relevant market. JASRAC appealed the order to the hearing procedure within the JFTC and the JFTC decided to rescind the original order in 2012. However, a competitor of JASRAC appealed the decision to the Tokyo High Court. The court overturned the JFTC's decision in 2013, finding an infringement. JASRAC and the JFTC appealed the court's ruling to the Supreme Court; however, the court dismissed the appeal.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

There is no exemption for private monopolisation under the AMA. However, new legislation introducing a commitment procedure passed the Diet in December 2016, pursuant to which the JFTC can decide not to issue any cease-and-desist order or surcharge order against an infringement subject to its investigation (mainly single firm conduct) if a company voluntarily proposes effective remedies to the JFTC and the JFTC approves them. The legislation would come into effect within a year since it is to be enacted at the effective date of the Trans-Pacific Strategic Economic Partnership Agreement (TPP), which has been signed again by 11 countries in March 2018 upon the withdrawal of the United States.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Yes. When the scheduled transaction is within the types of transactions for which the AMA requires a merger filing and the relevant filing thresholds are met, a party or parties to the transaction have to submit a mandatory merger notification to the JFTC. There is no notification deadline, but the parties to the transaction cannot close the transaction until the expiration of the statutory waiting period that is to be counted from the date of the formal receipt of the notification.

The types of the transaction for which the AMA requires a merger filing are an acquisition of voting rights that exceeds either 50 per cent or 20 per cent, merger, corporate split, joint share transfer and acquisition of business.

As for the filing thresholds, the consolidated turnover in Japan of each party is relevant. The key thresholds for transactions other than business transfers are: consolidated turnover in Japan of the acquirer or one party exceeds ¥20 billion; and consolidated turnover in Japan of the target or other party exceeds ¥5 billion. The key thresholds for a business transfer are: the consolidated turnover of acquirer exceeds ¥20 billion and the consolidated turnover in Japan generated by the target business exceeds ¥3 billion.

The party responsible for notification differs depending on the type of transaction. As for an acquisition of voting rights or business, the acquirer has responsibility. As for a merger, corporate split, and joint share transfer, both parties have responsibility.

26 How long does it normally take to obtain approval?

The merger control regime in Japan has two review phases.

Normally a transaction is reviewed in Phase I, which has a 30 calendar day review period (counted from the formal receipt of the notification form and all attached materials). If, however, the JFTC considers that more detailed review is necessary and makes an official request for information, the Phase II review starts.

In Phase II, the review period is extended to 120 days from the date of the formal receipt of the notification form and all attached materials or 90 days from the date of formal receipt of all the response to the official request for information, whichever is later.

Though there is no simplified procedure in Japan, the JFTC may, when necessary, shorten the waiting periods. The shortening of the waiting period is permitted, in principle, under the condition that it is evident that the effect of the reviewed transaction may not substantially restrain competition in any relevant market, and the notifying company requests in writing to shorten the waiting period.

Though the review period differs depending on the cases, vast majority of merger reviews are concluded in Phase I.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

No. The JFTC only examines whether the notified transaction will substantially restrain competition in any particular field of trade. In this regard, the termination of the merger review cannot be interpreted as the JFTC's having made a review on any other aspects of the transaction (eg, terms and provisions in the relevant documents).

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

A fine of not more than ¥2 million is applicable to a failure to file a notification, incorrect or misleading information in a notification or failure to observe waiting periods.

Also the JFTC may issue a cease and desist order against the parties if it finds that the transaction which was not appropriately notified has the possibility of causing a substantial restraint of competition in any particular field of trade. As for a failure to comply with the cease and desist order, imprisonment with work for not more than two years or a fine of not more than ¥3 million for a person, and a fine of not more than ¥300 million for a company may be applicable after it has become final and binding. Also, a non-penal fine of not more than ¥500,000 may be applied to any person who has violated a cease-and-desist order.

To date, no actually sanctioned case exists in Japan for non-compliance with merger controls.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Though separate legal representation may be desirable for the company and for the officers or employees of the company when conflicts of interest exist between them, almost all officers or employees who have committed a violation of the AMA in a course of their employment are advised by legal counsel of the company they are working for. The JFTC usually does not require separate legal representation during the investigations.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The JFTC typically launches a dawn raid in cartel and bid-rigging cases.

There are two types of investigations for which the JFTC may launch a dawn raid. Most dawn raids are conducted under administrative investigation, but some are conducted under compulsory investigation of criminal cases. In the course of an administrative investigation, the JFTC may launch a dawn raid in any type of case as long as it believes there may be a fact in violation of the AMA. In the course of a compulsory investigation of criminal cases, the JFTC may launch a dawn raid only when there may have been a violation of articles 89 through 91 of the AMA.

Among others, the following procedural rules as well as the AMA itself should be complied with by the JFTC during dawn raids: Enforcement Ordinance on the AMA, Rules on Administrative Investigations, Rules on Compulsory Investigation of Criminal Cases and Rules on Reporting and Submission of Materials.

The JFTC may conduct dawn raids on any premises as long as the investigator reasonably believes the place is necessary to be raided with respect to the investigation. Typically, the JFTC conducts dawn raids on business offices of the company. Though no specific rules on digital searches exist, the guidelines on investigations under the AMA clearly state that electronic data is subject to investigation and submission.

31 What are the company's rights and obligations during a dawn raid?

A company that was subject to a dawn raid has an obligation to cooperate with the dawn raid. If the company violates the obligation, the company shall be subject to a criminal fine of not more than ¥3 million.

Pursuant to section 22 of the Rules on Administrative Investigations, a company that was subject to a dawn raid may make a motion for objection to the JFTC within one week of the day on which the measure was taken.

Although the JFTC may allow the company to let a lawyer attend the dawn raid, the JFTC may start dawn raids without attendance of the lawyer as the company has no legal right to let its lawyer attend the dawn raid.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Currently no mechanism to settle, or to make commitments to regulators, during an investigation exist in Japan. An act that introduces a mechanism similar to the commitment procedure in Europe was enacted, but the act has not yet come into effect (see question 42).

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

Not applicable.

34 Are corporate monitorships used in your jurisdiction?

Corporate monitorships have not been used in Japan.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

Not applicable.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Attorney–client privilege is not available in Japan.

As for the privilege against self-incrimination, an individual who is alleged to be involved in a violation of the AMA may invoke privilege in the course of an interview under compulsory investigation of criminal cases. Under the administrative investigation process, on the other hand, the privilege against self-incrimination cannot be invoked.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

Confidential information of the company or individual involved in investigations is protected by the confidentiality obligation of the current and former staff of the JFTC.

Pursuant to article 38 of the AMA, current officials of the JFTC must not express their opinions outside the JFTC on the existence or non-existence of facts or the application of laws and regulations with regard to a case. Also, pursuant to article 39 of the AMA, current and former officials of the JFTC shall not divulge or make surreptitious use of trade secrets of enterprises that came to their knowledge in the course of their duties.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

Any person who refuses to cooperate with the authorities in an administrative investigation shall be subject to punishment by imprisonment with work for not more than one year or by a fine of not more than ¥3 million (article 94 of the AMA).

39 Is there a duty to notify the regulator of competition infringements?

No. Although article 45, paragraph (1) of the AMA describes that any person who believes there to be a fact in violation of the AMA may report the fact to the JFTC and ask for appropriate measures to be taken, the reporting is not compulsory.

40 What are the limitation periods for competition infringements?

Cease-and-desist orders and surcharge payment orders may not be made after five years have elapsed since the date of discontinuation of

MORI HAMADA & MATSUMOTO

Kenji Ito **kenji.ito@mhmjapan.com**
Hideki Utsunomiya **hideki.utsunomiya@mhmjapan.com**
Yusuke Takamiya **yusuke.takamiya@mhmjapan.com**

16th floor, Marunouchi Park Building
2-6-1 Marunouchi
Chiyoda-ku
Tokyo 100-8222
Japan

Tel: +81 3 5220 1800
Fax: +81 3 5220 1700
www.mhmjapan.com

the violation. On the other hand, there is no limitation period for the completion of an investigation or to make a decision on the merits.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

Article 2, paragraph (9) of the AMA and the Designation of Unfair Trade Practices specify a variety of anticompetitive conducts as 'unfair trade practices', some of which have a feature of vertical arrangements.

For details of unfair trade practices, see question 19.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

There are two major reform proposals (or potential reform proposals) for the AMA.

First is the introduction of the commitment procedure. Under the procedure, the JFTC's investigation may be terminated without issuing any cease and desist order or surcharge order when an investigated company voluntary proposes effective remedies to the JFTC and the JFTC approves them. Though the act that introduces this procedure has already been enacted, it would only come into force once the TPP comes into effect for Japan, as this procedure was introduced as a compliance measure for the TPP. It is expected that the act would come into effect within a year, as the TPP has been signed again by 11 countries in March 2018 upon the withdrawal of the United States. This procedure could provide another option for a company to seek reasonable solution in the JFTC's investigation.

Second is the introduction of the discretionary surcharge payment system. Currently the amount of administrative surcharge that the JFTC may impose on a company violating the AMA is statutorily defined in the AMA and the JFTC has no flexibility. To increase administrative flexibility and companies' incentive to cooperate with the JFTC's investigation, discussion on the introduction of the discretionary surcharge payment system was conducted in the 'Study Group on the AMA' (a study group that the JFTC set up). Though whether, when and what kind of the system is introduced is not yet clear at this stage, some sort of proposal may be made in the near future. Once the amended administrative surcharge payment system is introduced, the JFTC may take enforcement action more flexibly.

Korea

Gene-Oh (Gene) Kim and Luke Shin
Kim & Chang

General

1 What is the general attitude of business and the authorities to competition compliance?

Over the years, there has been increased recognition in Korea by both companies and the regulators regarding the importance of voluntary compliance efforts. Against this backdrop, in 2001, the Korea Fair Trade Commission (KFTC) formally recognised the concept of compliance programmes (CP) that provide the framework for companies to voluntarily monitor for and enforce competition compliance.

Businesses generally take the view that a CP provides a valuable means for setting clear expectations regarding employee conduct, preventing violations in advance and addressing violations that are discovered in an efficient manner. A robust CP may also have public relations benefits, by increasing consumer trust and helping the company to show that it operates in a transparent and ethical manner.

The authorities also view CPs favourably because voluntary compliance efforts by the industry reduce the cost of the government's enforcement of competition law, and have engaged in various efforts to encourage companies to strengthen their internal compliance mechanisms.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

In October 2008, the KFTC published the Rules on Operation of and Incentives for Fair Trade Compliance Programmes (CP Operation Rules) for the first time, which provide certain incentives to companies whose CP meets prescribed criteria (see questions 4 and 6). The CP Operation Rules have been recently amended effective in June 2016.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on the company's size and the sector of the economy it operates in?

The CP Operation Rules set forth general standards only, and each company determines the details of its CP based on considerations such as company size, and company and industry characteristics.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

Previously, the KFTC reduced the administrative surcharge of companies being investigated and found to be in violation of competition law if they had adopted a CP and received a qualifying rating in an evaluation by the KFTC. Under the recently amended CP Operation Rules, this particular incentive is no longer available, but others such as an adjustment in the scope of the company's obligation to publicly disclose its violation (eg, in terms of number of newspapers where the violation must be announced) and exemption from KFTC investigations initiated ex officio remain available.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

Adopting and vigorously enforcing a CP is a key means of demonstrating commitment to competition compliance. Whereas companies previously regarded a CP primarily as a feature that would bolster their defence in a KFTC investigation or make them eligible for various incentives, there is now growing recognition that a CP can be an effective means of managing risk and boosting a company's competitiveness. According to the KFTC, as of September 2017, there were 660 companies that had adopted a CP, and 18 companies applied to the KFTC to rate their CP between January and September 2017.

6 What are the key features of a compliance programme regarding risk identification?

As discussed, the terms and features of a CP are determined by the company at its discretion. However, to be recognised as a CP by the KFTC, the programme must contain the following features:

- a declaration of commitment to compliance by the representative of the company (eg, CEO);
- the appointment of a compliance officer;
- the preparation and dissemination of compliance manual;
- continuous and systematic compliance training;
- the implementation of internal monitoring system;
- disciplinary measures against violators; and
- an appropriate system for management of documents.

7 What are the key features of a compliance programme regarding risk assessment?

The Korea Fair Trade Mediation Agency (KOFAIR), which is subordinate to the KFTC and is responsible for operating the CP rating programme, has published a checklist of criteria it references when evaluating CPs.

The checklist requires companies to continuously monitor to check for potential violations of law and to put in place a system whereby potential violations can be quickly escalated to the compliance officer and senior management. Moreover, companies are recommended to prepare a risk assessment report that stipulates matters such as the frequency of the risk assessment, the institution that conducted the risk assessment, the departments that were evaluated, the content and results of the assessment and follow-up measures.

8 What are the key features of a compliance programme regarding risk mitigation?

The above checklist provides that companies should take measures to mitigate any identified risk, impose disciplinary measures against violators and implement an incentive system to encourage adherence to compliance policies.

9 What are the key features of a compliance programme regarding review?

The KOFAIR's checklist is designed to allow companies to regularly evaluate the CP and make improvements. It recommends that companies prepare a training results report that describes and analyses the effects of the compliance training and employees' level of understanding regarding compliance issues.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

The Monopoly Regulation and Fair Trade Law (FTL) prohibits agreements from engaging in the following, where such arrangement would have an anticompetitive effect:

- fixing, maintaining or altering prices;
- determining the terms and conditions for trade in goods or services or for payment of fees;
- restricting the production, shipment of transportation or trade in goods or services;
- restricting the territory of trade or customers;
- hindering or restricting the installation or expansion of facilities or procurement of equipment necessary for manufacturing or provision of services;
- restricting the types or specifications of the goods at the time of production or trade;
- establishing a corporation or the like to jointly conduct or manage important parts of businesses;
- determining a successful bidder, bidding price, contracting price or certain other factors in an auction; or
- hindering or restricting the business activities or the nature of the business of other enterprises, thereby substantially restraining competition in a relevant area of trade.

Not all these arrangements are prohibited per se, and usually, the anticompetitive impact is weighed against efficiencies. However, a 'hardcore' cartel such as market allocation and quantity restriction may be deemed unlawful without an assessment of anticompetitive effect, absent special circumstances.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The company should generally avoid including the arrangements described in question 10 in the agreement with the competitor. Since implicit as well as explicit agreements are regulated and an agreement may be inferred through coordinated conduct, the company should ensure that there is no 'side agreement' through which an understanding is reached to engage in prohibited activity, such as market allocation or restrictions on launching a competing product. The company should also take care to restrict the flow of sensitive information (eg, on price or output volume) to and from the competitor.

12 What form must behaviour take to constitute a cartel?

The agreement need not be written, and even an implicit agreement may constitute a cartel. The agreement may be inferred from concerted action, where two or more companies engage in the conduct described under question 10, and relevant circumstances such as the nature of the relevant product or service, economic incentives and effects, and the frequency and form of communication between the companies makes it likely that the companies were acting in concert.

Since the FTL prohibits the agreement itself as a cartel, companies may (and routinely are) be punished for engaging in cartel even if they were not successful in carrying out the relevant agreement. The requisite agreement may be deemed formed even if one party did not intend to actually engage in the relevant action, as long as the other party acted in reliance of the agreement being implemented. However, unilateral conduct where there was no meeting of the minds with a counterparty would not constitute a cartel.

13 Under what circumstances can cartels be exempted from sanctions?

An agreement among competitors who collectively have a market share of 20 per cent or less is deemed not to have an anticompetitive effect, and the relevant companies will be exempted from sanctions. In addition, even though the KFTC in 2009 published a guideline on cartel review process under which companies may request the KFTC to review legality of contemplated coordination or collaboration involving two or more companies, this system has not been actively utilised.

14 Can the company exchange information with its competitors?

In a series of recent cases, the Supreme Court in Korea took the position that information exchange, on its own, does not constitute unlawful collusion, and that there must be additional factors, such as evidence showing a 'meeting of the minds'. For example, in 2015, the Supreme Court overturned the lower court's finding of a price-fixing agreement in the instant noodle industry, despite evidence of price-related information exchange and parallel pricing, as well as the active cooperation of a leniency applicant (Supreme Court decision dated 24 December 2015, Case No. 2013Du25924). This and similar decisions have limited the evidentiary value of information exchange in establishing the existence of a price-fixing agreement.

Notwithstanding the above, the KFTC has traditionally viewed information exchange coupled with parallel conduct as giving rise to a prima facie inference of a cartel, and even the Supreme Court has maintained that information exchange may constitute strong evidence of a meeting of the minds. As such, it is prudent for companies to restrict information exchange with competitors to the extent strictly necessary.

Information considered sensitive generally includes any information that may impact the competitor's pricing or marketing policies, including information on price, sales margin, cost, discounts and rebates, transaction terms, product launch schedule, production capacity, and inventory.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

A leniency programme is available for cartel participants. The programme does not extend to other forms of prohibited conduct.

A successful leniency applicant must meet certain conditions, and the level of leniency granted will depend on whether and the degree to which such conditions are met. The general parameters are as follows:

- priority in reporting: The level of leniency the applicant qualifies for depends on whether the applicant is the first to report 'exclusive' information to the KFTC;
- timing: The applicant's eligibility for and level of leniency will also depend on:
  - whether the KFTC had already commenced investigating the matter prior to the applicant's provision of information; and
  - whether the applicant is the first, second or further down in line;
- degree of cooperation: The degree and duration of the applicant's cooperation with the KFTC's investigation will be considered; and
- continued involvement in cartel: The KFTC will also take into account whether the applicant has ceased to participate in the cartel.

Subject to the satisfaction of all of the relevant requirements, an applicant (including its employees) who first reported the relevant conduct prior to the KFTC's commencing its investigation of the matter will receive full leniency from all applicable administrative sanctions. A second-in-line applicant who meets the leniency criteria receives a 50 per cent reduction in its administrative fine. Companies that qualify for leniency are exempted from criminal referral.

Ringleaders are also eligible for leniency, provided that leniency is not available for companies that repeatedly engaged in a cartel, coerced others to participate in a cartel or stopped others from ceasing to participate in a cartel.

The name of the applicant is kept confidential and the KFTC must take measures to retain confidentiality, such as, using an alias for the applicant in all examination reports and decisions and redacting parts that contain identifying information.

16 Can the company apply for leniency for itself and its individual officers and employees?

Leniency, if granted, extends to individual officers and employees.

17 Can the company reserve a place in line before a formal leniency application is ready?

In cases where it would take a considerable period of time to compile all of the relevant information or to submit substantiating documents together with the leniency application, the applicant may first

submit only basic information regarding itself (its name, representative, address, etc) and an overview of the relevant conduct. The applicant must state the period (maximum 15 days) it needs in order to compile and submit the outstanding information, including exhibits, and this supplementation period may be extended by a further 60 days for cause, at the KFTC's discretion.

18 If the company blows the whistle on other cartels, can it get any benefit?

The FTL provides for 'amnesty plus', under which an applicant who was subject to an ongoing investigation regarding an alleged cartel (first cartel) can seek amnesty or full leniency with respect to another cartel (second cartel) that was not the subject of the KFTC's initial investigation. In this case, the applicant for amnesty plus may be partially exempt from the corrective order and fully or partially exempt from the surcharge with respect to the first cartel, depending on the relative importance of the first cartel and second cartel, and fully exempt from administrative sanctions for the second cartel.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

Vertical arrangements are regulated under the FTL as one form of unfair trade practices or abuse of market dominance (see question 23), and those subject to competition enforcement include resale price maintenance (RPM), exclusive dealing, tying, and restrictions on sales territory or counterparty.

Two statutes – the recently enacted Fairness in Distribution Transactions Act (Distributor Act) (effective 23 December 2016) and the Fairness in Franchise Transactions Act (Franchise Act) – afford protections to certain purchasers in a B2B transaction that are regarded as having a weaker negotiating position. The Distributor Act and the Franchise Act elaborate on the unfair trade practices prohibited in business transactions with distributors and with franchisees, respectively.

There are also statutes that protect vulnerable suppliers. These are the Fair Transactions in Large-Scale Retailing Business Act (Large-Scale Retailers Act), which prohibits abusive conduct by 'large-scale retailers' as regards suppliers and lessees, and the Fairness in Subcontracting Transactions Act (Subcontracting Act), which applies when the provision of goods or services is outsourced to a small- or medium-sized enterprise (SME) by a non-SME or a larger SME (in terms of turnover or assets).

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

Maximum RPM and minimum RPM are subject to different review standards. A minimum RPM is deemed unlawful as a general rule, unless it is justifiable due to reasons such as its promoting inter-brand competition and increasing consumer welfare. Maximum RPM is only unlawful if it has an anticompetitive effect (eg, if setting the maximum price is likely to lead to a cartel), and even if there is a potential anticompetitive effect, the maximum RPM may be justified if such anticompetitive effect is outweighed by efficiencies.

The other types of vertical arrangements are subject to the rule of reason.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

For exclusive dealing and restrictions on sales territory or counterparty, the company will not be subject to sanctions if it has less than 10 per cent market share (or if the market share is difficult to calculate, annual sales of less than 2 billion won).

There are no safe harbours for RPM or tying.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

A dominant market position is presumed if a company has a market share of 50 per cent or more, or has, combined with one or two other companies, a market share of 75 per cent or more, where each of the relevant companies has a market share of at least 10 per cent. Once the presumption is triggered, the burden shifts to the respondent to demonstrate that it does not possess market dominance.

Other factors that the KFTC will consider in determining dominance include: barriers to entry; the relative size and strength of competitors; the possibility of coordination between competitors; the existence of similar products or adjacent markets; ability to foreclose the market; and financial power.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

Companies with a dominant market position may not engage in: unfairly setting, maintaining or changing the product or service's price, unfairly controlling the sale of products or the rendering of services, unfairly interfering with the business activities of another company, or unfairly excluding competitors or harming consumers' interest.

The FTL's provisions on abuse of market dominance largely overlap with a separate set of prohibitions on unfair trade practices. The latter does not require a finding of market dominance, and the KFTC has traditionally relied on the unfair trade practices provision more frequently than the abuse of market dominance provision. In recent years, however, the KFTC has increasingly begun applying the abuse of market dominance provision (which carries a heavier sanction) in tandem with the unfair trade practice provision, most prominently in the IT sector where the proliferation of standard-essential patents is perceived as increasing the risk of abuse. For example, this year the KFTC imposed on Qualcomm a fine of 130 million won (the largest ever imposed by the KFTC in a single case), in connection with certain licensing practices that the KFTC alleged were in breach of the company's FRAND commitments.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

As discussed, a company with less than 10 per cent market share is not subject to the presumption of market dominance, and would generally not be subject to sanctions for an abuse of market dominance. Such a company may be potentially found to have engaged in an unfair trade practice, however.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

The following arrangements must be approved by the KFTC: acquisition of 20 per cent or more shares or equity interest with voting rights or acquisition of additional shares or equity interest in voting right to become the largest shareholder, interlocking directorships, mergers, acquisition of all of important part of business or business assets, and establishment of a newly incorporated joint venture.

The transaction must meet the following 'size-of-the-parties' test in order for the filing obligation to be triggered: one party (including affiliates that will continue to be affiliates after the transaction) has assets or turnover equal to or greater than 300 billion won, and the other party (including affiliates that continue to be affiliates after the transaction) has assets or turnover equal to or greater than 30 billion won. In addition, for an overseas transaction where both parties are foreign companies, both parties (including their respective affiliates that will continue to be affiliates after the transaction) must have a Korean turnover of equal to or greater than 30 billion won.

Assuming the above thresholds are met, pre-closing clearance is required in most cases if either of the parties (including affiliates that will remain as such after the transaction) has global assets or annual turnover of equal to or greater than 2 trillion won.

The party with the obligation to file is the acquirer, in the case of an acquisition of shares or equity interest with voting rights or an acquisition of business or business assets. For mergers, the surviving company or the company being newly established by the merger has the filing obligation. For interlocking directorships, the company appointing its employee, officer or director in an unaffiliated company is responsible

Update and trends

In March 2018, the KFTC launched the Special Committee to Improve Fair Trade Laws and Systems (the Special Committee) to review the FTL and attendant regulations and recommend improvements. The study was occasioned by a perception that the current FTL inadequately reflects changed economic and market conditions (the statute was first enacted in 1980) and that the dozens of piecemeal amendments of the statute over the years have resulted in internal incongruities.

The Special Committee has 23 members, most of whom are independent experts, and consists of the following three subcommittees:

The Special Committee is scheduled to complete its review by July 2018 and the KFTC will take its findings and recommendations into account in preparing a government bill to amend the FTL.

	Competition subcommittee	Conglomerate subcommittee	Procedural subcommittee
Review area	• Abuse of dominance regulations • Unfair trade practice regulations • Leniency system and pre-approval for concerted action • Penal provisions and exclusive criminal referral system • Effectiveness of market structure investigation and system for reforming anticompetitive regulations • Modernisation of competition laws to meet challenges of fourth industrial regulation.	• Conglomerate designation regulations • Holding company regulations • Regulations on investment (eg, on circular investment) • Public disclosure requirements • Regulations on fraud and unfair support of affiliates.	• Codification of procedural rules and protecting due process rights • Increasing speed/efficiency of investigations • Increasing use and effectiveness of consent resolution • Increasing KFTC's structural independence • Systemic reforms to increase confidence in KFTC enforcement practice.
[All subcommittees] Structural changes to laws and regulations			

for the merger filing. For joint ventures (JVs), the largest shareholder subscribing to the shares of the JV is responsible for the merger filing.

26 How long does it normally take to obtain approval?

The statutory processing period for a filing is 30 calendar days, but such 30-day period may be extended by an additional 90 days at the sole discretion of the KFTC. Also, the review period will be automatically tolled upon the KFTC's issuing a request for additional information, until the requested information is submitted to the KFTC. In the case of a simplified review, the KFTC normally completes its review within 15 calendar days.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

Clearance by the KFTC does not automatically mean that all terms in the submitted documents have been cleared. To the extent any restrictive provisions are later brought to the KFTC's attention, the KFTC can revisit the matter without being bound by its clearance decision.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

The maximum administrative fine for failure to file is 100 million won. When the KFTC becomes aware of non-compliance of the merger filing requirements, it would require the relevant transaction to be notified and impose an administrative fine for a late filing when the filing is submitted. In determining the administrative fine, the actual amount in each case is determined by a number of factors, including the number of days delayed and the size of the party that had the obligation to file.

The KFTC no longer publishes individual penalty amounts for failure to file since 2009; however, based on the most recent available statistics up to early 2009, the largest fine amount imposed for failure to file is 30 million won. For 2017, there were 668 transactions filed, and 28 cases of failure to file.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

There is no set rule regarding the types of situations where separate legal representation is required. Generally, separate legal representation is advisable where the company's interests diverge from that of its officers and employees – for example, if an employee is alleging that they engaged in improper conduct in accordance with management instructions but the company believes that the act was performed at the working level without authorisation.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The KFTC may conduct a dawn raid with respect to any suspected violation of the FTL. Dawn raids are a frequently used method of investigation by the KFTC. The KFTC's Rules on KFTC Investigation Procedures set forth certain procedural requirements, such as to: confine investigation to minimum scope necessary; present a written mandate for the dawn raid; only search premises stipulated in the written mandate; refrain from overbearing or humiliating words or conduct; review and copy documents only with cooperation from or at the presence of the relevant company employee, provided that seizing an electronic medium for imaging purposes is permitted in certain circumstances; allow legal counsel to be present during the entire investigation process; and provide the company with a written report regarding the investigation results.

31 What are the company's rights and obligations during a dawn raid?

Unlike the prosecutors' dawn raids based on a court-issued warrant, the KFTC's investigations, including dawn raids, are based on voluntary cooperation of those subject to the investigations. In practice, however, due to the penalties that can be imposed on the companies for failure to comply with the KFTC's requests, the companies tend not to rely on the voluntary nature of the cooperation in handling the KFTC's dawn raids.

In the dawn raid context, criminal sanctions (imprisonment of up to two years or criminal fine of up to 150 million won) can be imposed for hiding, destroying, modifying or denying access to documents. In addition, companies that fail to comply with the KFTC's document production order may be subject to not only an 'enforcement levy' (a charge to induce compliance) of up to 0.3 per cent of the company's average daily revenue, for each day of delay, but also criminal sanctions (imprisonment of up to two years or criminal fine of up to 150 million won).

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

The FTL provides for a process whereby companies under investigation by the KFTC may settle or resolve the investigation through a 'consent

resolution.' Under this procedure, which does not apply to cartel investigations, the applicant agrees to certain enumerated conditions in order to voluntarily resolve the matter, and the consent resolution will not be treated as an admission of violation. The KFTC has discretion to decide whether to accept or reject an application for a consent resolution. Since the consent resolution system was introduced in 2012, there have only been a handful of cases where a consent resolution was applied for and approved.

The application for the consent resolution must be filed with the KFTC before the last hearing for the matter. The KFTC must decide whether to commence the consent resolution process within 14 days of receiving the application. If it decides to proceed with this procedure, the consent resolution will be prepared and finalised based on discussion among and input from the company, the KFTC, other interested parties and government agencies and the prosecutors.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

The fact of whether companies have an existing CP or are implementing or amending a CP is not indicated as a factor considered during the consent resolution process. The consent resolution system is fairly new and there has been insufficient opportunity to observe what weight the authorities would place on the implementation or amending of a CP in connection with consent resolution discussions.

34 Are corporate monitorships used in your jurisdiction?

There is no corporate monitorship system in Korea. In cases of remedies issued by the KFTC, for the purpose of monitoring the compliance, the KFTC often requires the companies subject to remedies to make periodic compliance reports to the KFTC over a certain period.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

No statement of facts submitted to the KFTC during the consent resolution process would be automatically admissible as evidence in private damages actions that may follow. That said, it would be possible for the plaintiff in such private damages action may gather publicly available information and materials on the consent resolution and submit them to the court, at which point the court would need to determine the admissibility of those materials. In addition, the court could potentially order the production of such materials if deemed essential for the action, although there has been no precedent on this point due to the short history of the consent resolution system in Korea.

Further on publication of information during the consent resolution process, a proposed draft of consent resolution is made available to the public for interest parties' comments, either by publishing the draft in the government's Official Gazette or by posting it in the KFTC's website. Further, once the consent resolution is finalised, it is published on the KFTC's website. Before the public disclosure described above, the companies involved are allowed to request for confidential treatment of sensitive information in the public documents.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Although the KFTC examiners cannot by law compel employees to answer questions or to submit documents or other materials, under the FTL, any unjustified refusal to cooperate with such requests may subject the company and its employees to imprisonment of up to two years or a criminal fine of up to 150 million won (see question 31).

Attorney–client privilege is not recognised in the context of agency investigations, and thus even communications with legal counsel may be seized if they are present onsite at the client's company.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

KFTC officials are under obligation to keep the information of companies that they have received during the course of their official duty confidential and not to use such information for purposes other than enforcement of the FTL, and KFTC investigations are generally kept confidential while the investigation is in progress. In some cases where the KFTC deems appropriate, however, it may issue a press release that includes certain details of the case investigated.

The general rule is that the KFTC's deliberations and final decision must be disclosed to the public (the written decision the KFTC issues at the conclusion of the investigation is made public through its website), but the KFTC may opt to make these confidential if necessary to protect the trade secrets of the relevant company or trade association. The KFTC's practice has been to issue written decisions only when a violation of the FTL is found, but under the recent amendment of the FTL mentioned above, the KFTC will be required by law to publish written decisions even in cases where the KFTC does not find a violation.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

See question 36.

39 Is there a duty to notify the regulator of competition infringements?

There is no duty to proactively notify the regulators of competition infringements.

40 What are the limitation periods for competition infringements?

The limitation period is seven years from the date the violation ended. If the KFTC commences its investigation before the expiration of the seven-year period, the limitation period is the longer of seven years from the date the violation ended and five years from the date of the commencement of the investigation.

KIM & CHANG

Gene-Oh (Gene) Kim **gokim@kimchang.com**
Luke Shin **lyshin@kimchang.com**

39, Sajik-ro 8-gil
Jongno-gu
Seoul 03170
Korea

Tel: +82 2 3703 1114
Fax: +82 2 737 9091/9092
www.kimchang.com

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

The FTL regulates exploitative as well as exclusionary behaviour. In this vein, it prohibits such conduct as discriminatory treatment and coercing the counterparty to accept unfair transactional conditions as an unfair trade practice. The improper solicitation of customers is also prohibited.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

On 29 December 2017, the National Assembly approved a bill to amend the Distributor Act, the Franchise Act and the Subcontracting Act. The amendments, which will go into effect on 17 July 2018, reflect the current administration's focus on eradicating abusive and exploitative conduct by parties with greater economic power. The key changes are as follows:

- Distributor Act:
  - adopts rewards system for reporting violations.
- Franchise Act:
  - prohibits franchisors from unilaterally changing the franchisee's business area;
  - prohibits franchisors from taking retaliatory action and makes treble damages available for retaliation;
  - adopts a rewards system for reporting violations;
- Subcontracting Act:
  - expands scope of protected technical data;
  - expands bases for demanding adjustment of fees;
  - expands types of conduct protected from retaliation and makes treble damages available for retaliation.

The new rewards systems and the prohibitions on and treble damages for retaliatory action are expected to lead to an increase in whistle-blowing regarding violations.

Malaysia

Sharon Tan and Nadarashnaraj Sargunaraj
Zaid Ibrahim & Co

General

1 What is the general attitude of business and the authorities to competition compliance?

The Malaysian Competition Act 2010 (Competition Act) is enforced by the Malaysia Competition Commission (MyCC) and introduces competition law for all markets in Malaysia except for certain sectors that remain subject to sector regulation.

The MyCC has had an impressive track record since the Competition Act took effect. Although it remains a young agency, it has nevertheless demonstrated its willingness to pursue difficult theories of harm and to conduct complex economic analyses and gradually establishing itself as an active enforcement agency in the region.

The MyCC's enforcement activities have focused on cartel conduct, particularly price-fixing in the context of trade associations. It is increasingly taking a stricter stance with a view to strengthening the deterrent effect of fines. In its most significant case to date, in February 2017 the MyCC proposed a decision against the General Insurance Association of Malaysia and 22 general insurers for alleged fixing of parts trade discounts and labour rates for workshops. The MyCC proposed a total penalty of approximately 213 million ringgit – its highest ever proposed fine.

Owing to the increased enforcement, awareness of competition law has likewise increased and it is becoming common for businesses to have compliance programmes in place. Businesses that do not have any compliance initiatives risk infringing the Competition Act and may be exposed to heavy fines based on their turnover over the entire period of infringement.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

The MyCC's Competition Act 2010 Compliance Guideline (Compliance Guideline) is a useful a reference for guidance on what a competition compliance programme may contain. However, the Compliance Guideline specifically states it is not intended to be a definitive or exhaustive guide. Businesses should obtain independent legal advice on compliance with the Competition Act.

The MyCC states in the Compliance Guideline that a compliance programme involves a review of all existing arrangements and practices and the implementation of an ongoing compliance programme specifically tailored to the needs of the business.

The Compliance Guideline has a checklist that summarises the Compliance Guideline into a 'to do' checklist with recommended reviews and actions to be taken. This checklist is not only useful to develop a competition law compliance programme but also for periodic audits and reviews to ensure that the compliance programme is robust.

The Compliance Guideline is available at MyCC's website at: www.mycc.gov.my/sites/default/files/handbook/Compliance_Guidelines_MyCC.pdf.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on company size and the sector of the economy it operates in?

The MyCC explains in the Compliance Guidelines that compliance programmes differ from business to business and from industry to industry, depending on the competition law risks. The risk exposure may be greater in highly concentrated industries, for larger businesses with strong (or potentially dominant) positions or those businesses that are in regular contact with competitors.

There is no one-size-fits-all compliance programme. Each business must assess its own competition law risks and determine what is required to ensure compliance. In particular, businesses must review their current contractual and non-contractual arrangements and business practices to determine whether there are competition law concerns.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

Yes. The MyCC has issued guidelines on financial penalties. In determining the amount of financial penalty to impose, the MyCC has indicated that it will take into account aggravating factors and mitigating factors. Mitigating factors include the existence of a compliance programme that is appropriate having regard to the nature and size of the business of the enterprise.

Implementing a competition compliance programme

5 How does a company demonstrate its commitment to competition compliance?

It is imperative for businesses to obtain commitment to compliance from senior management. Management must understand the risks and buy into the need for compliance. To demonstrate a top-down approach to compliance, senior management should consistently emphasise its importance and implement sufficient compliance protocols to identify, assess, and manage risks, and to ensure that the compliance culture is communicated effectively to every level of the business.

6 What are the key features of a compliance programme regarding risk identification?

The MyCC's Compliance Guideline states that for a business to identify competition law risks, all of the business agreements and conduct must be reviewed, including current contractual and non-contractual arrangements and business practices. Particular attention should be given to the following:

- Hardcore cartels: price fixing, market sharing, limiting production and bid rigging.
- Agreements with competitors: agreements such as information exchange agreements or joint purchasing or selling may have the effect of preventing, restricting or distorting competition.
- Agreements with non-competitors: agreements with non-competitors such as suppliers or distributors may be anticompetitive if they contain anticompetitive restrictions, such as resale price maintenance or exclusivity provisions.
- Risks if business is dominant: if the business has a large share of any market it operates in, it may be dominant. Being dominant is not against the Competition Act. However, the business would need to be cautious with any conduct that might amount to an abuse of this dominance.

7 What are the key features of a compliance programme regarding risk-assessment?

Once the business has identified its competition law risks, it will need to assess the seriousness of the risk. Risks can be categorised based on

qualitative terms, for example, high to low risks. High-risk areas must be prioritised for immediate compliance measures. For businesses with various business streams, risk assessment may involve categorising each business stream based on revenue. Considering that the financial penalty under the Competition Act is calculated based on revenue, business streams with bigger revenue would require more effort from a compliance perspective.

If the business has strong market power, there would be greater risk exposure on its' conduct and practices in the market.

8 What are the key features of a compliance programme regarding risk-mitigation?

Risk mitigation to address competition law risks exposure may include:

- competition law compliance manual and checklists;
- competition law training for management and employees;
- obtaining legal advice on competition law issues affecting the business;
- appointment of a competition law compliance committee or person (or champion) in charge of competition law compliance;
- regular reports should be prepared for the board or senior management explaining how competition law compliance is being managed within the organisation; and
- carrying out regular audits to check compliance and identify any new risks.

9 What are the key features of a compliance programme regarding review?

Regular reviews must be carried out to ensure that the compliance programme is effective and is continually enhanced to take into account changes to the regulations and business practices of the organisation.

Apart from internal audit, the business may also consider appointing independent experts to audit internal competition law compliance processes and protocols.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

Anticompetitive agreements are prohibited under chapter one of the Competition Act (Chapter One Prohibition). Section 4(1) of the Competition Act provides a horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

The Chapter One Prohibition is to a large extent similar to article 101 of the Treaty on the Functioning of the European Union. Section 4(2) of the Competition Act deems certain agreements between competing enterprises as having the object of significantly restricting competition. This means that the MyCC need not examine the anticompetitive effect of horizontal agreements that:

- fix a purchase or selling price or any other trading conditions;
- share markets or sources of supply;
- limit or control production, market outlets or market access, technical or technological development or investment; or
- constitute bid rigging.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The scope and nature of the agreement should not have any elements prohibited under section 4(2) of the Competition Act (see question 10) and businesses should obtain legal advice before entering into any form of agreement with a competitor.

In addition, businesses should have in place practical precautions, for example, rolling out a competition law compliance programme (with clear dos and don'ts) and providing adequate training and guidance for business teams that frequently interact with competitors.

12 What form must behaviour take to constitute a cartel?

The term 'agreement' is deliberately defined in a broad manner and includes any form of contract (written and oral), arrangement or understanding between enterprises, whether legally enforceable or not, and includes a decision by an association (such as trade and industry associations) and concerted practice.

The concept of 'concerted practice' is adopted from European case law and has been defined to mean any form of coordination between enterprises that knowingly substitutes practical cooperation between them for the risks of competition. This usually involves some form of informal cooperation or collusion where parties enter into an informal arrangement or understanding, and would include situations where enterprises mirror or follow the price that is set by another competitor without being unilateral and independent.

Since the Competition Act came into force, the MyCC has targeted cartel practices, mainly by trade associations such as the Cameron Highlands Floriculturists Association, Pan-Malaysia Lorry Owners Association, Sibu Confectionery and Bakery Association, as well as the ice manufacturers that were found to have fixed selling prices. There has been one market-sharing case, namely the *MAS-AirAsia* case, which involved a collaboration agreement entered into by Malaysia Airlines and AirAsia, which the MyCC found to have the object of market sharing resulting in the withdrawal of some routes on which both airlines competed.

13 Under what circumstances can cartels be exempted from sanctions?

Agreements are prohibited only if they significantly prevent, restrict or distort competition in any market for goods or services in Malaysia. The MyCC has interpreted the term 'significant' to mean that the agreements must have more than a trivial impact. The impact would be assessed in relation to the identified relevant market. When defining the relevant market, the MyCC will identify close substitutes for the product under investigation in the relevant product market as well as the geographic market.

As a starting point, the MyCC's Guidelines on Chapter 1 Prohibition provide that the MyCC will generally not consider agreements between competitors in the same market whose combined market shares do not exceed 20 per cent of the relevant market to have a 'significant' effect on competition, provided that such agreements are not hardcore cartels. Under certain circumstances, an agreement between competitors below the threshold may nonetheless have a significant anticompetitive effect and the MyCC reserves the ability to take enforcement action against the parties to such agreement.

When assessing whether an agreement has the object of restricting competition, the MyCC will not only examine the actual common intention of the parties but will assess the aims of the agreement taking into consideration the surrounding economic context. If the object of any agreement is highly likely to have a significant anticompetitive effect, then the MyCC may find the agreement to have an anticompetitive object. Once an anticompetitive object is shown, the MyCC does not need to examine the anticompetitive effect of the agreement. However, if the anticompetitive object is not found, the agreement may still infringe the Competition Act if there is an anticompetitive effect.

Horizontal agreements that raise competition issues can nevertheless be relieved from liability where the criteria in section 5 of the Competition Act are proven. In principle, no activity is precluded from the application of section 5, which allows parties to an agreement that restricts competition to defend the restriction based on pro-competitive grounds. However, in practice, it is unlikely for hardcore cartels to be able to satisfy the relief of liability criteria under section 5.

Section 5 provides that anticompetitive agreements may be relieved from liability where all of the following criteria are proven by the parties:

- there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- the benefits could not reasonably have been provided without the agreement having the anticompetitive effect;
- the detriment to competition is proportionate to the benefits provided; and
- the agreement does not eliminate competition in respect of a substantial part of the goods or services.

All four criteria must be met and the parties claiming this relief have the onus of proving that the benefits gained are passed on to the consumers.

14 Can the company exchange information with its competitors?

There is no express provision on 'information exchange' in the Competition Act. Information exchanges are assessed under section 4 in relation to anticompetitive agreements between enterprises (Chapter One Prohibition). The MyCC is likely to follow European cases on exchange of commercially sensitive information, including cases on the hub-and-spoke cartel where the parties to a cartel use a third party (for example, in a vertical agreement) as a conduit for exchanging such information.

The MyCC's Guidelines on Chapter One Prohibition state that sharing of price information could fall within the conduct deemed to have the object of 'significantly preventing, restricting or distorting competition in the market' as stated in section 4(2). Whether non-price information-sharing significantly reduces competition needs to be assessed on a case-by-case basis. In general, the frequent exchange of confidential information in a market with few competitors is more likely to have a significant effect on competition. In addition, the exchange of information between competitors that is not provided to consumers is also likely to have a significant adverse effect on competition.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

The Competition Act empowers the MyCC to establish a leniency regime that provides for a reduction of up to a maximum of 100 per cent of any penalties, which would otherwise have been imposed (ie, full immunity). The leniency regime is only applicable for the admission of an infringement of a prohibition under section 4(2). See question 10. The leniency regime does not apply to cases of abuse of dominance.

Leniency granted would not protect the successful applicant from other legal consequences, such as private actions by aggrieved persons who have suffered loss or damage directly caused by an infringement.

The leniency regime is thus only available in cases where the enterprise has:

- admitted its involvement in an infringement of a prohibition under section 4(2); and
- provided information or other form of cooperation to the MyCC which significantly assisted, or is likely to significantly assist, in the identification or investigation of any finding of the infringement against any other enterprises.

16 Can the company apply for leniency for itself and its individual officers and employees?

No, as there is no liability for infringement of the Chapter One Prohibition on individual officers and employees. Nor are there criminal sanctions on individuals involved in anticompetitive practices. Note, however, that individuals can have personal liability for offences under the Competition Act (for example, obstructing investigations).

17 Can the company reserve a place in line before a formal leniency application is ready?

The leniency regime permits different percentages of reductions to be made available to an enterprise. This would depend on whether the enterprise was the first to bring the suspected infringement to the attention of the MyCC, as well as on the stage in the investigation at which it admits its involvement in the infringement. Given the illicit nature of cartels, the leniency regime is designed to encourage cartelists to race to be the 'first in' to supply as much information as possible in order to expedite the MyCC's investigation.

An infringing enterprise that is second in line may still benefit from the leniency regime. However, the percentage of reduction would largely depend on the stage in the investigation at which it admits its involvement in the infringement and the value of the incremental information or other cooperation it is able to provide. Such percentage of reduction is expected to be commensurate with the additional information and assistance such enterprise is able to provide to the MyCC.

The MyCC's Guidelines on Leniency Regime provide guidance on the reduction of financial penalties, the procedure for making a leniency application and the grant of leniency. In relation to the methods of contacting the MyCC for leniency matters, the Guidelines state that the MyCC has appointed an official to serve as the leniency officer to facilitate the handling of inquiries about the availability of leniency. Any person or enterprise wishing to apply for leniency should call the leniency hotline telephone number on the MyCC's website. No other person at the MyCC should be contacted unless the MyCC directs otherwise.

If, upon request, the leniency officer advises that leniency is available in respect of a situation, the potential applicant may ask for a marker in order to preserve its priority in receiving leniency while an application is being prepared. A marker is valid for 30 days from the date on which it is granted. If the recipient of a marker fails to complete its applications by the end of the specified period, the enterprise will lose its priority position.

18 If the company blows the whistle on other cartels, can it get any benefit?

The Guidelines on Leniency Regime provide that the leniency regime may be available in the case of any enterprise that has provided information or other forms of cooperation to the MyCC that has significantly assisted or is likely to assist in the identification or investigation of any finding of an infringement of any prohibition by any other enterprises. Further, the Guidelines provide that an applicant may provide information relating to a different cartel.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

In examining restrictions in vertical agreements, the MyCC broadly divides these into price restrictions and non-price restrictions.

Generally, the MyCC will take a strong stance against vertical price restraints, in particular, resale price maintenance and minimum price restraints, which it considers anticompetitive by object. Other forms of resale price maintenance, including maximum pricing and recommended retail pricing, that serve as a focal point for downstream collusion, will also be considered anticompetitive. The concern is that the downstream resellers or retailers do not compete on price. The prohibition on price restraints is likely to include any restriction on components of pricing (for example, margins, bonuses, rebates and discounts), even though these are not explicitly mentioned in the context of vertical price restraints.

Non-price restraints, such as exclusivity and single branding restrictions, are not considered anticompetitive by object and the MyCC will assess the effects on competition. Competition issues may arise if there is foreclosure or no effective competition from other brands (ie, inter-brand competition).

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

The Chapter One Prohibition states that a horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

The term 'object' is not defined in the Competition Act. According to the MyCC's Guidelines on Chapter One Prohibition, the MyCC in general will not just examine the actual common intentions of the parties to an agreement, but also assess the aims pursued by the agreement in the light of the agreement's economic context. If the object of an agreement is highly likely to have a significant anticompetitive effect, then the MyCC may find the agreement to have an anticompetitive object.

If an anticompetitive object is shown, then the MyCC does not need to examine the anticompetitive effect of the agreement, and thus can make a finding of infringement even before the anticompetitive effect manifests. However, if an anticompetitive object is not found, the agreement may still breach the Competition Act if there is an anticompetitive effect.

In determining whether the impact of an agreement on the market is likely to be significant, the MyCC has indicated in its Guidelines on Chapter One Prohibition that:

- for anticompetitive agreements between competitors, a combined market share of less than 20 per cent is unlikely to significantly affect competition; and

- for anticompetitive agreements between non-competitors, if the buyer and seller individually has less than 25 per cent market share, this is unlikely to significantly affect competition in the market.

While the Guidelines explicitly indicate safe harbours for non-price restraints for enterprises that are below 25 per cent of their relevant market, this is not similarly provided for in the section of the Guidelines relating to price restraints. In the Guidelines, the MyCC has also emphasised that it will take a strong stance against minimum resale price maintenance and find it anticompetitive, and as such the safe harbour may not apply to price restraints.

No vertical agreements are per se unlawful. Any agreement that is prohibited under section 4 may be relieved of liability if the parties to the agreement can show that there are pro-competitive benefits brought about by the restrictions that outweigh the detriments (see question 21).

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Where an agreement infringes section 4, the parties may justify their conduct by proving the pro-competitive benefits in section 5.

No vertical agreements are per se unlawful. Any agreement that is prohibited under section 4 may be relieved of liability if the parties to the agreement can show that there are pro-competitive benefits brought about by the restrictions that outweigh the detriments. The parties claiming relief must prove that:

- there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
- the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
- the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
- the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

Parties must also prove that these benefits are passed on to consumers.

How to behave as a market dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

Dominance is defined as a situation in which one or more enterprises possess such significant power in a market as to be able to adjust prices or outputs or trading terms without effective constraint from competitors or potential competitors. The MyCC considers that the ability of an enterprise to price well above the competitive level for a sustained period or the ability to actually drive an equally efficient competitor out of business as evidence that the enterprise is dominant.

Other factors such as barriers to entry and countervailing buyer power may also be used in the assessment of dominance. Further information is set out in the MyCC's Guidelines on Dominance (Guidelines on Chapter Two Prohibition).

Section 10(4) of the Competition Act specifically provides that market share alone is not determinative of a dominant position. Nonetheless, according to the Guidelines on Chapter Two Prohibition, the MyCC will generally consider a market share that exceeds 60 per cent of the relevant market to be indicative of dominance. However, given the text of section 10(4), there may well be findings of dominance below this threshold. The Guidelines on Chapter Two Prohibition indicate, for example, that a new product with patented features may be considered dominant even though its market share is only 20 to 30 per cent of the market, but rapidly growing as consumers switch to this product.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

The concept of abuse is not specifically defined in the Competition Act. However, section 10(2) of the Competition Act provides a non-exhaustive list of conduct that may constitute abuse of a dominant position:

- directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- limiting or controlling production, market outlets or market access, technical or technological development or investment, to the prejudice of consumers;
- refusing to supply to a particular enterprise or group or category of enterprises;
- discriminating by applying different conditions to equivalent transactions with other trading parties;
- forcing conditions in a contract that have no connection with the subject matter;
- predatory behaviour towards competitors; and
- buying up a scarce supply of resources where there is no reasonable commercial justification.

The prohibition on abuse of dominance covers both exploitative practices (for example, unfair prices or trading terms) and exclusionary conduct (for example, predatory conduct, refusal to supply or exclusive dealing).

According to the Guidelines on Chapter Two Prohibition, the MyCC is only concerned with exploitative or excessive pricing if there is unlikely to be competition in the market to constrain the dominant enterprise. Exclusionary conduct is conduct that prevents equally efficient competitors from competing and will be assessed in terms of its effects on the competitive process and not its effects on competitors. So, even if an enterprise is dominant it should not be stopped from engaging in competitive conduct that benefits consumers even if inefficient competitors are harmed.

The MyCC will use an effects-based approach as used elsewhere in assessing a potential abuse of a dominant position. By adopting this approach, the MyCC will ensure that conduct that benefits consumers will not be prohibited and therefore ensure that enterprises have the incentives to compete on merits.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

In contrast to the prohibition on anti-competitive agreements (similar to article 101 of the Treaty on the Functioning of the European Union), the prohibition on abuse of dominance does not allow a defence based on efficiency gains. There is also no power to grant an exemption from abuse of dominance.

However, similar to the position in the EU, a dominant enterprise can protect its own commercial interest in the face of competition from existing competitors and new entrants. Section 10(3) of the Competition Act allows a dominant enterprise to take any step that has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor. For example, a dominant enterprise may meet a competitor's price even though the price may be below cost (in the short term).

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

There is no merger control regime under the Competition Act. The Malaysian Aviation Commission Act 2015 (Malaysian Aviation Commission Act) is the first legislation in Malaysia to introduce a voluntary merger control regime in addition to prohibiting anticompetitive agreements and abuse of dominance in the Malaysian aviation services market. Subject to certain exemptions and exclusions, the Malaysian Aviation Commission Act prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition in any aviation service market in Malaysia or any part of Malaysia.

Merger parties may notify their anticipated mergers to the Malaysian Aviation Commission (MAVCOM) or to apply for a decision as to whether the anticipated merger will infringe the prohibition against anticompetitive mergers.

The Guidelines on Notification and Application Procedures state that merger situations should be notified if the merger parties anticipate that the merger may have the effect of substantially lessening competition within any Malaysian aviation service market. MAVCOM is more likely to investigate a merger situation if:

- the combined turnover of the merger parties in Malaysia in the financial year preceding the transaction is at least 50 million ringgit; or
- the combined worldwide turnover of the merger parties in the financial year preceding the transaction is at least 500 million ringgit .

In any case, MAVCOM has the power to investigate an anticipated merger or a merger where there is reason to suspect that it has resulted, or may be expected to result, in a substantial lessening of competition in any aviation service market even where the above turnover thresholds are not met.

26 How long does it normally take to obtain approval?

MAVCOM's Guidelines state that the duration for the assessment of an application will be determined on a case-by-case basis depending on factors such as the complexity of the issues and the timeliness and the completeness of the information provided by the enterprises.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

Any decision from MAVCOM that the merger is not anticompetitive under the Malaysian Aviation Commission Act cannot be read as approval of all the terms of the agreement between the parties.

In addition, a non-infringement decision with regard to an anticipated merger may be limited to a period specified by MAVCOM. In such situation, a non-infringement decision for an anticipated merger would only be valid for a specified period and if the merger parties decide to proceed with the anticipated merger, it must be carried out within the specified period.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

An anticipated merger or merger that was not notified to MAVCOM that raises competition law concerns under the Malaysian Aviation Commission Act may pose an infringement risk to the merger parties. Upon a determination by MAVCOM that an anticipated merger or merger infringes the prohibition against anticompetitive mergers, MAVCOM may require the merger to be dissolved or modified, and impose financial penalties on the merger parties.

The Guidelines state that MAVCOM may refuse to accept an application if it is:

- incomplete;
- not accompanied by the relevant supporting documents;
- not made in the form determined by MAVCOM; or
- not made in accordance with any provision of the Malaysian Aviation Commission Act, any applicable regulations, guidelines or application requirements determined by MAVCOM.

MAVCOM may also consider an application to be incomplete until the payment of any applicable fee as prescribed by the relevant regulations is made.

Investigation and settlement

29 Under which circumstances would the company and officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

The Competition Act does not provide for mandatory separate legal representation for certain types of investigations.

It must be noted that by virtue of the definition of an 'enterprise' under the Competition Act, competition law infringements can only be pursued against business entities and not individuals. However, where an officer or employee is being simultaneously investigated for a separate offence, for example, bribery, it is advisable that such person be represented separately.

Update and trends

In April 2017, Datuk Che Mohamad Zulkifly Jusoh was appointed as the new Chairman of the MyCC replacing Tan Sri Dato' Seri Siti Norma Yaakob. It remains to be seen whether this change in leadership will result in increased enforcement action by the MyCC.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

A dawn raid may be launched for any alleged infringement under the Competition Act. However, dawn raids are not frequently resorted to by the MyCC.

The MyCC may search premises with a warrant issued by a magistrate, where there is reasonable cause to believe that any premises have been used for infringing the Competition Act or there is relevant evidence of it on such premises. The warrant may authorise the MyCC officer named in the warrant to enter the premises at any time by day or night and by force if necessary. During such searches, the MyCC officers may seize any record, book, account, document, computerised data or other evidence of infringement.

The powers extend to the search of persons on the premises, and there is no distinction in the powers for business or residential premises. Where it is impractical to seize the evidence, the MyCC may seal the evidence to safeguard it. Attempts to break or tamper with the seal constitute an offence.

Where the MyCC officer has reasonable cause to believe that any delay in obtaining a warrant would adversely affect the investigation or the evidence will be damaged or destroyed, he or she may enter the premises and exercise the above powers without a warrant.

In addition to powers under the Competition Act, the MyCC investigating officers have the powers of a police officer as provided for under the Criminal Procedure Code.

31 What are the company's rights and obligations during a dawn raid?

It is a criminal offence to obstruct the MyCC's investigations that can be punished with imprisonment, monetary fines or both. It is also a criminal offence to destroy, falsify, or conceal documents to provide false or misleading information to the MyCC officers.

The Competition Act does not expressly set out any rights and obligations during a dawn raid. That said, since dawn raids are to be carried out in accordance with the provisions of the Criminal Procedure Code, the usual rights of a person subject to search and seizure under the Criminal Procedure Code would apply to dawn raids as well, including the safeguards on search of persons and rights of a person under arrest.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

The MyCC may accept an undertaking from an enterprise to do, or refrain from doing, anything the MyCC considers appropriate. Where the MyCC believes that it has a strong case, it is unlikely to accept an undertaking. Conversely where an undertaking enables the MyCC to bring about a quick and effective remedy without lengthy legal proceedings, this may be seen as a more effective use of the MyCC's resources, which can then be channelled into other infringement cases.

Where the MyCC accepts an undertaking, it shall close the investigation without any finding of infringement and it shall not impose a penalty on the enterprise. Any undertaking accepted by the MyCC will be made publicly available and can be enforced in the High Court. Offering a suitable undertaking is particularly useful to avoid a finding of infringement.

In a price-fixing case involving the Pan-Malaysia Lorry Owners Association, the MyCC did not propose financial penalties but instead issued proposed interim measures and accepted an undertaking from the association and related lorry enterprises that they would not engage in any future anticompetitive conduct such as price fixing, and would cease and desist from increasing the transportation charges of up to 15 per cent after the MyCC stated that this action constitutes price fixing.

In October 2015, the MyCC accepted undertakings from the Malaysia Heavy Construction Equipment Owner's Association

(MHCEOA), in relation to machinery leasing charges. The MHCEOA made an announcement that was reported in a Chinese daily newspaper that the costs for leasing of machinery will increase by 15 per cent. In addition, the constitution of the MHCEOA contained a clause that states that the MHCEOA will draw up guidelines for hiring fees and tender of contracts by members. The MyCC found that the announcement by the MHCEOA of its decision to increase the machinery rental charges may infringe Chapter One of the Competition Act. Further, the MyCC found that the drawing up of guidelines to set hiring fees may similarly infringe Chapter One of the Competition Act. The MyCC did not impose financial penalties but instead accepted undertakings from MHCEOA, which include to refrain from making similar press announcements and to remove the impugned clause from its constitution.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

The MyCC may take into account the implementation of a compliance programme as a mitigating factor in assessing the appropriate financial penalty (see question 4).

34 Are corporate monitorships used in your jurisdiction?

There is no provision for corporate monitorships under the Competition Act.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class-actions or representative claims?

There is no provision in the Competition Act for the automatic admissibility of such evidence. The test for whether evidence is admissible in court proceedings for private damages is 'relevance'. Relevancy of evidence is a question of fact and the general rule is that all relevant evidence is prima facie admissible.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Yes, the MyCC's investigation powers are subject to lawyer–client privilege and may, at the request of the person disclosing, be protected by confidentiality.

As anticompetitive conduct is not a criminal offence, there is no privilege against self-incrimination.

37 What confidentiality protection is afforded to the company and/or individual involved in competition investigations?

The Competition Act prohibits the disclosure or use of confidential information with respect to a particular enterprise or the affairs of an individual obtained by virtue of the Competition Act. 'Confidential information' is defined as trade, business or industrial information that belongs to any person, that has economic value and is not generally available to or known by others.

However, the MyCC is authorised to make disclosures to other competition authorities in conjunction with their investigations and where necessary for the performance of the MyCC's functions.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

The MyCC may, by written notice, require any person whom the MyCC believes to be acquainted with the facts and circumstances of the case to assist in investigations.

A person required to provide information has a responsibility to ensure that the information is true, accurate and complete, and such person must provide a declaration that he or she is not aware of any other information that would make the information untrue or misleading. In addition, the Competition Act prohibits any person from obstructing investigations including refusing any officer of the MyCC access to any premises that the officer is entitled to have or seeking to prevent the execution of any duty imposed or power under the Competition Act. Failure to comply with these provisions is punishable as a criminal offence with fines up to 5 million ringgit or imprisonment for a term up to five years or both.

39 Is there a duty to notify the regulator of competition infringements?

There is no statutory duty to notify the regulator of competition infringements. The MyCC, however, encourages complaints and has issued its Guidelines on Complaint Procedures to assist complainants. Complaints must be made in the prescribed form, providing information about the complainant, the parties complained of, a description of the alleged infringing activity and include other relevant information or supporting documents. Anonymous complaints are possible but discouraged, as the MyCC will not be able to seek clarification or further information from the complainant. A number of the MyCC investigations have been commenced following complaints.

40 What are the limitation periods for competition infringements?

The Competition Act does not stipulate any period of limitation for investigating anticompetitive agreements or abuse of dominance.

The limitation period for a private action for competition law infringements under the Competition Act is six years from the date the cause of action accrued. The limitation period is postponed if the:

- cause of action is based on the infringing enterprise's fraud;
- right of action is concealed by the infringing enterprise's fraud; and
- action is for relief from the consequences of a mistake.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

The Competition Act introduced general competition law for all markets in Malaysia except those carved out for sector regulators under the

ZaidIbrahim&co
a member of ZICO | law

Sharon Tan **sharon.suyin.tan@zicolaw.com**
Nadarashnaraj Sargunaraj **nadarashnaraj@zicolaw.com**

Level 19, Menara Milenium
Jalan Damanlela, Pusat Bandar Damansara
50490 Kuala Lumpur
Malaysia

Tel: +603 208 79999
Fax: +603 209 44888, 20944666
www.zicolaw.com

Communications and Multimedia Act 1998 in relation to the network communications and broadcasting sectors, the Energy Commission Act 2001 in relation to the energy sector and the Malaysian Aviation Commission Act 2015 in relation to the aviation services sector. Activities regulated under the Petroleum Development Act 1974 and the Petroleum Regulations 1974, in relation to upstream operations comprising the activities of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia, are also excluded from the application of the Competition Act.

In addition, the Postal Services Act 2012 introduced general competition law applicable to the postal market, which is also under the purview of the Malaysian Communications and Multimedia Commission. The Gas Supply (Amendment) Act 2016 also introduced general competition law provisions to the Gas Supply Act 1993, which is applicable to the Malaysian gas market. Following the amendment to the Gas Supply Act 1993, the Energy Commission has published Guidelines on Competition for the Malaysian Gas Market in relation to Market Definition, Anti-Competitive Agreements and Abuse of a Dominant Position.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

The MyCC has an impressive track record, where it has investigated and taken enforcement action against cases involving cartel conduct, anti-competitive vertical agreements and abuse of dominance.

Based on media reports, the MyCC has identified the pharmaceutical sector as a priority sector. In addition, the MyCC has indicated that it will focus on the logistics, transportation, financial, consumer services and various fast-moving consumer goods sectors.

Russia

Anna V Maximenko and Elena M Klutchareva
Debevoise & Plimpton LLP

General

1 What is the general attitude of business and the authorities to competition compliance?

Business and the authorities have a positive attitude to competition compliance.

Leading Russian companies, especially those that are market dominant, conduct antitrust audits of their business practices and implement antitrust compliance programmes.

The Russian competition authority – the Federal Antimonopoly Service (FAS) – encourages the compliance efforts of companies. It has developed a bill introducing antitrust compliance to Russian law (the Bill). If adopted, the Bill will officially acknowledge antitrust compliance programmes. Adoption of such a programme will be considered a mitigating circumstance and would decrease the fine for an antitrust violation. For certain companies (eg, state corporations, natural monopolies, legal entities with state participation exceeding 50 per cent) adoption of antitrust compliance policies will be mandatory.

FAS also mentioned at public conferences that effective antitrust compliance programmes would shift liability for antritrust violations from a company to an individual engaged in illegal conduct.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

Currently there is no government-approved standard for compliance programmes in Russia.

According to the Bill, antitrust compliance programmes will have to include:

- requirements to antitrust risks assessment;
- measures aimed at the mitigation of antitrust risks;
- control measures over functioning of antitrust compliance programme;
- procedures to familiarise employees with antitrust compliance policy; and
- information about the antitrust compliance officer.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on the company's size and the sector of the economy it operates in?

The Bill provides generally applicable compliance guidance for all companies regardless of their size and the sector of the economy in which they operate. However, the government approved special compliance guidelines for companies engaged in state military procurement in April 2017.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

If the company has a competition compliance programme in place it may claim that it is not guilty of an antitrust violation and should not be subject to administrative liability. This possibility is provided by article 2.1 of the Administrative Offences Code, which states that a legal entity is guilty of a violation if it had an opportunity to comply with the law but did not take all possible measures to do it. However, implementation and enforcement of a competition compliance programme has to be proven; the mere existence of a competition compliance programme may not be sufficient.

As mentioned in question 1, if the Bill is adopted, implementation of antitrust compliance programme, provided that it was done before the antitrust violation was committed and the antitrust violation was terminated before an antitrust case was commenced, will serve as a mitigating circumstance and will reduce the turnover fine imposed for an antitrust violation.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

Under the current practice, the company demonstrates its commitment to competition compliance by adopting an antitrust compliance policy, appointing an antitrust compliance officer and conducting antitrust compliance trainings for its employees. The company may also disclose its adoption of antitrust compliance programme and related policy on its website and show FAS.

6 What are the key features of a compliance programme regarding risk identification?

In the absence of statutory regulation, based on the current practice the key features of a compliance programme regarding risk identification are:

- identification of applicable antitrust laws (eg, antitrust laws of jurisdictions of incorporation and activity);
- analysis of the provisions of applicable antitrust laws;
- identification of the markets where the company operates and assessment of its market shares; and
- identification of the company's operations subject to antitrust risks and related risks.

7 What are the key features of a compliance programme regarding risk assessment?

In the absence of statutory regulation, based on current practice the key features of a compliance programme regarding risk assessment are:

- assessment of risks' probability based, in particular, on the level of antitrust regulatory focus on specific types of conduct or industries, market exposure to certain risks, interaction with competitors, etc;
- assessment of risks' impact, including reputational damages, administrative fines on the company and its officers, disqualification of officers and their criminal liability, claims for damages and invalidation of anticompetitive transactions, disruption of business activities, etc; and
- periodical reassessment of risks, in particular, in response to any changes in the company's business (eg, launch of new business lines).

8 What are the key features of a compliance programme regarding risk mitigation?

In the absence of statutory regulation, based on current practice the key features of a compliance programme regarding risk mitigation are:

- a description in the antitrust compliance policy of the main antitrust prohibitions and requirements applicable to the company's operations;

- the provision of guidelines for employees on antitrust-sensitive conduct;
- the appointment of an antitrust compliance officer;
- arranging for regular antitrust compliance trainings for employees; and
- an anonymous 24/7 hotline for urgent reporting of potential or actual violations of antitrust laws.

9 What are the key features of a compliance programme regarding review?

In the absence of statutory regulation, based on the current practice the key features of a compliance programme regarding review are:

- a review of effectiveness of compliance processes and controls by monitoring whether the individual behaviour of employees meets process requirements (eg, tracking attendance of antitrust compliance trainings), checking whether procedures required for proper functioning of compliance programme are established (eg, procedure for receipt of antitrust compliance officer approval for certain behaviour) and rendering audit reviews of compliance processes and controls;
- substantive assessment of antitrust compliance of business practices by selective 'deep dives' into certain lines of business, including document review and interviews with key employees, or by comprehensive audit of the company's compliance with antitrust laws; and
- an adjustment of the antitrust compliance programme on the basis of the review results.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

The company should avoid the following arrangements with competitors:

- Agreements that are prohibited per se, that is, cartels. According to Federal Law No. 135-FZ on Protection of Competition dated 26 July 2006 (the Competition Law) cartels are arrangements for price-fixing; price-fixing at tenders; market allocation by territory, sales or purchase volumes, assortment of sold goods or composition of sellers or purchasers of goods; reduction or termination of production; or refusal to deal with certain sellers or customers.
- Other agreements may be considered unlawful if they lead or may lead to restriction of competition. These agreements include, in particular, arrangements on imposition of contractual conditions unprofitable for a counterparty or not relating to the subject matter of the contract; price discrimination; creation of hurdles for entry to the market or exit from the market; or on determination of conditions for participation in professional and other associations.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The following precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor: pre-review of any arrangement with competitor by the person responsible for antitrust compliance (antitrust compliance officer); antitrust compliance training of the employees to be involved in the implementation of this arrangement; control over information exchange in such an arrangement; and prior clearance of an arrangement with FAS.

12 What form must behaviour take to constitute a cartel?

A cartel does not require written form of an agreement. Concerted actions are sufficient. Unsuccessful attempts to conclude a cartel do not constitute a violation under the Competition Law.

13 Under what circumstances can cartels be exempted from sanctions?

As a general rule, cartels cannot be deemed permissible under Russian law. The only exception is made for joint venture agreements. FAS clarified in August 2013 that joint venture agreements are defined as Russian or foreign law-governed agreements between commercial entities, including agreements that contemplate the creation of a new legal entity or the joint participation of the parties in an existing legal entity, as well as other agreements providing for joint activity by the parties and contemplating that the parties to such agreement will combine their resources to achieve the goals of the joint activity or will make joint investments for the purposes of achieving the goals of the joint activity and will jointly bear the risks associated with the joint activity, and that information on the joint activity or the creation of the joint venture is public knowledge.

Joint venture agreements may be deemed permissible if they collectively meet the following conditions:

- they do not provide an opportunity to certain entities to eliminate competition in the relevant market;
- they do not impose limitations on their participants or third parties that do not correspond to the purpose of the joint venture agreement;
- they result or may result in the enhancement of production and sale of goods or promotion of technical and economic progress or compatibility of Russian goods on the global market; and
- they provide or may provide benefits to buyers comparable to the benefits of the parties to such agreements.

A company may apply to FAS for prior clearance of its joint venture agreements, which may be deemed permissible under the Competition Law. Such agreements cleared by FAS cannot be qualified as cartels.

Joint venture agreements between competitors in respect of joint activity in Russia require mandatory prior antitrust clearance if the total balance sheet value of the assets of the parties to the agreement and their group companies exceeds seven billion roubles as of the last reporting date or the total worldwide revenue of the parties to the agreement and their group companies for the previous calendar year exceeds 10 billion roubles.

14 Can the company exchange information with its competitors?

Information exchange between competitors is not explicitly regulated or prohibited in general. It becomes prohibited if it influences an independent determination of individual commercial policies of competitors and thus leads to concerted anticompetitive actions.

The law does not provide for the list of competitively sensitive information. Customarily it can be information on:

- markets and customers allocation: territorial restrictions, allocation of customers, etc;
- pricing, including: price changes, discounts, rebates and costs; and
- production: production strategy and plans.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

A leniency programme is available for companies participating in cartels in Russia.

A company will be exempt from liability for cartel if it is the first to satisfy all of the following conditions:

- it voluntarily reported to FAS about the cartel;
- at the moment of such report FAS did not know about the cartel;
- the company stopped its participation in the cartel; and
- the documents and information submitted to FAS by the company are sufficient to prove the existence of the cartel.

A company will pay a minimal fine for participation in a cartel if it is the second or the third to satisfy all of the following conditions:

- it voluntarily reported to FAS about the cartel;
- it admitted its participation in the cartel;
- it stopped its participation in the cartel;
- the documents and information submitted to FAS by the company are sufficient to establish existence of the cartel; and
- the company did not arrange the cartel.

Leniency programmes for companies are applicable not only to cartels but to other unlawful agreements (see questions 10 and 19). Self-reporting about other antitrust violations (eg, abuse of dominance, unfair competition) may serve as a mitigating circumstance in determining a fine.

FAS is not required to keep the name of the applicant confidential.

16 Can the company apply for leniency for itself and its individual officers and employees?

A company can apply for leniency only for itself. However, its individual officers and employees may be exempted from criminal liability for a cartel if they were the first to:
- voluntarily report the crime;
- actively assist in its discovery or investigation; and
- compensate for damage caused by the crime.

There are no similar rules for exemption from imposition of administrative fines on or disqualification of officers or employees (if applicable).

17 Can the company reserve a place in line before a formal leniency application is ready?

A company cannot reserve a place in line before a formal leniency application is ready as in this case not all conditions for leniency would be satisfied (see question 15).

However, FAS mentioned at some conferences that it intended to develop respective mechanisms for leniency applications.

18 If the company blows the whistle on other cartels, can it get any benefit?

Generally, blowing the whistle on other cartels does not give any benefits.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

The following vertical arrangements between the company and its suppliers or customers are subject to competition enforcement:
- Vertical agreements prohibited per se: agreements that lead or may lead to resale price maintenance (except for maintenance of maximum resale price) and agreements under which a customer undertakes not to sell goods from the seller's competitor (this prohibition does not apply to agreements on sale of goods under a trademark of a seller or a manufacturer).
- Vertical agreements that may be considered unlawful if they lead or may lead to restriction of competition. These agreements include, in particular, arrangements on imposition of contractual conditions unprofitable for a counterparty or not relating to the subject matter of the agreement; price discrimination; creation of hurdles for entry to the market or exit from the market for other business entities; or on determination of conditions for participation in professional and other associations.

Agency agreement is not qualified as a vertical agreement.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

Agreements that lead or may lead to resale price maintenance (except for maintenance of maximum resale price) and agreements that a customer undertakes not to sell goods of the seller's competitor are considered per se illegal. Other vertical agreements follow the 'rule of reason' test and are unlawful if they lead or may lead to restriction of competition.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Vertical arrangements can be exempted from sanctions if:
- they are franchising agreements concluded in written form;
- the shares of each of its parties (except for financial entities) on the market of goods that are the subject matter of the vertical agreement do not exceed 20 per cent;
- permissibility conditions described in question 13 are met; or
- respective agreements are permissible subject to General Exemptions in respect of Agreements between Sellers and Customers approved by Governmental Decree No. 583 dated 16 July 2009. According to this document agreements are permissible if the seller sells goods to two or more customers and its market share is less than 35 per cent or sells goods to a single customer whose market share is less than 35 per cent; a seller and a customer do not compete with each other or compete on the market where a customer purchases goods for their further resale; and a customer does not produce substitutes to the goods being subject matter of the agreement.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The main factor that determines dominance is the market share of a business entity:
- a business entity with market share exceeding 50 per cent is considered dominant, unless FAS determines that the business entity is not dominant on the respective market, regardless of its market share; and
- a business entity with market share not exceeding 50 per cent is not considered dominant per se. To establish its dominance FAS needs to prove additional circumstances, eg, stability of its market share, its relation to market shares of its competitors, possibility for new competitors to enter the market.

If market share of a business entity does not exceed 35 per cent, as a general rule, it cannot be found dominant.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

Abuse of dominance is defined as acts (or omission) of a dominant entity that result or may result in prevention, elimination or restriction of competition or infringement of rights of other business entities in the sphere of their entrepreneurial activities or indefinite range of consumers.

The list of acts (or acts of omission) qualified as abuse of dominance is not exhaustive, but the Competition Law names certain violations considered as abuse of dominance per se. Such acts include, in particular:
- any fixing of monopoly high or monopoly low prices;
- any withdrawal of goods from circulation if it resulted in increase of prices for such goods;
- any imposition of contractual conditions unprofitable for a counterparty or not related to subject matter of an agreement;
- any economically or technologically unjustified reduction or termination of production of goods;
- any economically or technologically unjustified refusal to contract with certain customers;
- any economically, technologically or otherwise unjustified setting of different prices for the same goods;
- any fixing of unreasonably high or low prices for a financial service;
- discrimination;
- creating hurdles for access to the market or withdrawal from the market to other business entities;
- any breach of regulatory prescribed pricing rules; and
- any manipulation of prices on wholesale or retail markets of electricity energy (capacity).

The most recent high-profile abuse of dominance case is the case against Google considered and decided by FAS and courts in 2015-2016. Google was found to be dominant on the market of application stores for Android OS. It abused dominance by prohibiting manufacturers of Android OS smartphones from pre-installation of applications competing with applications from the Google Mobile Services (GMS) package. Google's abusive practices included coupling Google Play application stores with other applications of the GMS package, compulsory pre-installation of Google search as the default search, preferential placement of Google applications on the home page and prohibition of pre-installation of competing software on smartphones. As a result Google was fined 438,067,400 roubles and required to, inter alia, introduce the necessary amendments to its agreements with smartphone manufacturers.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Acts (or acts of omission) constituting an abuse of dominance may be deemed permissible if they meet the conditions described in question 13. However, this defence cannot be used for certain types of abuse of dominance, including price-fixing, withdrawal of goods from circulation, imposition of unprofitable contract terms on a counterparty, unjustified refusal to contract with certain counterparties, setting different prices for the same goods, price-fixing for financial services, and a breach of regulatory prescribed pricing.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

It is mandatory to obtain FAS approval before completion of the merger or acquisition if the following thresholds are met.

Acquisitions

Pre-closing consent shall be obtained in the following cases:

- acquisition by a person (or group of persons) of voting shares in a Russian joint-stock company where such person (or group of persons) acquires the right in respect of more than 25 per cent (or more than 50 per cent or more than 75 per cent) of the voting shares in the Russian joint-stock company;
- acquisition by a person (or group of persons) of participatory interests in a Russian limited liability company where such person (or group of persons) acquires the right in respect of more than one third (or more than half or more than two-thirds) of the participatory interests in the Russian limited liability company;
- acquisition by a person (or group of persons) of title to or right of possession in respect of fixed assets located in Russia (other than land plots, non-industrial premises, uncompleted construction) or intangible assets of a legal entity, if the value of such assets exceeds 20 per cent of the balance sheet value of the fixed assets and intangible assets of the transferring legal entity (for financial companies – if the value of assets exceeds 10 per cent of the balance sheet value of assets);
- acquisition by a person (or group of persons) under one or a set of transactions (eg, under a trust management agreement, agency agreement, cooperation agreement, etc) of the right to determine terms and conditions for carrying out business activities of a company registered in Russia, or the right to exercise its CEO's powers (among other things, as a managing company); or
- acquisition by a person (or group of persons) of more than 50 per cent of voting shares or participation interests in a company registered outside Russia or other rights to determine terms and conditions for carrying out its business activities or the right to exercise its CEO's powers (provided that such foreign entity supplied goods to the Russian territory in the amount exceeding one billion roubles within the year preceding the date of a notifiable transaction).

Provided that:

Non-financial entities

- the aggregate balance sheet value of the assets (worldwide) of the purchaser and its group of persons and the target company and its group of persons exceeds seven billion roubles as of the latest reporting (balance sheet) date or their aggregate revenue for the last calendar year exceeds 10 billion roubles; and
- the balance sheet value of the target company's and its group of persons' assets (worldwide) exceeds 400 million roubles as of the latest reporting (balance sheet) date.

In determining the amount of the aggregate balance sheet value of assets of the purchaser and its group of persons and the target and its group of persons, one should exclude the assets of the seller of shares of (participation interests in or rights in respect to) the target and its group of persons, if, as a result of the transaction, the seller and its group of persons forfeit the right to determine terms and conditions for carrying out business activities of the target.

Financial entities (depends on the type of licence obtained by the target)

- banks: balance sheet value of assets of the target bank exceeds 31 billion roubles;
- insurance companies (except for medical insurance companies): balance sheet value of assets of target insurance company exceeds 200 million roubles;
- insurance companies (medical insurance companies): balance sheet value of assets of target insurance company exceeds 100 million roubles;
- leasing companies: balance sheet value of assets of assets of target leasing company exceeds three billion roubles;
- non-state pension funds: balance sheet value of assets of target non-state pension fund exceeds two billion roubles;
- stock exchanges: balance sheet value of assets of target stock exchange exceeds one billion roubles;
- mutual insurance entities, credit consumer cooperatives: balance sheet value of assets of target mutual insurance entity, credit consumer cooperative exceeds 500 million roubles; or
- microfinance organisations: balance sheet value of assets of target microfinance organisation exceeds three billion roubles.

Establishment and merger of legal entities

Pre-closing consent shall be obtained in the following cases:

- establishment of a commercial legal entity, the share capital of which is paid with shares (participatory interests) or fixed or intangible assets of another commercial legal entity (other than financial) (based on, inter alia, a transfer act), in respect of which the newly established legal entity receives any of the rights specified in 'Acquisitions' (see above) provided that filing criteria set out there are met;
- establishment of a commercial legal entity, the share capital of which is paid with share (participatory interests) or assets (other than financial) of financial company in case the balance sheet value of assets of financial company exceeds the amount set up by the government (see above); or
- merger of companies, provided that the aggregate balance sheet value of the assets (worldwide) of the merger parties and their groups of persons exceeds seven billion roubles as of the latest reporting (balance sheet) date or their aggregate revenue for the last calendar year exceed 10 billion roubles or with respect to financial entities the thresholds indicated above are exceeded.

A proposed transaction or other action does not require pre-closing consent of FAS if it meets the requirements specified under 'Acquisitions' or 'Establishment and merger of legal entities' (see above) and either of the following applies:

- one of the parties to the proposed transaction or other action owns more than 50 per cent of voting shares (participation interests) in another party; or
- the proposed transaction (or other action) occurs within the same group of people and the list of people that make up the group has been filed with FAS not more than one month prior to the implementation of the proposed transaction (or other action) and has not changed as of the date of the transaction (or other action) (this transaction triggers post-closing filing); or
- the proposed transaction or other action is prescribed by acts of the government or the President.

An acquirer carries the onus for obtaining the approval for acquisition. The parties participating in establishment and merger bear the burden for obtaining the approval for respective acts.

26 How long does it normally take to obtain approval?

FAS considers merger filings in 30 days since submission of the application. This term may be extended by two months.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

If the company obtains FAS approval for a transaction it does not mean that the terms in the documents are in compliance with the Competition Law as FAS reviews only drafts of transaction documents

and evaluates how the transaction as a whole will influence competition. Clearance of antitrust compliance of the terms in the documents follows a separate procedure and is voluntary.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

Failure to file, delay in filing and incomplete filing may lead to FAS's claim to court for liquidation or reorganisation of a company established as a result of a merger or for invalidation of a transaction on acquisition of interest in a company if such acts led or may lead to the restriction of competition.

Besides, entities who fail to file for antitrust clearance in due terms may be subject to administrative liability consisting of a fine up to 500,000 roubles for companies and up to 20,000 roubles for company officers. However, these are not frequently enforced by FAS.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

The company and officers or employees need separate legal representation if their interests contradict each other or if they are involved in separate administrative or criminal proceedings. The authorities do not require separate legal representation during certain types of investigations.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The FAS may launch a dawn raid for any type of antitrust infringements.

A dawn raid can be scheduled based on materials coming from law enforcement or other state authorities and showing signs of an antitrust violation; reports and applications of individuals, legal entities and mass media reports showing the signs of an antitrust violation; expiry of the time period for execution of an earlier issued FAS compliance order; instructions of the President and the government; and FAS detecting the signs of an antitrust violation.

Chapter 6 of the Competition Law establishes specific procedural rules for dawn raids. According to these rules FAS must warn a business entity in 24 hours prior the start of a dawn raid, except for dawn raids connected with suspicions in cartel activities. In the latter case notification about the coming inspection is prohibited. The total duration of a dawn raid shall not exceed one month. In exceptional cases this term may be extended by two months.

During a dawn raid FAS officers may, upon producing their official identification cards and the FAS inspection order, enter freely into various types of governmental bodies, commercial and non-profit organisations (except for an individual's property) in order to obtain the necessary documents and information and examine visually areas, premises (except for a dwelling of an individual), documents and articles of the inspected entity in the presence of at least two attesting witnesses. During such examination they are entitled to carry out photographing, filming and videotaping, make copies of documents and of electronic media. If required, they may engage qualified experts in the course of examination.

FAS officers may request documents and information from the inspected entity as well as materials made in the form of a digital or electronic record that are necessary for inspection purposes (including commercial and other secrets), copy and make extracts from such documents, materials and information and, if necessary, review the originals. In addition, FAS officers may request oral or written explanations on matters related to the dawn raid.

31 What are the company's rights and obligations during a dawn raid?

During the dawn raid the company has a right to:

- be familiarised with administrative regulations governing an inspection prior to its commencement and receive full information related to the inspection, its scope and subject matter, as well as related documents;
- be present during the inspection and give explanations;
- request a copy of an inspection report with annexes, confirm the inspection results reflected in the inspection report or state its objections to the inspection report or separate acts of the FAS officers;
- exercise its rights directly or through a representative;
- appeal against the results of an inspection in FAS or in court; and
- receive compensation for the damages caused by FAS officers' unlawful acts, including for lost profits.

The company must not create obstacles for access of FAS officers to its premises and provide documents and information per the FAS officers' request.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Generally, a case cannot be settled during an investigation. However, in case of certain forms of abuse of dominance (ie, the imposition of contractual conditions unprofitable for a counterparty or not related to the subject matter of an agreement, an economically or technologically unjustified refusal to contract with certain customers; an economically, technologically or otherwise unjustified setting of different prices for the same goods; discrimination) and unfair competition, FAS may issue a warning order to a company before commencement of an antitrust case. If the company fulfils the warning order, FAS will not commence an antitrust case for this violation.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

FAS will view it as a positive development, which may make settlement negotiations easier.

34 Are corporate monitorships used in your jurisdiction?

Corporate monitorships are not used in Russia.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

FAS decision on antitrust case can serve as evidence in private antitrust litigation.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Legal privilege covers any information (in oral or written form) obtained by an attorney from his or her client in the course of advising his or her client or vice versa (attorney–client privilege). An attorney cannot give witness statements with respect to the facts he or she has become aware of in the course of providing legal services to a client. Evidence obtained by legal counsel not registered as an attorney, such as in-house counsel, is not privileged.

Privilege against self-incrimination is not available during FAS investigations.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

The company or individual must provide FAS with all documents and information related to the subject matter of the investigation, including those constituting their commercial secrets. FAS has to keep this information confidential. In addition, a participant of FAS investigation may apply for consideration of the case in a closed hearing if it is required to protect its commercial secrets. FAS may also decide to carry out a closed hearing per its own initiative.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

Failure to provide documents or information to FAS in due terms may lead to administrative liability consisting in a fine up to 500,000 roubles for companies and up to 15,000 roubles for company officers. The creation of any other obstacles to FAS investigation may lead to administrative liability consisting in a fine up to 50,000 roubles for companies and up to 10,000 roubles for company officers.

39 Is there a duty to notify the regulator of competition infringements?

There is no duty to notify the regulator of competition infringements.

40 What are the limitation periods for competition infringements?

The statutory limitation period for competition infringements constitutes three years since their commitment, or, if the infringement is continuous, since its termination or revelation. Continuous infringement is a failure to comply with the law over a lengthy period of time.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

The Competition Law prohibits unfair competition. Unfair competition includes any acts of business entities aimed at obtaining business benefits that contradict Russian legislation, business customs, principles of good faith, reasonableness and fairness and that have caused or may cause losses of competitors or damaged or may damage their business reputation. Unfair competition covers the following practices, though this list is not exhaustive:

- defamation;
- misrepresentation;
- false comparison;
- unfair competition related to improper use of IP;
- confusion; and
- illegal acquisition, use and disclosure of commercial information.

In addition, the Competition Law prohibits certain anticompetitive practices of state authorities, such as the adoption of regulations eliminating or restricting competition (eg, those discriminating against certain companies), the conclusion of anticompetitive agreements among each other or with companies, anticompetitive practices at tenders (eg, coordination of behaviour of participants of a tender), and provision of state and municipal preferences without FAS consent, etc.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

See question 1. In addition, FAS plans to remove the limitation that antitrust prohibitions do not apply to the exercise of rights over IP and to agreements in respect of IP. If adopted, an unjustified refusal to conclude a licence agreement or reduction or termination of production of goods with use of the respective IP (eg, a patent) may be considered as abuse of dominance. Compulsory licences can be used as a remedy.

Debevoise & Plimpton

Anna V Maximenko **avmaximenko@debevoise.com**
Elena M Klutchareva **emklutchareva@debevoise.com**

Business Center Mokhovaya
Ulitsa Vozdvizhenka 4/7
Stroyeniye 2
Moscow, 125009
Russia

Tel: +7 495 956 3858
Fax: +7 495 956 3868
www.debevoise.com

Spain

Edurne Navarro Varona, Raquel Lapresta Bienz and Jordi Calvet Bademunt

Uría Menéndez

General

1 What is the general attitude of business and the authorities to competition compliance?

Large companies tend to have competition compliance programmes. These include training sessions, eLearning software, mock dawn raids, compliance guidelines, etc. The importance of the programmes for companies operating in Spain has grown significantly in recent years.

The Spanish Competition Authority considers that, as a general rule, competition compliance is positive and promotes it (for instance, by organising conferences on the subject or, as mentioned in question 4, by reducing the amount of fines resulting from competition law infringements).

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

No, Spain has no government-approved standard for compliance programmes.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on the company's size and the sector of the economy it operates in?

No compliance guidance generally applies in Spain. However, the practice of the Competition Authority sets some very broad requirements that must be met, if a compliance programme is to be taken into account to reduce the amount of a fine (see question 4).

In order to determine whether the requirements are met, the specific circumstances of the case need to be analysed, thus the company's size and the sector in which the undertakings operate will likely be relevant.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

Yes, the existence of a competition compliance programme can affect the fine or penalty imposed on an undertaking. Note, however, that the mere existence of the programme does not automatically mean that a fine will be reduced (especially if the infringement derives from the programme's failure).

With regard to programmes implemented prior to an infringement, the Spanish Competition Authority has stated that the existence of a compliance programme can be considered a mitigating circumstance only if it can be concluded that the programme was effectively implemented and that internal controls and significant sanctions were imposed on those infringing the rules established in the programme (decision of 23 July 2015, case S/0482/13).

In addition, the Spanish Competition Authority has accepted that implementing a programme (that fulfils the requirements mentioned above) after the infringement proceedings have started may be taken into consideration to reduce the amount of the fine (decision of 6 September 2017, case S/DC/0544/14). In fact, the implementation of such a programme was taken into account to reduce the fine in the decision of 17 September 2015, case SNC/0036/15.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

There is no specific guidance on how companies should prove their commitment to competition compliance. However, the Spanish Competition Authority has referred in broad terms to the need to effectively implement the competition compliance programme, establish internal controls and impose significant sanctions to those infringing the rules established in the programme in order to reduce the amount of a potential fine (see question 4).

6 What are the key features of a compliance programme regarding risk identification?

The key features of a compliance programme regarding risk identification are essentially the following: carry out regular audits to enable the undertaking to detect any possible competition law infringement, provide competition law training to staff to give them the means to be able to identify potential infringements, establish a whistle-blower programme that allows employees to safely report competition law infringements and appoint a compliance manager that guarantees the effective implementation and application of the compliance programme.

7 What are the key features of a compliance programme regarding risk assessment?

The key feature of a compliance programme regarding risk assessment is analysing the potential areas of risk in view of the sector in which the undertaking operates and the frequency and the nature of the contact between the undertaking's staff and its stakeholders. The existence of a trade association (especially if it gathers information from the undertakings and prepares statistical data) is especially relevant for these purposes.

8 What are the key features of a compliance programme regarding risk mitigation?

A key feature of a compliance programme regarding risk mitigation is the regular review of any competition law risks identified by the undertaking's in-house legal department and by external legal counsel.

9 What are the key features of a compliance programme regarding review?

The key features of a compliance programme regarding review are the existence of eLearning programmes and training sessions that employees regularly carry out and attend and the proactive follow-up by managers of the implementation and correct application of the programme. It is also important to review the programme periodically to adapt it to any changes that may have occurred in the field of competition law.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

All types of arrangements between competitors should be carefully assessed to make sure they are consistent with competition regulations. In general, all types of agreements, either express or tacit, regarding the

allocation of clients or territories, pricing arrangements or exchanges of confidential information are contrary to competition regulations.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

Parties should make sure that the agreement does not allow them to set prices or allocate customers or markets between them. In addition, it is also advisable to have measures aimed at ensuring that no confidential information is exchanged between the parties as a result of the agreement. Joint supply or purchase agreements should be handled with caution.

12 What form must behaviour take to constitute a cartel?

Royal Decree-Law 9/2017, which transposed the EU Damages Directive, modified the legal definition of cartel as it was previously established in the Spanish Competition Act. The Spanish Competition Act now defines 'cartel' as:

> *'any agreement or concerted practice between two or more competitors which aim to coordinate their competitive behaviour in the market or influence the competitive process through practices such as, among others, fixing or coordinating purchase or sale prices or other commercial terms, even as regards intellectual and industrial property; allocation of production or sale quotas; market or client sharing, including collusion regarding tenders, restrictions on imports or exports or measures adopted against other competitors that hinder competition.*

This new definition does away with the secrecy requirement previously required and broadens the legal concept to include behaviour consisting of concerted practices between competitors (and not only agreements). Additionally, it provides further examples on conducts that can constitute a cartel.

Spanish administrative law establishes no penalties for attempted cartel conduct when it is unsuccessful. However, if a cartel agreement is reached, the relevant authority can impose penalties even if the agreement is not actually implemented or has no restrictive effect.

13 Under what circumstances can cartels be exempted from sanctions?

Sanctions for cartel infringements can only be avoided under Spanish law if the conduct is imposed by law. This exemption does not apply when the agreement is deemed to affect trade between member states and thus is subject to EU competition rules. No notification mechanisms and individual exemptions are foreseen in relation to cartel conducts under EU or Spanish law.

14 Can the company exchange information with its competitors?

The exchange of information between competitors is not in itself illegal. However, these exchanges of information may facilitate anticompetitive acts among undertakings by reducing the uncertainty of the future conduct of other competitors and they normally occur before price-fixing practices. Therefore, this requires a case-by-case analysis of the potential restrictive effects of information exchanges in regard to the benefits that they may generate.

The Spanish Competition Authority generally applies the criteria set out in the European Commission's Guidelines on horizontal cooperation agreements. These guidelines state that the nature, quality and regularity of the data exchanged, the structure of the market and the form of access to the information should be taken into account. Consequently, some information exchanges, such as the exchange of aggregated and sufficiently historical information are unlikely to constitute an infringement. On the contrary, exchanges of disaggregated, present or future information regarding, for example, prices, costs, suppliers or other confidential information are likely to be considered restrictive. The Spanish Competition Authority has adopted a very strict stance in relation to information exchanges between competitors, and has even considered such exchanges to be a cartel. In 2015, 20 car manufacturers were fined for their involvement in a cartel consisting in the exchange of commercially sensitive and strategic information in the Spanish vehicle distribution and after-sales market. The information exchanged referred to past, current and future data on sales, quantities, remuneration and margins of the commercial networks as well as marketing strategies for the after-sales market.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

Leniency is available in Spain only in relation to cartel conducts. No other prohibited conducts can benefit from leniency.

Following the European model, the leniency programme offers full immunity and a fine reduction (partial leniency).

The benefits of the programme are available not only to undertakings but also to individuals (either because the original applicant is an individual or because the company requests that leniency be extended to its employees).

Full immunity is available to the first undertaking or individual that provides evidence that enables the competition authority to order an inspection or prove a cartel infringement but only if at the time of the leniency application the authority does not have sufficient evidence of the infringement. In addition, the leniency applicant must comply with the following requirements:

- full, continuous and diligent cooperation with the authority throughout the investigation;
- immediate cessation of its involvement in the infringement, unless the authority considers that its involvement is necessary for the effectiveness of its investigation;
- no evidence related to the application for the exemption has been destroyed;
- there has been no direct or indirect disclosure to third parties of the fact that an application for leniency is being considered or of any of its content; and
- no measures have been adopted to coerce other undertakings to participate in the infringement.

Partial leniency in the form of a fine reduction is also available to undertakings or individuals that provide evidence of the alleged infringement that adds significant value to evidence that the authority already possesses (ie, the new evidence makes it significantly easier for the authority to prove the infringement). These undertakings or individuals can benefit from reductions of up to 50 per cent of the fine.

The name of the leniency applicants is kept confidential until the statement of objections is issued. However, their name is disclosed in the final decision.

16 Can the company apply for leniency for itself and its individual officers and employees?

Yes, individual officers and employees can also benefit from a company's leniency application if they are identified in the initial leniency application and they cooperate with the authority during the proceedings.

17 Can the company reserve a place in line before a formal leniency application is ready?

Spanish law does not have a 'marker' system as such. However, in practice, the competition authority may grant, upon an applicant's justified request, more time to submit evidence on the cartel. Following the submission of the evidence within the agreed period, the filing date for the leniency application will be understood to be the date of the initial application.

18 If the company blows the whistle on other cartels, can it get any benefit?

If a company provides additional information on other cartels, it will get immunity in relation to those conducts.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

The Competition Act defines vertical agreements similarly to EU competition law. Therefore, the same type of vertical restraints between

undertakings and their suppliers or customers are subject to competition enforcement.

In this regard, vertical agreements in Spain are subject to an exemption under Spanish competition law parallel to the one established by Regulation 330/2010 of 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union (TFEU) to categories of vertical agreements and concerted practices. In addition, the Spanish Competition Authority uses the European Commission's Guidelines on Vertical Restraints to assess vertical restraints that fall outside the block exemption.

Case law on vertical agreements has not been very prevalent recently if compared to that on horizontal agreements. Even so, the procedure initiated by the Spanish Competition Authority against Schweppes for prohibiting its distributors to sell in Spain Schweppes' tonic water not produced by Schweppes' Spanish subsidiary (case S/DC/0548/15, Schweppes) should be noted. The Spanish Competition Authority closed the investigation in view of the commitments offered by the company, according to which only the sale of Schweppes' tonic water produced in the United Kingdom (which is made by Coca-Cola, not Schweppes) would be prohibited in Spain.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

As explained in question 19, competition rules on vertical agreements apply in a similar way under both EU and Spanish competition law. In that vein, the Spanish Competition Authority has also adopted a less stringent approach towards vertical restraints, compared to horizontal agreements.

The Spanish Competition Authority, similarly to the European Commission, distinguishes between the practices that restrict competition law by object (eg, resale price maintenance or certain territorial and customer restrictions) and those that do so by effect (eg, recommended prices). In essence, the same categories that the European Commission considers restrict competition by object are deemed to do so by the Spanish Competition Authority (and conversely with regard to by-effect restrictions).

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Vertical agreements under Spanish competition law are subject to an exemption parallel to that provided by Regulation 330/2010 of 20 April 2010 on the application of article 101(3) of TFEU to categories of vertical agreements and concerted practices (see question 19).

In addition, the Spanish Competition Act exempts practices that result from the application of a law. These practices are not exempted if they are the result of an act of a public authority or public company (eg, if a public authority orders an undertaking to act in a way that infringes competition law) or of a rule that is not a law (eg, a regulation).

Moreover, the Spanish Competition Act provides a de minimis exemption (similar to that established by the European Commission in its de minimis guidelines). In this regard, vertical agreements involving undertakings with an individual market share under 15 per cent are deemed automatically compatible with the Spanish Competition Act (if the conduct is carried out by competing undertakings, the exemption only applies if the combined market share is below 10 per cent). Note that certain especially serious practices (eg, resale price maintenance) are not automatically exempted. However, the Spanish Competition Authority is empowered to expressly exempt these practices if their impact is negligible in a given legal and economic context.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

In order to determine whether a company holds a dominant position, the Spanish Competition Authority generally follows the practice of the European Commission. It generally analyses whether the company has the ability to act independently in the market regardless of possible reactions from consumers or competitors.

In essence, the Spanish Competition Authority uses the following criteria for its analysis: market share of the undertaking concerned, market share of competitors in the relevant market, commercial and financial potential of such competitors, competitive advantages that the undertaking concerned may have (eg, technological, financial, commercial), barriers to entry to the market, or countervailing power of demand.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

The Spanish Competition Act provides an open list of examples that may amount to an abuse of dominant position, such as the following: directly or indirectly imposing prices or other commercial or service conditions, which are inequitable; limiting production, distribution or technical development in a way that is detrimental to companies or consumers; unjustifiably refusing to satisfy the demands to sell products or render services; applying, in commercial or service relationships, unequal terms for equivalent services that place some competitors at a disadvantage compared to others; and making the execution of contracts subject to the acceptance of supplementary services that, by their nature or according to commercial usage, have no connection with the purpose of such contracts.

However, this is not an exhaustive list and other conduct may be considered abusive if carried out by a dominant company, as long as it has the characteristics broadly described in the Spanish Competition Act (which essentially mirrors article 102 of TFEU).

In 2017, the Spanish Competition Authority issued four decisions in this field:

- In case S/DC/0511/14, *Renfe Operadora*, a rail company (Renfe Group) was imposed a fine of €15.1 million for an abuse of dominance consisting in the application of dissimilar conditions to equivalent transactions, placing a competitor (Deutsche Bahn Group) at an advantage as regards other operators.
- In case S/DC/0557/15, *Nokia*, this company was sanctioned for having abused its dominant position by engaging in margin squeeze practices in a tender called by the state-owned railway manager regarding maintenance services for the GSM-R telecommunications network. The fine imposed amounted to €1.7 million.
- In case S/DC/0558/15, *ACB*, the Spanish National Basketball Association fined €400,000 for an abuse of dominance consisting in the application of disproportionate and discriminatory economic conditions to teams in order to be promoted to the top leagues, which actually impeded their promotion.
- In case S/DC/0580/16, *Criadores de Caballos* 2, a €187,677 fine was imposed on the National Horse Breeders' Association of Spain for having applied abusive conditions to companies that wished to organise competitions and contests.

It is also worth mentioning the recent judgment of the Spanish Supreme Court (5 February 2018, judgment 163/2018) whereby a decision of the Spanish Competition Authority was annulled. The Supreme Court declared that the authority had not sufficiently proven that the prices applied by the incumbent postal operator constituted an abuse in the form of a margin squeeze, since alternative operators had not been completely excluded from the market as a result thereof.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

According to the Spanish Competition Act, an abuse of market dominance can be exempted if it is the result of applying a law. As explained in question 21, the conduct will not be exempted if it is the result of an act by a public authority or public company or of a rule that is not a law.

In addition, the de minimis exemption established in the Spanish Competition Act also applies to abuses of dominant position. However, this exemption has limited effects in practice. Abuses of dominance are not automatically exempted, that is, they need to be expressly exempted by the Spanish Competition Authority. Such can be the case if their impact is negligible in a given legal and economic context, for example, if the duration of the conduct is limited or the market concerned is very small.

Finally, an abuse of dominance can be objectively justified, when a conduct is objectively necessary and proportionate. This is assessed under Spanish competition law in substantially the same way as under EU competition law.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Transactions falling outside the scope of the EU Merger Regulation and meeting any of the following thresholds are subject to mandatory notification in Spain:

- As a consequence of the transaction, the relevant undertakings acquire a market share of 30 per cent or higher in a national market or a substantial part thereof regarding a particular product or service. The market share threshold will not be deemed met if the target's aggregate turnover in Spain is less than €10 million and the individual or combined market share of the parties to the transaction is below 50 per cent.
- Alternatively, the turnover of the relevant undertakings in Spain in the preceding financial year is at least €240 million, provided that at least two of the undertakings concerned had a minimum turnover of €60 million in Spain during that period.

As a rule, there is no formal deadline to file a notification. The only requirement is for the parties to notify the concentration (and have it approved) prior to its execution. However, in the case of Spanish takeover bids for shares admitted to trading on a stock market and authorised by the CNMV, the concentration must be notified within five days of submitting the application for the bid's authorisation to the CNMV.

If sole control is acquired, the acquirer is solely responsible for the filing. If joint control is acquired, those who jointly control the entity after the transaction are jointly responsible for the filing.

26 How long does it normally take to obtain approval?

In most cases, the Spanish Competition Authority will adopt a decision in Phase I. Phase I decisions must be adopted within one month of filing, although this deadline may be extended by 10 working days if the parties submit commitments.

If the authority believes that the transaction may give rise to serious competition concerns, it will adopt a decision opening Phase II proceedings. In that case, a decision must be adopted within two months of the decision to start Phase II proceedings, although the deadline may be extended by 15 working days if the parties submit commitments.

The authority may send information requests during the review process if it considers that it needs further information for its analysis. These requests will stop the clock. In order to avoid any delays in the assessment and clearance of the transaction, it is strongly advisable to initiate pre-notification discussions with the authority before the formal filing.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

Ancillary restraints will be covered by a clearance decision provided that they are directly related to the transaction and necessary for its implementation. These concepts are interpreted in accordance with the European Commission's guidelines on the matter.

The final decision will include an express declaration assessing whether the restrictions included in the transaction documents are ancillary to the transaction. If a provision included in the agreements is not deemed ancillary to the transaction, the decision will state that the parties should self-assess the compatibility of such provision with competition regulations.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

Companies that implement a transaction that meets the relevant thresholds prior to receiving clearance can be fined up to 5 per cent of the turnover of the parties involved in the transaction in the year preceding the imposition of the fine. In addition, the authority will order the parties to file a notification within 20 days. If the company fails to do so, it can be fined of up to 1 per cent of the annual turnover of the undertakings concerned in addition to periodic penalties that can be imposed for each day of delay.

The competition authority actively investigates potential violations of the obligation to notify transactions that meet the relevant thresholds and has fined several companies for gun jumping. Fines are usually calculated as a percentage (between 0.5 and 3 per cent) of the target's turnover in Spain. Recent fines imposed by the authority for gun jumping range between €40,000 and €200,000. It is also worth noting that in most cases, the obligation to notify resulted from meeting the market share threshold established under the Spanish Competition Act.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Although it is not formally required to do so, it may be advisable for the company and its officers to have separate legal representation in cases in which its officers may be penalised. In 2016, 15 officers were sanctioned by the Spanish Competition Authority with fines. The fines imposed ranged between €4,000 and €36,000. The last decision in which an officer was sanctioned was adopted in case S/DC/0545/15, *Hormigones de Asturias*, where the officer of one of the undertakings involved in the anticompetitive conducts sanctioned was fined €12,000.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The Spanish Competition Authority has broad powers to carry out unannounced dawn raids at the companies' premises to investigate any kind of conduct and it frequently exercises these powers in order to investigate all kinds of competition law infringements. The authority carried out eight dawn raids in 2016 and three as at April 2017.

During a dawn raid, officials are permitted to seize and make copies of all documents (whether physical or electronic) located at the company's premises. However, private or legally privileged documents (attorney–client privilege only applies to correspondence between clients and external counsel but not to correspondence with in-house counsel) may not be seized. It is the duty of the company under inspection to identify personal and privileged documents during the inspection.

31 What are the company's rights and obligations during a dawn raid?

In order to carry out a dawn raid, the competition authority must issue an investigation order. However, under Spanish law, access to premises must be consented to by either the occupants or a court through an order. Thus, in practice, the authority usually requests a court order in advance to make sure it can access the premises. Information contained in the investigation or court orders must include: the date of the inspection; the officials in charge of the inspection; the name of the undertaking and the address of the premises subject to inspection; and the object of the inspection. It is important to check that this information is correct before allowing the inspection to proceed.

Companies must cooperate during an inspection. Indeed, companies can be fined up to 1 per cent of their total turnover in the previous year if they fail to comply with this obligation.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Under Spanish law, the competition authority may accept the commitments offered by the parties if it believes that they will address the competition concerns identified, provided that the public interest is protected and the commitments offered can be easily monitored. No fines are imposed and no declaration of infringement is made in commitment decisions. Cartel cases and long-lasting infringements having produced irreversible effects or recurring infringements by companies cannot be closed with a commitment decision. The authority has wide discretion to accept or reject commitments.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

The authority may take those amendments into account but how much weight it gives to them varies from one case to another.

34 Are corporate monitorships used in your jurisdiction?

No.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

The facts included in a settlement decision are admissible as evidence in actions for private damages.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The Spanish Constitutional Court has established that companies and individuals can rely on legal privilege to deny the Spanish Competition Authority access to information. Three conditions need to be met for this purpose. First, the information must be confidential advice. In addition, the advice must have been provided by external legal counsel, namely, advice provided by in-house lawyers is not privileged. Third, the external counsel must be from an EU member state.

As regards relying on privilege against self-incrimination, article 24.2 of the Spanish Constitution provides the right not to testify against oneself. This right, however, may clash with the duty of undertakings to provide, at the request of the Spanish Competition Authority, all kinds of data and information that may be necessary to apply the Spanish Competition Act (established in the Spanish Competition Act and in Act 3/2013 of 4 June on the creation of the Spanish Competition Authority).

The Constitutional Court has stated that, in general, it is constitutional to request the cooperation of a party to impose penalties established by law (as the Spanish Competition Act and Act 3/2013 mentioned above do). By applying such general case law to Spanish competition law, the parties are obliged to provide the Spanish Competition Authority with the information it requests in accordance with the Spanish Competition Act, even if such evidence is self-incriminatory.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

The Spanish Competition Act establishes that confidential data or documents can be ordered to be kept secret, ex officio or at the request of a party. A separate confidential file is created for these purposes, which can only be accessed by the party that has provided the information and the authority.

In addition, the Spanish Competition Act imposes a duty of secrecy on parties who take part in the handling or resolution of proceedings or become aware of the proceedings as a result of their profession (eg, lawyers, economists) or their involvement in them. They must keep secret all the confidential information that they have access to and breaching this duty has criminal, civil and administrative implications.

Note that the aforementioned Royal Decree-Law 9/2017 (see question 12) establishes a new and specific mechanism regarding access to sources of evidence, applicable only to procedures concerning claims for damages arising from antitrust infringements. This new mechanism enables a claimant to request the judge to order the counterparty or third parties to provide access to some sources of evidence necessary to substantiate the claim. The principles of proportionality, necessity and suitability must be preserved. Additionally, sanctions are foreseen if the evidence obtained by this means is inadequately used.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

Not supplying the information requested by the Spanish Competition Authority or supplying incomplete, incorrect, misleading or false information is a minor offence according to the Spanish Competition Act. As mentioned in question 36, undertakings are obligated to collaborate with the Spanish Competition Authority and must provide all the data and information required to apply the Spanish Competition Act.

In addition, obstructing a dawn raid (eg, by not submitting the documents requested or not answering the questions) carried out by the Spanish Competition Authority is a minor infringement according to the Spanish Competition Act.

Minor infringements are subject to fines of up to 1 per cent of the total turnover of the undertaking in the business year immediately preceding that in which the fine is imposed. If the turnover cannot be determined, this type of offence is fined between €100,000 and €500,000.

39 Is there a duty to notify the regulator of competition infringements?

No, there is no duty to notify the regulator of competition infringements. However, Spain has a leniency programme to promote the notification of infringements by undertakings (see question 15). Complaints can also be submitted.

40 What are the limitation periods for competition infringements?

The limitation periods depend on the nature of the infringement: four years for very serious infringements (eg, horizontal anticompetitive agreements); two years for serious infringements (eg, vertical anticompetitive agreements); and one year for minor infringements (eg, providing incomplete, incorrect, misleading or false information). The limitation period starts the day the infringement is committed or, in the case of sustained infringements, when it stops. In addition, limitation periods are interrupted by any act of the authority (of which the interested party must be notified) with the purpose of making the undertaking comply with the Spanish Competition Act.

URÍA MENÉNDEZ

Edurne Navarro Varona **edurne.navarro@uria.com**
Raquel Lapresta Bienz **raquel.lapresta@uria.com**
Jordi Calvet Bademunt **jordi.calvet@uria.com**

Príncipe de Vergara 187
Plaza de Rodrigo Uria
28002, Madrid
Spain
Tel: +34 915 860 400
Fax: +34 915 860 403/4

Square de Meeûs 40
B-1000 Brussels
Belgium
Tel: +32 263 964 64
Fax: +32 264 014 88

www.uria.com

With regard to penalties, the limitation period is four years, two years and one year depending on whether they are imposed for very serious, serious or minor infringements, respectively.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

The Spanish Competition Act prohibits, among others, all 'consciously parallel practices' that restrict competition. This conduct is substantially similar to the notion of 'concerted practices' established at EU level (also included in the Spanish Competition Act), but the Spanish Competition Authority has pointed out that they constitute two separate notions. Consciously parallel conducts have been defined as restrictions of competition through which each player, without any agreement, and acting unilaterally but harmoniously, adjusts its behaviour to that of the other players, avoiding competition.

In addition to consciously parallel practices, the Spanish Competition Act also prohibits acts of unfair competition (eg, the unjustified and systematic imitation of the actions carried out by another undertaking aimed at blocking or hindering its access to the market, or the exploitation of a situation of economic dependency of a customer or a provider) that affect the public interest by distorting competition. This prohibition encompasses practices that would not necessarily be prohibited by the provisions of the Spanish Competition Act that refer to anticompetitive agreements and abuse of dominance.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

In 2017, the Spanish government put forward a draft law that would imply the separation of the Spanish Competition Authority to create a competition authority that is independent from the regulatory bodies (the current Spanish Competition Authority was created in 2013 after the competition authority integrated such regulatory bodies). It is uncertain if and when the separation will occur. In any event, the creation of an independent competition authority is not expected to affect company compliance in any way.

In addition, the Spanish Competition Authority has recently announced its intention to establish within the next few months a new economic intelligence unit aimed at fostering ex officio investigations based on statistical techniques. This might make the authority less dependent on leniency applications.

Sweden

Fredrik Lindblom, Elsa Arbrandt and Sanna Widén

Advokatfirman Cederquist KB

General

1 What is the general attitude of business and the authorities to competition compliance?

Swedish business generally has a certain awareness about the competition rules and the risks inherent in ignoring them but a comprehensive compliance structure within companies is, nevertheless, quite rare, except for the largest companies, and smaller companies with a large global reach. The authorities' attitude is that all businesses should be aware of the competition rules as a basic principle without any specific requirements or expectations. Legal ignorance is not a valid defence.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

No, in Sweden there is no government-approved standard for (competition) compliance programmes.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on the company's size and the sector of the economy it operates in?

Compliance guidance in Swedish companies varies to a great extent. Smaller companies in general tend to be fairly ignorant of the competition rules and compliance routines, whereas larger, and in particular multinational, companies tend to have comprehensive compliance programmes in place.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

There are no rules addressing the effect of compliance programmes to sanctions for infringements. Having no compliance programme in effect does not render larger sanctions for competition law infringements. Moreover, the possibility cannot be excluded that a company with a comprehensive compliance programme in place, that, nevertheless, infringes the competition rules, would be subjected to harder sanctions, as it could then be considered to have intently (rather than negligently) infringed the competition rules. However, the existence of a functioning compliance structure will reduce the risk for criminal sanctions against the company itself for other criminal acts by its officers.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

There are two aspects of this: Internally, the company would present its compliance commitment as part of its corporate policy and conduct compliance training of some sort, followed up by individual commitments to the corporate policy from employees. Externally, there would typically be limited demonstration of such commitment, although in some cases it could be noted in corporate presentations and the like. However, following the implementation of the Directive on disclosure of non-financial and diversity information by certain large companies (2014/95/EU), 'public interest entities' with more than 500 employees will be required to report in their annual report on environmental, social and employee-related, human rights, anti-corruption and bribery matters, thus also demonstrating their commitment to compliance in a broader sense.

6 What are the key features of a compliance programme regarding risk identification?

One initial parameter would be to appoint a compliance officer with the task of identifying risky structures and behaviour in the company and its markets. This function is usually complemented by a whistle-blower function, ensuring anonymity, where employees (and sometimes customers and suppliers) can reveal inappropriate behaviour, etc. All policies that are set up following such a risk analysis should not only be implemented but also audited at regular intervals on a risk-based approach.

7 What are the key features of a compliance programme regarding risk assessment?

Assessing risk would ideally be vested with the company compliance officer or, alternatively, with an external adviser, typically a lawyer well versed in competition law. However, difficulties arise already over the definition of compliance risk. Is it the risk of legal or regulatory sanctions, material financial loss, or loss to reputation a company may suffer as a result of its failure to comply with laws, regulations, rules, related self-regulatory organisation standards, and codes of conduct applicable to its activities (compliance laws, rules and standards) or is it the risk for breaches of compliance laws, rules and standards? Most of the time, people tend to focus on the breaches themselves when, in our opinion, the risk assessment should focus on the likelihood of breaches and the potential consequences of such breaches, to ensure that the compliance resources are set to use where they have most effect.

8 What are the key features of a compliance programme regarding risk mitigation?

The corporate compliance officer should continuously assess the company's activities and address potential risky situations when such appear. At the same time (if applicable) the corporate legal department should be involved in as much corporate activity as possible, at least if external contacts are involved. Therefore, a compliance programme should ideally provide for appropriate control stations for corporate activities as appropriate for each company.

9 What are the key features of a compliance programme regarding review?

See above.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

The Swedish Competition Act prohibits agreements, concerted practices and decisions with the effect or object of restricting, distorting or preventing competition. The hardcore restrictions mentioned in article 101 TFEU also constitute hardcore restrictions according to the Swedish Competition Act. The Swedish Competition Act mimics article 101 TFEU and the Swedish Competition Authority (SCA) also looks to the decision-making practice and the guidelines of the European Commission when applying the national rules.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

In order to manage any competition law risk it is recommended that the company contacts an internal or external legal counsel and requests that the counsel reviews a proposed arrangement before it enters into force. It is important that the company continuously updates key personnel about competition law compliance to ensure that it is compliant at all stages when in contact with competitors.

12 What form must behaviour take to constitute a cartel?

Decisions, agreements and concerted practices are covered by the Swedish Competition Act: it is, consequently, sufficient if the behaviour is coordinated without having a written agreement. The Swedish Competition Act does not regulate attempts and it is only either agreements or concerted practices with the object or the result of preventing, restricting or distorting competition that are caught. Acts with the object to restrict competition are prohibited per se and acts with anticompetitive results must be shown to have affected the market.

13 Under what circumstances can cartels be exempted from sanctions?

Cartels can be exempted from sanctions if the agreement in question fulfils the criteria set out in article 101.3 TFEU, as the Swedish Competition Act provides a corresponding provision. The applicable block exemption regulations adopted by the European Commission are also applicable in Sweden. Consequently, agreements fulfilling the criteria set out in the Block Exemption Regulation (BER) will also be exempted in Sweden. Specific national exemptions apply for primary agricultural associations (economic associations whose members are individual farmers or other undertakings engaged in agriculture, horticulture or forestry) and agreements between taxi undertakings or agreements between a central taxi booking service and taxi undertakings encompassing no more than 40 taxi vehicles.

14 Can the company exchange information with its competitors?

Information exchange is regulated by the general prohibition to restrict competition. Information that is considered competitively sensitive encompasses business matters that determine the actions of a company, and that, if known, will affect a competitor's behaviour on the market. Sensitive information is information concerning, for example, prices, costs, prognoses for further sales or investments, statistics on specific competitors, etc. The sensitivity of the information mentioned also needs to be assessed based on the industry concerned and how it functions. It is also important to assess how a company has gained access to the information, if customers use information about competitors when negotiating, and if the market in question is highly transparent. Historic information and statistics within industry associations that are generally not forward looking and where it is impossible to identify individual companies are not problematic.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

The SCA has a leniency programme in force for cartels. Only one company can be granted leniency and it is not possible for several companies to jointly apply for leniency. In order to be eligible for leniency, the company cannot have been the initiator or 'ring-leader' of the competition law infringement. In order to be granted leniency the company must give the SCA all necessary information and proof of the infringement it has or has access to, actively cooperate with the authority during the investigation, not destroy evidence or in any other way obstruct the investigation and immediately cease the infringement when the application for leniency has been filed with the authority. A company that wishes to file for leniency can anonymously contact the authority to learn if the information it has provided is enough to be granted leniency from fines and it can also be given an extension to provide the necessary information required for leniency without fear of a competitor submitting the information first. The authority has an obligation to state if another company participating in the same cartel has already submitted an application for leniency.

16 Can the company apply for leniency for itself and its individual officers and employees?

When a company applies for leniency and is granted leniency, individual officers and employees (key persons) will also receive leniency from a potential trading prohibition sanction. This will automatically take place when a company is granted leniency or a reduction of their fines for submitting information to the authority. A trading prohibition may be imposed on a person exercising management control over an undertaking.

17 Can the company reserve a place in line before a formal leniency application is ready?

Yes, there is a marker system in place. The marker system allows for the company to receive a maximum of two weeks to gather all necessary information. In order to be granted the extension, it is required that the company explains and motivates why the extra time is needed to collect all necessary information.

18 If the company blows the whistle on other cartels, can it get any benefit?

No, not unless it is also active in the other cartels whereby it can apply for leniency or a reduction of fines in relation to such other cartels.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

In essence, all types of vertical arrangements that are subject to competition enforcement under EU competition rules are also subject to competition enforcement under Swedish law. However, the SCA has shown a fairly lax attitude towards vertical arrangements. Recently it thoroughly investigated a clear-cut case of resale price maintenance but eventually came to the conclusion that the actors involved had too insignificant a market share for the infringement to merit any sanctions.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

The per se illegality for hardcore restrictions in vertical arrangements was for a long time taken for granted but following the investigation referred to in the preceding point, where the effect on competition was a determining factor even in a typical hardcore restriction case, it can no longer be considered that a vertical restriction is illegal per se under Swedish law.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Except for the considerations that can be made under the European Commission's Guidelines on Vertical Restraints and the BER for vertical agreements, which are applied as Swedish law, it seems like the lack of tangible restrictive effects may also exempt vertical arrangements from sanctions under Swedish law.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The preparatory works of the Swedish Competition Act refer to the definition of the European Court of Justice in *United Brands* (C-27/76, p 65), that is, a position of economic strength enabling a company to prevent effective competition being maintained and act independently of its competitors, customers and consumers. It also relates to the possibility to hinder market entry and the dominant undertaking normally being an unavoidable commercial partner.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

The Swedish Competition Act has copied the examples of abuses set out in article 102 TFEU. The most recent case from the Patent and Market Court is *Nasdaq Stockholm* where Nasdaq and its subsidiaries

allegedly prevented a competing trading platform from placing its matching computer in a computer facility operated by a third party. According to the SCA, Nasdaq's preventive actions foreclosed the competitor from the ability to provide attractive services, which eventually led to the competitor exiting the market. The Patent and Market Court held that Nasdaq had a dominant position during the relevant time period but the SCA had not proved that Nasdaq's actions amounted to an abuse of its dominant position. Nasdaq had indeed acted to oppose cross-connections with the competitor but it had been done based on the contractual rights afforded by the agreement between Nasdaq and the third party, the supplier of the computer facility, and not by abusing its dominant position. The judgment has been appealed and is currently (April 2018) pending before the Patent and Market Court of Appeal.

Another recent case is *Swedish Match* where the company was found to have abused its dominant position when applying a system for labels for their snus (a smoke-free tobacco) coolers in supermarkets and kiosks. The system disallowed competitors from designing their own labels as they had to use a template determined by the dominant actor or accept that the labels would be switched for generic labels. The new labelling system for coolers provided by the dominant player was found to constitute an abuse of a dominant position that lessened competition to the detriment of the consumers as the other snus brands lost the opportunity to communicate price and brand. The judgment has been appealed and the hearing is scheduled for May 2018 before the Patent and Market Court of Appeal.

In February 2018, the SCA handed down a decision whereby a Swedish company active in the market for collection and recycling of packaging waste, FTI, was ordered to recall the termination of an agreement with a competitor allowing it to access FTI's infrastructure for collection of packaging waste from households. The SCA found that the termination of the agreement and the fact that no new agreement was entered into amounted to a refusal to supply. FTI's infrastructure was furthermore considered an essential facility according to the SCA. It was found that the infringement would best be remedied by ordering FTI to recall the termination of the agreement with the competitor as without the agreement there would not be any competition on the market. The decision has been appealed and is currently (April 2018) pending before the Patent and Market Court.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

As long as the company can demonstrate an objectively necessary reason for its actions or show that the action brings about efficiency gains beneficial for customers it is possible that the abuse can be exempted from sanctions or enforcement. A company is allowed to protect its commercial interests by using the means available to effectively compete as long as it can be motivated by industry business norms.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

If a concentration meets the thresholds set out in the Swedish Competition Act it must be notified to the SCA.

The relevant thresholds are: (i) the combined aggregate turnover in Sweden of all the undertakings concerned in the preceding financial year exceeded 1 billion Swedish kronor, and (ii) at least two of the undertakings concerned each had a turnover in Sweden the preceding financial year that exceeded 200 million Swedish kronor.

If the relevant threshold requirement in (i) but not (ii) is met, the SCA may require a party to notify the concentration where particular grounds exist or a party can voluntarily notify the concentration. In addition, a party to the concentration can voluntarily notify the concentration (in order to prevent uncertainty regarding the SCA potentially requiring a notification, which it may do as long as a proceeding against the concentration can be completed within two years from the concentration having taken place).

The party or parties acquiring control of another company or a part of it shall notify the concentration.

26 How long does it normally take to obtain approval?

During Phase I the SCA has 25 working days to decide whether to approve the merger or decide to carry out a special investigation (Phase II). In 2017, the average time for a Phase I clearance was 14 working days.

Phase I can be extended to 35 days if the parties offer commitments during the Phase I-investigation. If a decision to enter into Phase II has been made, the SCA has three months to decide whether to approve, object to or stipulate remedies in order to approve the proposed concentration.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

According to the Swedish Competition Act a decision by the SCA not to take any action with regard to a concentration shall also cover restrictions directly related and necessary to the implementation of the concentration that has been notified. The restrictive provisions in the share purchase agreement (and any other submitted agreements) will be cleared at the same time as a decision not to take action is taken by the authority.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

There is no sanction for failure to file in the Swedish Competition Act, even though parties to a concentration meeting the thresholds may not take action to put the concentration into effect. The SCA can order a prohibition or an obligation for the parties in a concentration not to take any action (standstill) until the SCA has made a decision whether the concentration would impede effective competition.

If the filing is incomplete the SCA will impose an obligation for the notifying party or parties to supply information, documents or other material, and thus ensure that all the relevant information needed for the assessment is available to the SCA. The obligation may be combined with a 'stop-the-clock' provision.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

There are no rules in the Swedish Competition Act regarding legal representation. Instead it is the Swedish Bar Association's Code of Conduct (the Code of Conduct) that limits the ability of a member of the Swedish Bar to represent several persons in the same case. The relevant section of the Code of Conduct is section 3.2, which states that an attorney must not accept a mandate if there exists a conflict of interest or a significant risk of a conflict of interest.

A conflict of interest exists if, for example: the attorney is assisting another client in the same matter and the clients have conflicting interests; the attorney is assisting another client in a closely related matter and the clients have conflicting interests; there is a risk that knowledge covered by the attorney's duty of confidentiality may be of relevance in the matter; or the existence of any other circumstance that prevents the attorney from acting in the client's best interests in respect of the mandate.

'Significant risk' indicates that the attorney must also consider whether a conflict of interest may arise in the future. Persons who take part in a cartel can be personally sanctioned by a trading prohibition from three to 10 years. The relevant circle of persons are either those who formally represent the company, such as the managing director, or the board of directors but it could also be the person who factually heads the business, without a formal position.

Thus, for example, if a trading prohibition could be relevant, then the company and certain of its officers could need separate legal representation.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The SCA can launch a dawn raid for any infringement of the Swedish Competition Act. Currently, it is the Patent and Market Court that decides on the mandate for a dawn raid, following an application from the SCA. Such an application will only be granted if there is reason to believe that an infringement has been committed, if the undertaking has failed to comply with an order to provide information, documents etc, or there is otherwise a risk that evidence may be withheld or tampered with. In all instances the importance of the requested measure must be weighed against the disruption or other inconvenience caused to the party affected by the measure. If there is a risk that the value of the investigation would otherwise be reduced, the court may order such measure without consulting the company.

As described below, there is a legislative proposal that the SCA shall be granted powers to decide on dawn raids itself, without having to apply to the court for permission.

During a dawn raid, the SCA may examine and take copies of, or extracts from accounting records and other business documents (including computer records), request oral explanations from representatives or employees of the company and otherwise investigate the premises, property and means of transport of the undertaking. The SCA does not have the right to mirror data without the company's consent, which is different from the powers of the European Commission. Subject to the approval of the Patent and Market Court, dawn raids may also be carried out in private homes or other private spaces (such as cars) of board members or employees of the company.

31 What are the company's rights and obligations during a dawn raid?

The company has an obligation to cooperate with the SCA during a dawn raid, however, their right of defence must always be respected. However, there are no sanctions for non-compliance with the duty to cooperate, compared with EU law. Many companies request legal representation to ensure that their rights are respected when the SCA carries out a dawn raid. Nevertheless, the SCA is not obliged to wait for the legal counsel before starting their onsite investigation.

If there is a document the SCA would like to read and the company claims that it is covered by legal privilege, the document is to be placed in a sealed envelope and handed over to the Patent and Market Court that will determine if the document is covered by legal privilege or not.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

There is no formal settlement procedure in Sweden. The closest thing to it is that the SCA may decide on an administrative fine if the infringement is established and all parties agree. A fine order that has been accepted is regarded to be a legally binding judgment. The SCA may also issue a behavioural order, ordering an undertaking to cease certain behaviour. Such order may be combined with fines. The undertaking may also offer to voluntarily cease a certain behaviour, and the SCA may, in such cases, decide to close its investigation.

It is up to the undertaking to approve or reject the suggested administrative fine in the fine order. In those cases where the undertaking does not approve the suggested fine, the SCA will take legal action and request the court to order the undertaking to pay the fine. The SCA is in such cases bound by its earlier request and cannot claim a higher fine than it had offered to the undertaking in the fine order.

As indicated above, a settlement through a fine order requires that the infringement is established. This means that the SCA will not accept a settlement through a fine order where there are uncertainties regarding the course of events, or where the case involves legal issues that can be of importance for the determination of similar cases.

If the SCA believes that the case is suitable for settlement through a fine order, it will inform the undertaking of this in connection with its draft statement of objection. The benefits of accepting a fine order is that the company will not have to undergo a lengthy court proceeding. The decision for a fine order is typically rather short, only a few pages long, which will make things more difficult for any undertakings seeking follow-on damages to prove their case, compared to when they will have access to a whole court file.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

From the SCA's perspective a company should be aware of its obligations and the implementation or amendment of a compliance programme will only have limited effects in settlement negotiations.

34 Are corporate monitorships used in your jurisdiction?

The SCA is able to accept commitments offered by a company in order to avoid an infringement investigation. Such remedies are foremost behavioural and often subject to the penalty of a fine if the commitments are not followed. Regarding mergers, the SCA prefers structural remedies in mergers as it is easier to ensure compliance, similar to the decision-making practice of the European Commission. However, the use of trustees are used more frequently in the European Commission's decisions than by the SCA. The SCA has, in one case, approved a merger with a trustee ensuring compliance with structural remedies to sell off certain assets as well as ensuring that the company carries on the business maintaining the value of the part of the business to be sold off, whereby the powers of the trustee is described in the decision to conditionally clear the merger. The SCA will later assess compliance with the decision and the monitor can be obliged to report to the SCA.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

As Sweden does not have a settlement procedure, it is the SCA that is responsible for drafting its decisions and a defendant may comment on draft decisions, but not otherwise influence the wording of the decision. There is, therefore, no possibility of agreeing on statements of the facts with the authorities. However, in principle, all evidence is admissible in Sweden and the court is free to weigh the evidence presented as it chooses under the rule on free provision and trial of evidence.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The duty to testify under Swedish law means that a person (suspect or non-suspect) cannot refuse to truthfully answer questions during an interrogation other than when there is a risk of self-incrimination, as self-incrimination is a valid defence in Sweden.

Furthermore, declarations made within a leniency programme and settlement briefs may not be produced as evidence according to the Competition Damages Act. The Competition Damages Act also protects certain other categories of documents, in the respect that they may only be produced to the court by such party who has originally obtained them from the competition authority, or a person who has acquired the rights of the first person. This is to prevent a 'market for documents' from arising.

Written correspondence to and from external lawyers held by the lawyer or by the client is also protected by legal privilege and may not be subject to a court order to produce such documents. External lawyers are also prevented from giving evidence on matters confided to them in their practice. Advice from in-house lawyers is not legally privileged in Sweden (essentially due to the fact that an in-house lawyer cannot be a member of the Swedish Bar Association).

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

As a general principle, documents received or drawn up by a public authority are public. This principle is, however, made subject to a number of exceptions in the Public Access to Information and Secrecy Act (2009:400) involving that in the SCA's file, information on an undertaking's business operations, inventions and research results are treated as confidential if the undertaking may be expected to suffer injury if the information is disclosed. Furthermore, such documents that a competition authority holds and that are declarations within a leniency programme, settlement briefs, written responses and other information that have been submitted to SCA, information provided by the SCA to the parties (such as a draft statement of objections, or draft settlement decision) and settlement briefs that have been recalled, may not be subject to a production order as long as the SCA is still handling the case.

Typically, confidentiality is only maintained towards third parties and not regarding any party to the proceedings. However, legislative initiatives have recently been taken by the Swedish government to provide courts with the possibility to, under criminal responsibility, ban counsels, management or parties from providing certain documents received during the court proceedings relating to competition damages to third parties in order to prevent a 'trade with documents'. The new legislation is expected to enter into force during the first half of 2017.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

The SCA may request that persons (including companies) provide information or documents and that they submit themselves for interrogation at a time and a place that the authority decides or that municipalities that carry out economic activities provide statements of costs and incomes. Such requests can be combined with fines.

39 Is there a duty to notify the regulator of competition infringements?

There is no duty to notify the regulator of competition infringements.

40 What are the limitation periods for competition infringements?

The rules on limitation have been changed through the introduction of the Competition Damages Act.

Previously, it was stated that the right to damages for breach of the Competition Act or articles 101 or 102 TFEU lapses if no claim is brought within 10 years from the date on which the injury was sustained, namely, when the infringement was made. In practice, with the long handling times of the authorities and courts, this meant that the right to damages had often lapsed. Therefore, the new Competition Damages Act stipulates a limitation period of five years from when the infringement ceased and the claimant became aware of, or would reasonably have been aware, of the anticompetitive behaviour, that this behaviour caused damages and the identity of the infringer. Previously, there were also no rules on a standstill or interruption of the limitation period during the time that a competition authority investigated the issue or legal proceedings were conducted. Such rules have now been included in the Competition Damages Act, stipulating that a limitation period is interrupted if a competition authority takes actions in case of the infringement that the claim relates to. A new limitation period commences on the day there is a legally binding decision on the infringement or if the authority concludes its investigation in another manner.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

There are no other regulated anticompetitive practices not mentioned above.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

A public investigation, assigned by the government, submitted a report in 2016 (SOU 2016:49) which suggests that the SCA should be given powers to, as the first instance, take decisions in matters concerning (i) competition infringements and (ii) prohibitions or orders concerning mergers. Financial penalties for competition infringements were proposed to be payable when the SCA's decision is final. Processing of appeals of SCA decisions should be done in accordance with the rules of the Court Matters Act, in compliance with the procedure provided for by the Patent and Market Court Act (2016:188). The investigation has so far (April 2018) not led to any legislative proposal as regards powers for the SCA in relation to competition infringements. However, the SCA has been given powers to take decisions on mergers as of 1 January 2018.

Currently the SCA investigates matters but lacks decision-making powers regarding sanctions against infringements, and prohibitions against and obligations on mergers. The authority must bring an action in the Patent and Market Court (and the Patent and Market Court of Appeal) and it is the court that has the power to take decisions in these matters. The total time required for processing the competition law matters in the authority and the courts is currently at least three and a half years from the launch of a case until the decision has been tried in the first instance. The time for final decisions to be examined in two instances is currently estimated to be five to seven years.

The recently adopted judicial reform with the introduction of specialised courts for cases under competition law can, however, be expected to lead to reduced turnaround time in court, but the investigation considers that there is a need to enhance the powers of the SCA in order to increase efficiency in the infringement and merger proceedings but also for the leniency programme.

CEDERQUIST

Fredrik Lindblom **fredrik.lindblom@cederquist.se**
Elsa Arbrandt **elsa.arbrandt@cederquist.se**
Sanna Widén **sanna.widen@cederquist.se**

Hovslagargatan 3
PO Box 1670
SE 111 96
Stockholm

Tel: +46 8 522 065 00
Fax: +46 8 522 067 00
www.cederquist.se

Switzerland

Thomas A Frick
Niederer Kraft Frey AG

General

1 What is the general attitude of business and the authorities to competition compliance?

Companies are generally aware of compliance obligations and have compliance programmes, although in particular for smaller undertakings, the fact that the legal obligations and the rules are often not clear makes it difficult to set up a stringent compliance programme not unduly hindering business. Authorities seem willing to accept that a company compliance programme may reduce the company's fault for a breach (leading to reduced sanctions), but only if the compliance programme meets high standards of suitability and seriousness, and only if compliance law was breached by employees not belonging to the senior management.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

There is no such standard. The ICC toolkit is widely known, but compliance programmes are usually tailor-made and take into consideration not only Swiss competition law, but also the laws of the target markets.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

In general, competition law obligations apply to all undertakings, and in the past the Swiss Competition Commission has also taken action against undertakings with a small turnover. Best practice and obligations depend, among others, on:

- company size;
- the position of the company on the market (such as market shares);
- the sectors of the economy it operates in;
- the distribution system used;
- market transparency; and
- the organisation of the market participants (whether there are trade associations, an information exchange, standards to be agreed, etc).

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The existence of a compliance programme is not explicitly mentioned as a mitigating factor in the Ordinance on Sanctions imposed for Unlawful Restraints of Competition of 12 March 2014. However, the Swiss Federal Administrative Court (court of appeal against decisions of the Swiss Competition Commission) repeatedly held that, subject to the standards mentioned in question 1, such a competition compliance programme may lead to a reduction of sanctions at the discretion of the authorities. The court has not yet rendered a judgment in which it actually reduced a sanction imposed due to the existence of a compliance programme.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

Demonstration of commitment to competition compliance can take various forms. Most common are the implementing of a Code of Conduct (and often publication of such code on the website of the undertaking), the setting up of a formal competition law compliance programme and periodic training sessions for the employees, which may be done in electronic form. Supplier codes of conduct (together with appropriate monitoring thereof) are often part of the Code of Conduct or of the compliance programme. A letter from top management ('tone from the top') to support the Code of Conduct is recommended. The commitment will only be plausible if the implementation is monitored by appropriate and suitable control procedures; usually, a whistle-blower policy protecting whistle-blowers will be part of it.

6 What are the key features of a compliance programme regarding risk identification?

Any compliance programme must take into account the specific risk profile of a company. It depends on the actual business in question and on the market structure what the main competition compliance risks are. There is no prescribed list of such risks. In a compliance programme, companies usually identify as a first step the areas of their business that may be exposed to compliance risks (eg, typical situations where their employees get into contact with competitors (trade association meetings; joint venues; information exchanges; private functions; reunions)). Furthermore, monitoring of market shares may be an important feature, as a number of Swiss small and medium-sized enterprises are market leaders in a (usually small) segment of the market. Finally, monitoring legal developments to become aware of new trends in the application of competition law should form part of the risk identification (regulatory risk).

7 What are the key features of a compliance programme regarding risk assessment?

As in general in compliance programmes and risk maps, risks are usually categorised along two lines (ie, likelihood of the risk materialising and seriousness of the consequences). The risk assessment must be updated at least once a year as well as each time a reorganisation of the company or significant changes of the market take place. In a risk matrix, the resulting inherent risks are then usually quantified as low, medium or high.

8 What are the key features of a compliance programme regarding risk mitigation?

Risk mitigation must address each inherent risk identified specifically and appropriately. The main tool to mitigate risks is the compliance programme, including employee training and regular controls (eg, debriefing after a trade fair where competitors were met). Specific instructions must be given to each employee about permissible and not permissible behaviour. This may include the recording of conversations with competitors, attendance of legal counsel in certain reunions and meetings, the opening of confidential reporting lines for employees and the implementation of information firewalls. Furthermore, risk mitigation should include actions to mitigate the effects of breaches that took place, such as guidelines regarding dawn raids and potential leniency programmes. Finally, risk mitigation should include a document retention guideline.

9 What are the key features of a compliance programme regarding review?

Periodic review must be part of the compliance programme in order for it to 'meet high standards of suitability and seriousness' (see question 1). A review should also be made (i) if the company structure changes, in particular if acquisitions are made or joint ventures are formed, and (ii) if the markets change, for example, the market share of the company is increased because a competitor leaves the market. Review should not be limited to a formal review of the programme but should also review and analyse the behaviour of employees with client or competitor contact and analyse past events that may be of relevance.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

According to the Swiss Cartel Act, agreements that significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency, as well as agreements that lead to the elimination of effective competition, are illicit. After a recent Federal Court Decision, it is currently unclear whether justification on grounds of economic efficiency can only be claimed if a numerus clausus of grounds listed in the Cartel Act are met or if other grounds may be claimed. While all such agreements or concerted practices may be held to infringe competition law, only certain agreements (or concerted practices) among actual or potential competitors can lead to direct sanctions. These are presumed to lead to the elimination of effective competition and include (i) the direct or indirect fixing of prices; (ii) the restriction of quantities of goods or services to be produced, obtained or supplied; and (iii) the allocation of markets geographically or among trading partners.

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The first step to such precautions must be an assessment of the issues involved: does the risk result from an information exchange, from a (potential) concerted behaviour or from a joint venture? Depending on the assessment, precautions may include such varied steps as:

- the setting up of information firewalls (including, in particular for M&A and joint venture transactions, organising and separating a 'clean team');
- aggregation of data received to ensure that the company does not have access to market specific competitor data;
- taking minutes at each meeting with a competitor; or
- a submission of draft agreements to the secretary's office of the Swiss Competition Commission for an (informal and officially non-binding) review. Only in exceptional cases, a formal notification of an agreement to the Competition Commission will be made.

12 What form must behaviour take to constitute a cartel?

The Competition Act defines 'agreements affecting competition' to include binding or non-binding agreements and concerted practices, the aim or effect of which is to restrain competition. Until recently, an effect on the market was a precondition to an agreement being contrary to competition law, so that attempts could not be sanctioned. However, a recent Federal Court decision (*GABA/GEBRO*) newly introduced per se prohibitions, so that a clause in an agreement may be sufficient to constitute a breach of competition law, even if it has not been implemented.

13 Under what circumstances can cartels be exempted from sanctions?

An agreement is deemed to be justified on grounds of economic efficiency if it is necessary to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally, provided that such agreement will not allow the elimination of effective competition.

Furthermore, an agreement can be notified to the Competition Commission before it entails any effect; after notification is filed, the agreement may become effective. However, the Competition Commission has five months after notification to open an investigation; if an investigation is opened, the agreement may not be upheld any longer. Notifications of agreement are cumbersome and rare. The Competition Commission published a form for notification on its website (https://www.weko.admin.ch/weko/en/home/services/notifications.html).

14 Can the company exchange information with its competitors?

Information exchange with competitors is problematic. Criteria used to assess it are similar to those in EU law and entail the contents (if the information relates to strategy or prices), the level of aggregation (how specific is the information), the actuality, the frequency, the homogeneity of the products and market concentration. If the information is publicly available but not accessible to all competitors easily and for no cost, or if uncertainty is diminished by the information exchange, even the exchange of publicly available information may be illegal.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

If an undertaking cooperates in the disclosure and elimination of a restraint of competition, it may be fully or partially relieved from paying a fine. Leniency programmes may apply to both horizontal and vertical restraints. In case of abuse of a dominant position, leniency may apply but not lead to a full suspension of the fine.

Individuals employed by a company are not subject to sanctions for market behaviour (criminal sanctions against individuals may only apply if they are in breach of certain procedural obligations, see below) so that the question of leniency programmes for individuals does not arise.

Complete immunity from sanctions is granted (i) if the undertaking is the first to report and provides the authorities with information sufficient to open proceedings or provides evidence that enables the authorities to establish an infringement, (ii) if such undertaking has not played a leading role in the cartel, submits all available information, continuously cooperates with the authority and (iii) ceases its participation in the infringement. Only one undertaking can be granted complete immunity.

If an undertaking is not the first to report but voluntarily cooperates and terminates it participation in the infringement, it may qualify for a reduction of up to 50 per cent of the sanction. If the undertaking furthermore provides evidence or information on further infringements of competition, the reduction may be increased to 80 per cent.

The identity of an undertaking reporting an infringement is at first kept confidential, but at a later stage of the proceedings, other cartel participants may be granted access to the file.

16 Can the company apply for leniency for itself and its individual officers and employees?

A company can apply for leniency for itself. As individual officers and employees are not subject to sanctions, there is no need to apply for leniency for these persons.

17 Can the company reserve a place in line before a formal leniency application is ready?

The Competition Commission operates a marker system. A marker is the declaration that the undertaking will file a leniency application. The marker must include the name and address of the undertaking as well as a contact person, the declaration that the undertaking coordinated its behaviour with other undertakings, the declaration that a leniency application will be filed, initial information about the cartel agreement, date and signature. The marker is usually sent by email to selbstanzeige@weko.admin.ch. A marker can even be sent during a dawn raid.

18 If the company blows the whistle on other cartels, can it get any benefit?

The company may only benefit if it is itself involved in an infringement of competition law and provides evidence or information on further infringements of competition. If this is the case, its sanction reduction may be up to 80 per cent.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

The Cartel Act addresses any vertical restraints of competition and the principles of EU law are applied in general, but only the following restraints may lead to direct sanctions: agreements on minimum or fixed prices and agreements on the allocation of territories to the extent other distributors are prohibited from selling into such territories.

Agency agreements, as a rule, are not subject to competition law rules, provided they qualify as true agency agreements. There are no clear rules about such qualification and Swiss legal authors refer to the relevant EU notice provisions.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

For many years, vertical arrangements could only be held illegal if they had an effect on the market. Since the recent Federal Court decision in the case *GABA/GEBRO,* there is a de facto per se rule and it is sufficient that, for example, the Swiss market is closed off in a distribution agreement. This may cause problems, as a Europe-wide distribution system in line with EU law (including an export prohibition) will be deemed illegal under Swiss law and may lead to sanctions imposed by the Swiss Competition Commission.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

As outlined under question 13.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

The Cartel Act defines 'enterprises having a dominant position in the market' as meaning one or more enterprises being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (competitors, offerors or offerees) in the market.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

Dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners. The following behaviour is in particular considered unlawful:

- any refusal to deal (eg, refusal to supply or to purchase goods);
- any discrimination between trading partners in relation to prices or other conditions of trade;
- any imposition of unfair prices or other unfair conditions of trade;
- any undercutting of prices or other conditions directed against a specific competitor;
- any limitation of production, supply or technical development; or
- any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services.

On 9 May 2016, Swisscom (a national telecom company) was fined 71 million Swiss francs for not granting a competitor access to exclusive rights held in TV rights on football and ice hockey games.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Exemption is possible subject to a formal notification, but no such case has ever been reported.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

Under the Cartel Act and the Merger Control Ordinance, planned concentrations of undertakings must be notified to the Competition Commission before their implementation if in the financial year preceding the concentration: the undertakings concerned together reported a turnover of at least 2,000 million francs, or a turnover in Switzerland of at least 500 million francs; and at least two of the undertakings concerned each reported a turnover in Switzerland of at least 100 million francs. In the case of insurance companies, 'turnover' is replaced by 'annual gross insurance premium income', and in the case of banks and other financial intermediaries that are subject to the accounting regulations set out in the Banking Act by 'gross income'. Notification is furthermore always (regardless of the above thresholds) mandatory if one of the undertakings concerned in a final and non-appealable decision in proceedings under the Competition Act has been held to be dominant in a market in Switzerland, and if the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof.

The notification must be made by the undertaking acquiring control or, in case of a merger, jointly by the undertakings concerned.

26 How long does it normally take to obtain approval?

Notification must be made prior to implementation. The Competition Commission secretary's office shall within 10 days provide the notifying parties with written confirmation that it has received the notification and that it is complete. In cases where the information or documents are incomplete on any material point, the secretary's office shall within the same period request the notifying undertakings to supplement the notification. The Competition Commission notifies the undertakings concerned of the opening of an investigation within one month of receiving the notification. If no such notice is given within that time period, the concentration may be implemented without reservation. The undertakings concerned may implement the concentration prior to the expiry of the period of one month after notification, provided the Competition Commission notifies them that it regards the concentration as unobjectionable.

Under a simplified notification procedure the undertakings concerned and the Competition Commission secretary's office may mutually agree on the details of the content of the notification. In doing so, the secretary's office may grant an exemption from the duty to submit particular information or documents.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

As a rule, if a merger is cleared, restrictive provisions in the agreements are automatically cleared at the same time.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

Incomplete filings will lead to questions by the Competition Commission and, therefore, to the one-month period starting to run at a later date (upon reception of the complete filing only).

Failure to file and filing after implementation will lead to administrative sanctions of up to 1 million francs; the Competition Commission can also ask for a subsequent filing or a demerger. Furthermore, an individual who implements a concentration of enterprises without notifying the Competition Commission may be subject to criminal sanctions of up to 20,000 francs (one of the rare instances where the Cartel Act stipulates criminal sanctions against individuals).

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

In case of an (actual or potential) conflict of interest between the company and its employees, a separate legal representation of the employee

Update and trends

Subsequent to the recent Federal Court decision GABA/GEBRO, direct sanctions may be imposed even if no effect in Switzerland can be proven. Hence, there is a considerable risk that legitimate distribution systems will be deemed illegal (and fined) under Swiss law, even if they hardly affect the Swiss market.

The Competition Commission recently published guidelines on amicable settlements.

The focus of the Commission's activity 2018 is not yet clear; in recent times, there have been investigations regarding information exchange. In view of the current governmental 'cyber strategy' for Switzerland, it may well be that the activities will focus on market places and access to networks and services. However, it is questionable whether the Swiss Competition Commission will proactively pursue such topics prior to receiving guidelines from precedents of the EU competition authorities.

is recommended. In case of an investigation against a company, its board members and senior management (officers) are treated as forming part of the company. Current and former employees will be considered witnesses. If the Competition Commission questions employees, it expects separate legal representation (legal representation is, however, not mandatory).

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

Dawn raids are increasingly used; they may be used to investigate any breach of competition law.

The Competition Commission has issued detailed guidelines how it conducts a dawn raid (https://www.weko.admin.ch/weko/de/home/dokumentation/bekanntmachungen---erlaeuterungen.html) .

The search team may search both business premises and private (residential) premises as well as vehicles. Any electronic data that the search team can access from the premises searched may be searched as well.

31 What are the company's rights and obligations during a dawn raid?

The occupant of the premises searched has the right to be present; his or her presence is, however, not a requirement. The company has to accept the search and must cooperate to a certain extent by, for example, opening rooms, safes, providing passwords, etc. There is no further duty to cooperate by, for example, indicating additional material, premises, etc. The company may ask that certain data (paper or electronic files) is sealed (eg, attorney-client correspondence).

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

During a dawn raid, a settlement will be difficult to reach, but a company may indicate that it will cooperate and file a marker (see question 17). Thereafter, the company must actively cooperate if it wishes to retain the status under a leniency application.

The Competition Commission secretary's office can close an investigation by proposing an amicable settlement with the undertaking investigated. Such amicable settlement must include clauses on how the restraint to competition will be removed and be in writing. An amicable settlement needs to be approved by the Competition Commission. On 28 February 2018, the Competition Commission issued guidelines on how it will structure and approach amicable settlements. In the settlement, the undertaking agrees to change its behaviour. Officially, the settlement does not address the issue of the amount of the sanction, which is unilaterally imposed by the Competition Commission. However, the secretary of the Competition Commission informs the undertaking prior to the settlement of the approximate amount has proposed to the Commission. In the settlement, the undertaking must renounce its right to file an appeal.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

In settlement negotiations the fact that a compliance programme will be implemented or amended or enhanced may be an element that is considered to determine whether the restraint to competition has been removed for good.

34 Are corporate monitorships used in your jurisdiction?

There have not been any precedents where a formal corporate monitorship was established; however, if a company breaches an amicable settlement, the Competition Commission may monitor its behaviour or mandate third parties to do so, and such undertaking will be subject to administrative sanctions (up to 10 per cent of the turnover in Switzerland in the prior three business years) and the individuals may be subject to criminal sanctions (up to 100,000 francs).

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

Agreed statements of facts may be used by claimants if they are available to them. However, as the settlement decisions are not published, claimants in actions for private damages either have to apply for access to the files or demand a copy from the defendants. The right to access the file will be assessed under the Swiss Data Protection Act; it may be limited, based on a weighting of interests of the parties involved. The practice is not yet clearly settled.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Officers and employees cannot be compelled to give answers that would indicate that they have breached the law. Correspondence with external (but not in-house) legal counsel is privileged to the extent it serves to provide legal advice. Following a recent Federal Court Decision, it is no longer entirely clear to what extent legal documents containing statements of facts only (not directly in connection with a defence in legal proceedings) are privileged (eg, findings of an internal investigation). The Competition Commission, however, has the right to ask for documents and to ask questions of fact; parties to an investigation are under an obligation to respond and to provide documents, and breach of this duty may be sanctioned by criminal fines of up to 20,000 francs.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

The Competition Commission may publish the name of the company it is investigating, although this is often done in a generic way only. Business secrets are protected and the Competition Commission may not publish business secrets of a party. A party may ask for business secrets in documents submitted to the Competition Commission to be blackened before other parties to the proceedings are granted access to the file.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

If the Competition Commission has issued a formal request for information, the company refusing to cooperate may be subject to administrative sanctions (and, in case of a final verdict, the non-cooperation may lead to increased final administrative sanctions) and the individuals to criminal fines up to 20,000 francs.

39 Is there a duty to notify the regulator of competition infringements?

There is not such duty under competition law. Companies under prudential supervision (such as banks) may have to notify their regulator under the supervisory rules applicable to them.

40 What are the limitation periods for competition infringements?

No administrative sanctions are levied if the incriminating behaviour was terminated more than five years prior to the opening of an

investigation. Criminal sanctions for breach of an amicable settlement or of orders of the authorities are subject to a statute of limitation of five years, other criminal sanctions to a limitation period of two years. Civil claims are subject to the regular limitation periods applying (eg, for torts one year after the damaged party received knowledge of the damage and of the identity of the person liable but in any case 10 years after the act causing the damage took place).

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

Certain sectoral rules may apply; in general, provisions establishing an official market or a price system prevail over the competition law rles.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

The Competition Commission last year made amendments to its vertical restraints notice. There have been repeatedly efforts to amend the Competition Act, but so far all recent attempts failed. The recent Federal Court decision *GABA/GEBRO* (referred to above) will likely have a major impact on any compliance programmes.

NIEDERER KRAFT FREY

Thomas A Frick **thomas.a.frick@nkf.ch**

Bahnhofstrasse 53
8001 Zurich
Switzerland

Tel: +41 58 800 8000
Fax: +41 58 800 8080
www.nkf.ch

Turkey

M Fevzi Toksoy and Bahadır Balki

ACTECON

General

1 What is the general attitude of business and the authorities to competition compliance?

The Turkish Competition Authority (TCA) welcomes and encourages the competition compliance efforts of undertakings. A competition compliance programme (CCP) is regarded by the TCA as an indicator of good faith and stands out as an effective tool in complying with competition law. The TCA's practice shows that while CCPs are encouraged (and in some cases may be regarded as a mitigating factor or accepted as a behavioural remedy in merger cases), the mere existence of a CCP cannot be regarded as a sole indicator of undertaking's compliance with competition law.

In its *Unilever* decision No. 12-42/1258-410 in 2012, the TCA showed a positive approach to Unilever's competition compliance efforts. During dawn raids as part of the investigation into the alleged exclusivity practices in the ice-cream market, the TCA found a document with reference to Unilever's CCP and regular competition law trainings. The existence and content of the aforesaid document illustrated Unilever's endeavour to act in compliance with competition law, and to some extend served as grounds for the TCA's decision not to initiate a full-fledged investigation against the company. A similar approach was taken by the TCA in the *Efes* decision No. 12-38/1084-343 in 2012.

At the same time, in the *Frito Lay* decision No. 13-49/711-300 in 2013 the TCA stated that CCPs constitute one of the significant policies of the TCA; however, the mere existence of CCPs cannot be regarded as a sole indicator of undertaking's compliance with competition rules. Moreover, in the *Industrial Gas* decision No. 13-49/710-297 in 2013, while admitting that the undertaking having a CCP in place was positive, the TCA nevertheless stated that it could not be deemed a mitigating factor in determining the fine.

In its recent *Banking* decision No. 17-39/636-276 in 2017, the TCA expressly set forth that the fact of undertakings having CCPs does not change their position when they violate the competition law, and that being part of a violation despite having a CCP merely shows that the CCP was not taken into consideration by these undertakings. The TCA further stated that the aim of CCPs is to prevent violations, and that there is no provision in the relevant legislation that would require taking the presence of CCPs into consideration while determining the amount of administrative fines.

While from a business perspective competition compliance is a frequent practice to raise awareness, multinationals and companies managed under corporate governance mostly apply their policies and pursue their sustainability with tools such as training, workshops and e-learning.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

Yes, there is the TCA's Competition Law Compliance Programme (CCP document) as part of the TCA's Competition Letter 2011, which clarifies the issues and concepts of competition compliance, such as the purpose and scope of CCP, checklist for compliance with competition legislation, the content of CCP, corporate guide, trainings, regular assessment and monitoring of CCP, as well as supportive practices. The document should be helpful for all undertakings in the process of developing their own CCPs. The CCP Document is largely inspired by EU competition law and provides advice to local businesses with structured requirements in order that their CCP be sound and workable. Existence of guidelines, employee responsibility, a confidential hotline, sanctioning or rewarding mechanisms, and regular reporting are among the 'must-have' features listed in the document. The TCA's Competition Letter 2011 is available at: www.rekabet.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FGeneral+Content%2FCompetition+Compliance+Program.pdf.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

A one-size-fits-all approach is not favoured at all. There is no such thing as a standard CCP for every undertaking applicable in any situation. Hence, the CCP shall be custom-made for each undertaking depending on the market characteristics or structure and power of the undertaking, regulations, past TCA decisions regarding the relevant market, as well as the undertaking's own needs. At the same time each CCP should include certain basic elements or issues that are generally applicable, such as:

- corporate guidance explaining the importance of compliance with competition rules;
- basic principles and procedures under Law No. 4054 on Protection of Competition (the Turkish Competition Law) and powers of the TCA;
- regular assessment, training, internal monitoring and reporting procedure;
- a checklist; and
- encouragement and disciplinary practices.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The Fines Regulation provides for a list of the aggravating and mitigating factors in determining the fine amount. Having a CCP in place is not listed among those factors within the Fines Regulation. Moreover, as referred to above in the *Industrial Gas* and *Banking* decisions, the TCA stated that the mere presence of a CCP does not constitute a mitigating factor in determining the amount of the administrative fines. Therefore, de jure having a CCP will not affect the sanctions imposed by the TCA. However, de facto a CCP may positively influence the TCA's views in the course of its evaluations of the alleged infringements (see question 1).

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

A company may demonstrate its commitment to competition compliance by preparing and actively implementing a CCP; providing regular training to current and onboarding employees; preparing a general checklist for all employees or departments according to their job definition and workflow; reviewing and assessing past and current practices in light of competition rules; appointing an in-house competition law expert or person responsible for effective CCP implementation; introducing a system of written commitments

from the employees to fulfil their responsibilities properly and in line with competition law; applying disciplinary actions for violation by employees of competition law or CCP, as well as by establishing encouragement systems or awards to those employees who contribute to the prevention of decisions or practices that are harmful for the undertaking. Senior managers play a major role here by showing their employees clear support for the CCP and compliance culture in general.

6 What are the key features of a compliance programme regarding risk identification?

The CCP helps in identifying risks (legal, financial, reputational) by way of outlining simple and clear 'dos and don'ts' lists for the employees and management. Market research, familiarising itself with the industry, the company's activities and past dealings with the TCA (if any), keeping a track of TCA's past decisions and current antitrust investigations in Turkey, EU and other jurisdictions, are all regarded as essential features of risk identification.

7 What are the key features of a compliance programme regarding risk assessment?

Risk assessment would typically start with informal discussions with the undertaking's senior management regarding the risks that are most common to economic activity in that specific industry. Additionally, enhancing existing communication with employees regarding the risks associated with anticompetitive practices; reviewing the undertaking's agreements or practices, their duration and potential impact on the market; assessing the undertaking and its activities as a whole, organisational structures and changes, geographic scope of activities; prioritising risks (as low, medium or high); and preparing and presenting a report regarding main findings and risk mitigation strategies, are all important. An appointed competition expert or department should monitor and oversee the whole process. In addition, the handling of findings susceptible to lead to a competition breach is one of the key features where a company can show its devotion for its risk-assessment efforts. The CCP Document encourages businesses to halt the infringement and notify the competent authority if necessary. For cartels, the tone is more prescriptive than advisory.

8 What are the key features of a compliance programme regarding risk mitigation?

Risk mitigation typically involves reporting and monitoring, and employee training programmes. Written commitments from the employees to fulfil their duties in line with the CCP may also be useful. Regular assessment by the authorised competition expert of compliance with the CCP by the employees, as well as regularly updating the CCP, depending on the legislative developments, is essential here. The competition expert should also participate in the executive meetings and visit the undertaking's facilities regularly.

Additionally, if the management becomes aware of an infringement, it should immediately; put an end to the illegal practice, assess the case and inform the TCA if necessary (a possible leniency application should be considered in case the infringement stems from a horizontal agreement or concerted practice (see question 15). Active cooperation with the TCA is always advantageous.

9 What are the key features of a compliance programme regarding review?

Review encompasses such features as regular assessment of the CCP and knowledge of employees about the law, CCP rules and procedures, as well as monitoring activities of employees with (or without) notice. Regular inspections (particularly without notice and focusing on the sales and marketing departments) conducted by the authorised competition expert are essential for assessing the compliance efforts of employees.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

Arrangements between competitors are more likely to attract the TCA's attention irrespective of their object or effect. Cartel agreements are automatically prohibited as restrictive by object. Arrangements with the effect or likely effect of the prevention, distortion or restriction of competition are prohibited as well. The following arrangements between competitors are highly likely to be considered a violation of competition rules and, therefore, should be avoided:

- discussing or agreeing on fixing the purchase or sale price of goods or services (as well as other elements such as cost and profit that form the basis for the price, and any terms of purchase or sale);
- agreeing to limit the competition;
- partitioning or allocating markets (geographically or customer-based) for goods or services, and sharing or controlling all kinds of market resources or elements;
- controlling or restricting the amount of supply or other input resources or demand in relation to goods or services;
- colluding with a view to complicating and restricting the activities of certain competing undertakings, excluding firms or customers from the market, including by way of boycotting or other behaviour, or preventing potential new entrants to the market;
- bid rigging; and
- exchange of competition-sensitive information

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The following precautions may be taken: contacting the responsible competition expert or external legal counsel; reviewing and assessing agreement or conduct in light of the CCP or checklist; avoiding exchanges of sensitive information; preparing meeting notes and clearly identifying what issues were discussed with competitors during the meeting (if this is the case) and making sure they are in line with the CCP dos and don'ts; refraining from attending meetings with competitors where no minutes are taken; assessing risks, if any, and applying to the TCA for negative clearance or individual exemption.

12 What form must behaviour take to constitute a cartel?

Cartels are normally defined as agreements restricting competition or concerted practices between competitors for fixing prices, allocation of customers, providers, territories or trade channels; restricting the amount of supply or imposing quotas, and bid rigging (the Fines Regulation and Regulation on Active Cooperation for Detecting Cartels (the Leniency Regulation)). Additionally, the exchange of competition-sensitive information among rivals such as future prices, outputs or sale amounts are generally considered as cartels, since they are generally aimed at fixing prices and quantities (the Guidelines on Horizontal Cooperation Agreements 2013). However, there are precedents whereby the exchange of such information regarding the future was not regarded as a cartel and was categorized under other infringements (eg, in the *Banking* decision the TCA held that exchange of information concerning future prices constituted an anti-competitive information exchange but not a cartel).

Cartels are very unlikely to be in writing. Any act or concerted action between competitors preventing or restricting competition, including any (even unsuccessful) attempt to run a cartel, if there is sufficient evidence of a solid intention to commit it, shall be regarded as a cartel. Whether or not the anticompetitive agreement or cartel has been (partially) implemented is only relevant to determining the gravity of sanctions to be imposed on the parties, not to the fact that article 4 (equivalent of article 101(1) TFEU) of the Turkish Competition Law has been violated.

13 Under what circumstances can cartels be exempted from sanctions?

Cartels may be exempted from sanctions following the leniency application, if certain conditions under the Leniency Regulation are satisfied. Depending on the circumstances, it is possible to obtain either full immunity from or a reduction in fines for undertakings (as well as their employees or managers) if the TCA is approached with a leniency application.

An application for leniency is possible until the investigation report is officially served. The first undertaking to file the leniency application until the investigation report is officially served may benefit from total immunity from fines, unless the applicant is a ringleader. All the subsequent applicants for leniency may benefit only from a reduction

in fines. Active cooperation with the TCA until the final decision on the case is indispensable in this process. The name of the applicant must be kept confidential until the end of the investigation, unless the assigned unit requests otherwise.

The undertaking applying for leniency must:

- submit information and evidence in respect of the alleged cartel, including products affected, the duration of cartel, the names of undertakings participating in the cartel, specific dates, locations and the participants of cartel meetings;
- not conceal or destroy information or evidence related to the alleged cartel;
- end its involvement in the alleged cartel, except when the assigned unit on the ground requests otherwise, if detecting the cartel would be complicated; and
- maintain active cooperation until the TCA takes its final decision.

14 Can the company exchange information with its competitors?

As mentioned in question 12, exchanges of competition-sensitive information among rivals may be anti-competitive under certain circumstances (they may also be considered as cartels, if they are aimed at fixing prices and quantities). Information related to prices, quantities, customers, costs, turnovers, sales, purchases, capacities, product characteristics, marketing plans, risks, investments, technologies, R&D programmes and similar information are considered competition sensitive. Exchanges of aggregated data (when it is sufficiently difficult to identify individual data of a particular undertaking) or historic data (as opposed to current or future data) are much less likely to lead to competition concerns.

An undertaking may exchange information with its competitors if the exchange of information leads to efficiency gains, which are passed on to consumers, and outweigh the restrictive effects on competition. The framework for information exchange among competitors is also shaped by the many precedents of the TCA in different industries and forms. These detailed precedents are the outcome of negative clearance applications to the TCA, mostly by industry associations.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

A leniency programme is available to companies in Turkey as well as individuals. Until the *Banking* decision, the leniency programme was in place exclusively to reveal cartels. Therefore, if the TCA discovered that the practices indicated in the leniency application in fact related to other types of infringements, the leniency applicant only benefited from the possibility of obtaining a reduction in its fine, if it cooperated actively with the authority (eg, in the *Hyundai Dealers* decision No. 13-70/952-403 in 2013, the TCA had held that the leniency applicant may not benefit from full immunity as the infringement concerned was not a cartel but an information exchange and deemed the leniency application as a form of active cooperation thereby reducing the amount of fine). However, in the *Banking* decision, although the TCA decided that the infringement was not a cartel, it granted full immunity to the leniency applicant due to its active cooperation with the TCA. It is important to note that the TCA relied directly on the provisions of the Turkish Competition Law concerning active cooperation rather than the Leniency Regulation, as the former does not distinguish between different types of violation whereas the latter stipulates that full immunity may only be granted in case of cartels. It should further be noted that full immunity would only be granted to horizontal agreements or concerted practices and not to anticompetitive vertical agreements or concerted practices or abuse of dominant position (the administrative fines to be imposed on the undertakings may be reduced in those cases if they actively cooperate with the TCA).

The name of the applicant must be kept confidential until the end of the investigation, unless requested otherwise by the assigned unit. (See question 13.)

16 Can the company apply for leniency for itself and its individual officers and employees?

Yes, when the undertaking applies for leniency, its application and leniency benefits would also cover its individual officers and employees.

17 Can the company reserve a place in line before a formal leniency application is ready?

A marker system is available in Turkey. Normally following a face-to-face meeting, the undertaking or its representative would sign an affidavit with the case handlers specifying the date and time of the marker. Placing a marker would not result in any additional obligation or duties on the undertaking concerned. On the other hand, as a rule of thumb, the undertaking would be expected to proceed and submit the available evidence in relation to the suspected practices or cartel.

18 If the company blows the whistle on other cartels, can it get any benefit?

Per the article 7(2) of the Fines Regulation, an undertaking may apply for leniency plus during an ongoing investigation. If an undertaking discloses a new infringement through the leniency programme (in accordance with the Leniency Regulation) during an ongoing investigation, it benefits twice by obtaining full immunity for the new infringement (provided the conditions in the Leniency Regulation are satisfied) and a fine reduction of a quarter for the ongoing investigation.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

Normally vertical agreements, if they simply provide for basic terms of a sale or purchase transaction, are not regarded as problematic from a competition law perspective. At the same time, in dealing with commercial partners undertakings must refrain from certain practices that involve restraints on suppliers or buyers, since those may constitute a competition law violation under the Turkish Competition Law, such as:

- determining (directly or indirectly) the resale price of the dealer or customer. The supplier may set a maximum sales price for the buyer or offer recommended sales prices to the buyer, provided these do not transform into fixed or minimum sales prices;
- intervening in sales conditions (eg, determining discount rates, profit margins, tying, limiting sales points, etc);
- imposing (directly or indirectly) restrictions regarding the region or customers to which the contracted goods or services may be sold;
- prohibiting active or passive sales to end users in a selective distribution system;
- imposing non-competition obligations, including those related to the period following the termination of the agreement, that concern inter-brand competition and may lead to anticompetitive effects if they create a foreclosure effect in the relevant market where the contracted goods and services are being sold; and
- most-favoured nation (MFN) practices implemented by players with a significant market power in the market leading to foreclosure of competitors.

As for agency agreements, in order to ensure that article 4 of the Turkish Competition Law does not apply, the agent must not undertake the following risks and costs:

- bearing costs related to the sale or purchase of the goods or services, including transportation costs, storage costs, costs of lost goods etc;
- contributing, directly or indirectly, to activities aimed at increasing sales;
- providing an after-sales service, maintenance or warranty services; making investments that may be necessary to operate in the relevant market and that can be used exclusively in that market;
- being responsible to third parties for any damages caused by the products sold; and
- assuming responsibility other than failing to get a commission owing to customers' failure to fulfil the terms of the contract, etc.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

Not all of the above-mentioned vertical arrangements are illegal per se. The TCA makes a distinction between agreements that restrict

competition by object and by effect. Resale price maintenance, imposing a minimum resale price limit and exclusivity agreements, including passive sales fall under the category of restrictions by object. Further analysis of the effects of such agreements with restrictions by object is only necessary to determine the gravity of the infringements and sanctions (the Guidelines on General Principles of Exemption).

Agreements that may be restrictive by effect should be assessed from the point of view of actual and potential effects on competition parameters in the market. Therefore, in addition to actual anticompetitive effects, restrictive effects that are expected to occur with a reasonable probability shall be considered sufficient grounds for finding them anticompetitive. If the anticompetitive effects are confirmed, they shall be assessed in the light of the efficiency defence conditions listed in article 5 (equivalent of article 101(3) TFEU) of the Turkish Competition Law.

Agreements with no restriction by object may be covered by the Vertical Block Exemption Communiqué if the 40 per cent market share threshold is not exceeded. Those agreements that exceed the 40 per cent market share threshold may still benefit from the individual exemption under article 5 of the Turkish Competition Law.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Vertical arrangement may be exempted from sanctions if they fall within the scope of one of the relevant Block Exemption Communiqués, namely, on vertical agreements, on research and development agreements, on vertical agreements and concerted practices in the motor vehicles sector, on insurance sector, and on technology transfer agreements. Alternatively, an individual assessment of the exemption under article 5 of the Turkish Competition Law shall be conducted. In case there is no certainty as to either block or individual exemption, it is highly recommended to approach the TCA in order to avoid any risk of being fined.

In its decision No. 17-01/12-4 in 2017 the TCA fined Booking.com for approximately 2.5 million Turkish lira for violation of Turkish Competition Law via its 'best price guarantee'/MFN practices. It was found that agreements (particularly the MFN clauses) concluded between Booking.com and accommodation facilities were outside the scope of the Block Exemption Communiqué on Vertical Agreements (due to the market share threshold). An individual exemption could not be granted either since the practices did not meet exemption conditions under article 5 of the Turkish Competition Law.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

Among the factors that are applied by the TCA to determine if the company is dominant, are:

- the market position of the undertaking concerned and its competitors. The established practice of the TCA is to consider undertakings with less than 40 per cent of the market share as less likely to be dominant;
- barriers to entry and expansion in the relevant market;
  - legal and administrative barriers;
  - economic barriers;
  - barriers stemming from the characteristics of the undertaking in question, for example, possession of key inputs and access to special information; and
  - conduct in the market, for example, large-scale investments, which existing or potential competitors would have to match, etc; and
- buyer power.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

The following behaviour may constitute abuse of market dominance:

- excessive or predatory pricing and complicating competitors' activities via pricing policy;
- price or margin squeezing;
- tying;
- rebates;
- exclusivity or single branding arrangements;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby discriminating;
- limiting production, market or technical development to the prejudice of consumers;
- restricting or cutting off the supply of goods to customers or competitors without reasonable grounds;
- preventing other undertakings from entering into market and complicating their activities in the market by using financial or technological or IP superiority in a market; and
- MFN practices.

This list is not exhaustive. The basis of the TCA's evaluation of conduct is whether the behaviour of the dominant undertaking leads to actual or potential anticompetitive foreclosure.

The TCA's decision No. 16-20/347-156 in 2016 in relation to the popular Turkish online food ordering platform Yemeksepeti declared that the company abused its dominant position via the MFN clauses, which prevented competitors from providing better or different conditions (ie, prices, discounts, promotions, menus, payment options, delivery regions), as well as by preventing advertisements of competing platforms, by offering promotions to restaurants in return for refusing to work with competing platforms. The undertaking was fined 427,977 lira and was ordered to exclude MFN clauses from the agreements.

Abuse of dominance was confirmed by TCA in its more recent decision No. 17-07/84-34 in 2017 in relation to the traditional alcoholic drink (rakı) producer Mey İçki. Providing financial benefits in relation to the shelf positioning and product layout of rakı category within the traditional channel sales points, loyalty rebates, in addition to other practices, were deemed as exclusionary and in breach of competition law. The company was fined 155,782,969 lira, an amount corresponding to 4.2 per cent of company's turnover (the fourth largest fine imposed on a company in Turkey). The decision lists in detail a number of actions that the dominant company needs to undertake or refrain from.

The TCA delivered another abuse of dominance decision No. 17-08/99-42 in 2017 in relation to branded sunglasses wholesaler Luxottica. The company was fined 1,672,647 lira for abuse of dominance via practices foreclosing the market to its competitors.

The TCA published its short decision 18-06/101-52 dated 20 February 2018 in relation to the first investigation ever conducted in the electricity sector and imposed a total fine of 38 million lira on Akdeniz Elektrik Dağıtım AŞ, the electricity distribution company in the Mediterranean Region, and Akdeniz Elektrik Perakende Satış AŞ, the incumbent retail electricity sales company, which is under the same control structure as the distribution company, for abuse of dominance.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Abusing market dominance may be exempted from sanctions if there are sufficient grounds to justify such behaviour. The justification claims put forward by the dominant undertakings should include an explanation of objective necessity and efficiency.

Under the 'objective necessity' category the abusive conduct should protect a legitimate benefit and such conduct should be indispensable for achieving that benefit. Additionally, such conduct must be caused by external factors, namely, health and safety requirements set by the public authorities. The restriction must not exceed what is necessary in the course of protection of that benefit.

As for the 'efficiency' category, the dominant company must prove that the abusive conduct meets all four of the following conditions: there are certain efficiencies (to be) realised as a result of the conduct; the conduct is indispensable for the realisation of those efficiencies; the efficiencies outweigh any possible negative effects on competition or consumer welfare; and the conduct should not eliminate effective competition (the Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position 2014).

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

If one of the following turnover thresholds is exceeded in a transaction involving a permanent change of control, such transaction must be notified to the TCA where:

- either the total Turkish turnover of the transaction parties exceeds 100 million lira and the Turkish turnovers of at least two of them separately exceed 30 million lira; or
- the Turkish turnover of the assets or businesses being acquired in acquisition transactions, and of at least one of the parties in merger transactions exceeds 30 million lira, and the worldwide turnover of the other party exceeds 500 million lira .

The average buying exchange rate of the Central Bank of Turkey for the financial year the turnover is generated is taken into consideration in the calculation of the turnover. The above-mentioned currencies are based on the average buying exchange rate for 2017.

For the purpose of calculating turnovers, transactions executed between the same persons, parties or undertakings or by the same undertaking in the same relevant product market (ie, creeping acquisitions) are considered to constitute a single transaction if they are realised within three years.

Article 8 of Communiqué No. 2010/4 Concerning the Mergers and Acquisition Requiring the Approval of the Competition Board establishes that the calculation of turnovers must be based on net sales, whereas article 9 prescribes specific rules regarding the calculation of financial institutions' turnovers including, among others, banks, insurance, factoring and financial leasing companies.

The notification may be made either jointly by the parties or severally by any of the parties or their authorised representatives (see question 26 and Communiqué No: 2010/4).

26 How long does it normally take to obtain approval?

The procedure before the TCA may have two phases.

Phase I consists of a preliminary review that lasts one to two months. The Board decides either to approve or to further investigate the concerned transaction at the end of Phase I. Following the notification, the Board is to conduct a preliminary examination within 15 days, upon which it decides either to clear the transaction or to further examine its possible effects by initiating a Phase II investigation. Within the 15-day period, the TCA may decide to request information from the transaction parties or third parties. The 15-day period restarts following the receipt of the requested information. In case the Board does not notify its decision or does not take any action as to the notified transaction within 30 days of the date of notification, it is considered to have implicitly approved the transaction. In practice, clearance of Phase I transactions generally takes one to two months.

A Phase II investigation is initiated if the notified transaction is considered to carry the risk of creating a dominant position or strengthening an existing one, and significantly impeding effective competition. The Phase II notice is sent to the parties within 15 days following such decision. The parties submit their first written defence within 30 days of receiving the Phase II notice. The TCA must issue the Phase II report within six months (extendable for another six months) after the initiation of the Phase II investigation. In practice, the TCA generally issues the Phase II report within the first six months. Parties have 30 days (extendable for another 30 days) for submitting the second written defence and the TCA issues its additional opinion within 15 days after receiving the second written defence. The parties may respond to the additional opinion within 30 days and this closes the investigation stage. Unless an oral hearing is held, the Board renders its decision within 30 days (extendable for another 30 days) after the conclusion of the investigation stage. The Board generally decides whether a Phase II transaction shall be cleared or not within a year after the transaction is notified. In this regard, the best timing for filing a notification depends on the specific circumstances and conditions of the transaction.

In either of those phases, the TCA may request information from parties, public authorities, or from any other interested parties. In 2017, the TCA examined 184 transactions, four of which went to Phase II.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

The TCA's clearance shall also cover ancillary restrictions that are proportionate, directly related and necessary for the concentration and restrictive only for the parties (non-compete, confidentiality, non-solicitation clauses). If those are not ancillary restrictions, the parties will have to self-assess them from the point of view of article 4, 5 and 6 of the Turkish Competition Law.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

This may result in a fixed administrative fine of 0.1 per cent of the annual gross turnover of the parties concerned in the financial year preceding the date of the decision (but no less than not less than 21,036 lira for 2018), irrespective of whether the TCA ultimately decides to clear the transaction. If the implemented-without-clearance concentration created or strengthened a dominant position and significantly impeded competition in the market in Turkey, the fine may be up to 10 per cent of the annual gross turnover for the preceding year. Additionally, executives and employees of the undertakings concerned who played a decisive role in the violation of the standstill obligation may also be faced with a fine of up to 5 per cent of the fine imposed on the undertakings.

The TCA in its decision No. 16-42/693-311 in December 2016 decided to impose an administrative fine on Labelon Group Limited for its failure to notify the transaction in Turkey prior to its closing in the amount corresponding to 0.1 per cent of its the annual gross turnover, and at the same to time authorise the acquisition of control of A-Tex Holding by Labelon Group.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Although not referred to in any competition legislation, an employee may seek external legal support in case he or she faces action from its employer with the allegation that his or her own initiatives caused the subjected breach of competition law. An individual may also seek individual legal advice in cases where his or her employer forced the employee to breach competition rules and put him or her under a responsibility towards competition law. In such cases, an individual may apply for leniency or whistle-blow under the guidance of the individual legal support.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

Dawn raid is a frequent method of investigation that may be used by the TCA regardless of the nature of the alleged infringement. Unannounced onsite inspections are used both at the pre-investigation and investigation stages.

The TCA may search the premises of the undertaking subject to its investigation. The TCA officials do not need a special authorisation from the court, but they do have to have authorisation from the President of the TCA specifying the subject matter and purpose of the investigation, and that administrative fines shall be imposed in case of provision of incorrect information. The authorisation from the court is required only if the undertaking concerned refuses to allow the dawn raid.

The TCA representatives may enter the premises and means of transport of companies; access electronic devices such as computers, company mobile phones, notebooks; examine and take copy of the books and other business records; and ask any representative or employee for explanations about facts or documents (article 15 of the Turkish Competition Law). Computers may be fully examined by the TCA, including any deleted items.

31 What are the company's rights and obligations during a dawn raid?

The undertaking is obliged to allow the TCA's inspectors to access the premises and conduct the investigation if a formal decision is taken by the TCA. In the absence of a formal decision, it is not obliged to permit it. It is not required to state reasons why it does not permit investigation. If the undertaking voluntarily decides to allow the investigation to be conducted, it will not be able to change its decision later on. In the presence of a formal decision, undertakings must allow the case handlers to conduct a dawn raid and an administrative fine amounting to 0.5 per cent of the turnover generated in preceding year is imposed in case dawn raids are hindered or obstructed. One of the most significant decisions of the TCA regarding the obstruction of dawn raid was TTNET decision No. 13-46/601-M in 2013, where it was found that an employee deleted certain documents during the dawn raid and the TCA fined the undertaking for 15,512,258 million lira, which was 0.5 per cent of the undertaking's turnover.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Currently there is no settlement procedure explicitly provided for by Turkish law. The TCA may, at the stage of preliminary investigation, adopt a decision or warning stating that it would initiate a full-fledged investigation if the undertakings concerned do not modify or put an end to their agreements or conduct and the parties should come up with effective commitments to be accepted by the TCA.

Currently settlements in the form of remedies are available within the scope of merger control. The TCA allows undertakings concerned to propose remedies related to transaction with a view to eliminating the competition concerns that may arise. At the same time the TCA is entitled to impose requirements and obligations to ensure the fulfilment of such remedies.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

Since the TCA considers CCPs as part of the remedies package in merger cases, as well as generally being a positive factor, we would expect that the CCPs in place may also be considered by the TCA in the process of settlement negotiations, if and when the new Draft Law comes into force.

34 Are corporate monitorships used in your jurisdiction?

No, corporate monitorships are not used in Turkey.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

This remains to be seen once the settlement mechanism is introduced in Turkey. Currently, the civil courts suspend the proceedings in actions for private damages until the TCA renders a decision confirming the competition law infringement. In case the TCA finds an infringement, the civil courts must take this as given and they may not further assess whether the conduct of the defendant is unlawful or not. The private damages claims are tort claims and the infringement decision of the TCA only proves the unlawfulness of the relevant conduct. The claimant must further prove the negligence of the claimant, its damages and the causal link between the unlawful conduct and its damages. There is no class action envisaged by the Turkish law for the purposes of private enforcement in relation to competition law violations (as opposed to cases on consumer protection).

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The undertaking (both the company and individual) may claim attorney–client privilege over any aspect of internal antitrust investigation that relates to the right of defence under certain conditions. Legal privilege in Turkey covers documents prepared by or correspondence with an independent external attorney that is directly related to the client's right of defence (eg, a legal opinion on whether the agreement infringes competition law). If this is not the case or if the purpose of the documents is to conceal or facilitate the violation (eg, discussions on how to apply the anticompetitive practices), then privilege cannot be invoked and hence those documents cannot be protected. Attorney–client privilege was confirmed by the TCA in its *Dow* decision No. 15-42/690-259 in 2015 stating that communications with an independent (with no employment relations with the client) attorney fall within the scope of attorney–client privilege and shall be protected from disclosure. Since legal privilege is not explicitly regulated by law, the TCA enjoys discretionary power on evaluating this issue.

In the *Luxottica* decision No. 17-08/88-38 in 2017 the TCA held that the responses provided by the undertakings to the information requests sent by the TCA must be evaluated within the scope of the principle of privilege against self-incrimination. The TCA stated that the undertakings have a right to answer questions that are directly related with the essence of the investigations in parallel with their defences, and that it may not be claimed that these responses are misleading owing to the privilege against self-incrimination.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

The undertakings involved in competition investigations are entitled to confidentiality protection by way of making reasoned confidentiality requests in writing to the TCA indicating what information or documents shall be regarded as confidential or trade secrets, the grounds for this, and providing non-confidential versions of those documents. The TCA has discretion in deciding whether there are legitimate reasons to grant the requested confidentiality. The TCA may ask for detailed explanation of the confidentiality claims (Communiqué No. 2010/3 on Access to File).

Irrespective of the confidentiality request, the law prohibits the officials of the TCA from disclosing and using (in their own or other's interests) the confidential information and trade secrets of undertakings obtained in the course of performing their duties, even if they have left the office.

Additionally, the applicant who submits information about alleged violations to the TCA may request to stay anonymous (Communiqué 2012/2). In such case, any information that may lead to the identification of such applicant shall not be included in any correspondence, including within the TCA.

Confidentiality may also be regarded as a duty under the Leniency Regulation, according to which a leniency applicant, in order to be eligible for leniency, must, among other requirements, keep the application confidential until the end of the investigation, unless requested to do otherwise by the TCA.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

Refusing to cooperate with the TCA in an investigation may take the form of hindering or complicating on the spot inspections, or failure to respond to information requests in a timely manner, etc, and may result in a fixed administrative fine of 0.5 per cent of its annual gross revenues for the financial year preceding the fine decision.

39 Is there a duty to notify the regulator of competition infringements?

No such duty is specifically envisaged by law. Rather it is a right of any natural person, institution or any other undertakings to submit an application to the TCA in the form of information or a complaint.

40 What are the limitation periods for competition infringements?

Eight years.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

Not applicable.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

The Ministry of Customs and Trade in 2013 issued a draft law that aims to amend certain provisions of the current Competition Law and it was submitted to the Turkish parliament's attention in early 2014. However, it was not enacted and became obsolete following the general elections in 2015. The draft law's provisions, however, might still serve as a roadmap as to what should be expected from a potential reform. Under the Draft Law, the settlement procedure is envisaged and undertakings will enjoy the opportunity to terminate an ongoing investigation by putting commitments forward if and when a provision similar to that in the Draft Law comes into force.

Additionally, the Draft Law replaces the dominance test with the 'significant impediment of effective competition' test for the purposes of merger assessment. The TCA (inspired by the *Marina* decision No. 15-29/421-118 dated 9 July 2015) has also been considering introducing the market share test in addition to the turnover thresholds with a view to ensuring that all problematic transactions are subject to merger control.

M Fevzi Toksoy **fevzi.toksoy@actecon.com**
Bahadır Balki **bahadir.balki@actecon.com**

Çamlıca Köşkü – Francalacı Sokak
No. 28 Arnavutköy – Beşiktaş
34345 İstanbul
Turkey

Tel: +90 212 211 50 11
Fax: +90 212 211 32 22
www.actecon.com

United Kingdom

Paul Gilbert and Alexander Waksman
Cleary Gottlieb

General

1 What is the general attitude of business and the authorities to competition compliance?

Compliance with competition law is a priority for the UK Competition and Markets Authority (CMA). Its 2018/2019 annual plan stated that it will 'continue to complement tough enforcement with support for businesses through compliance and awareness-raising activities to help prevent anti-competitive practices and unfair trading occurring in the first place'. The CMA deploys wide range of tools to promote compliance, for example:

- advice on managing compliance risks through published guides, such as *Competition Law Risk – A Short Guide* (2017), *Competition Law Case Studies* (2015), *Competing fairly in business* (2015) and *How your business can achieve compliance with competition law* (2011);
- a series of short online films explaining the principles of competition law and giving advice on how to ensure compliance (2016 to 2018);
- open letters on compliance with competition law in particular sectors, such as in the creative industries (2017), resale price maintenance in online markets (2016), medical practitioners (2015), and school uniform suppliers (2015);
- warning letters and advisory letters (see question 9);
- publishing summaries of cases that are closed without a formal prohibition or commitments decision (such as the closure of the investigation into rebates in the pharmaceutical sector in 2015); and
- developing a free-to-use procurement Screening for Cartels tool to help identify bid rigging from tender data and publishing open letters to procurement professionals.

Business awareness of competition law has likewise increased and it is common for larger companies to have compliance policies in place. A 2015 survey commissioned by the CMA found that 'awareness of competition law increased with business size.' The CMA's predecessor body, the Office of Fair trading (the OFT), also published a detailed study of *Drivers of Compliance and Non-compliance with Competition Law* in 2010, analysing the factors that motivated companies to comply with competition law and the challenges they face.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

The CMA considers that an effective compliance culture requires a 'top down' commitment. Joint guidance from the CMA and Institute of Risk Management (*Competition Law Risk – A Short Guide,* 2017) states that 'Senior management, especially the board, must demonstrate an unequivocal commitment to competition law compliance.'

CMA guidance on 'Company directors and competition law' (OFT1340) is, therefore, important in enabling directors to ensure competition law compliance. It states that 'a director with responsibility for compliance with competition law will be expected to have sufficient grasp of the principles of competition law to identify and assess the types of risk to which the company is exposed.' It provides guidance on the risks of director disqualification, approaches to detecting and preventing infringements, and practical examples.

The CMA recommends that companies adopt a four-stage approach to competition-law compliance, as follows (CMA and Institute for Risk Management, *Competition Law Risk – A Short Guide*, 2017):

- identify the key competition law risks faced by the business;
- analyse and evaluate how serious the risks are, for example categorising them as low, medium, or high, and identifying employees in high-risk areas (eg, staff that have contact with competitors);
- manage the risks through policies, procedures and measures to detect and address breaches if they occur, depending on how serious the risk is; and
- monitor and review regularly competition law compliance, such as through annual reviews or after acquiring a new business or following a competition law investigation.

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

Competition law applies to all businesses and the CMA has taken enforcement action against companies with small turnovers. The risk of enforcement for breaches of competition law therefore applies to both large and small firms, including in abuse of dominance cases. The risk-based approach to competition law compliance promoted by the CMA also applies to firms of all sizes; firms are encouraged to assess their individual exposure and take proportionate steps to address the risks they face.

In addition to the materials above, the CMA has published guidance for small businesses (OFT1330, 2014) as well as a checklist for small and medium-sized enterprises (SME checklist, 2015). The CMA works closely with the Federation of Small Businesses and other industry bodies to improve awareness of competition law across all industry sectors.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The mere existence of a compliance programme is not sufficient to trigger a discount. The CMA's fining guidelines (OFT 423) explain that the CMA may treat evidence of 'adequate steps' to improve compliance as a mitigating factor that can result in a fine reduction of up to 10 per cent.

The CMA has reduced fines on the basis of compliance measures in a series of recent cases, including the following.

- Residential real estate agency services (2017). The CMA applied discounts of 10 per cent to certain real estate agencies that had implemented compliance programmes and a discount of 5 per cent for another agency that had taken steps to mitigate the risks of non-compliance (but without taking steps to improve the identification, assessment of its exposure and review of its compliance measures).
- Bathroom fittings (2016). The CMA applied a discount of 5 per cent after the company's board publicly adopted a competition law compliance programme and supplied evidence to the CMA that senior managers would receive competition law training. The company also agreed to supply an annual compliance report to the CMA for the next three years.
- Eye surgeons (2015). The CMA applied a discount of 10 per cent after the introduction of an organisation-wide compliance programme and a clear commitment to compliance by the association

of private ophthalmologists that would set an example to members of the profession.
- Estate and lettings agents (2015). The CMA applied a discount of 5 per cent after receiving evidence that senior managers had been trained in competition law compliance and that a competition manual had been implemented.

In exceptional circumstances, the CMA may treat the existence of a compliance programme as an aggravating factor where it is used to conceal or facilitate an infringement or to mislead the CMA.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

Evidence of a top-down commitment to competition law compliance can take various forms, such as a board resolution affirming its commitment to competition law compliance, adopting a compliance code or handbook for employees, and messages from senior management to staff affirming the company's compliance culture. To demonstrate a commitment to compliance, statements 'from the top' have to be backed up with measures to identify, assess, and manage risks, and to review compliance procedures. The CMA has published guidance on 'Company directors and competition law' to provide directors with practical advice on their competition law obligations.

6 What are the key features of a compliance programme regarding risk identification?

The CMA's guidance identifies a series of risks that can be grouped in the following categories:
- risks from contact with competitors (eg, contact between the employees of a company and rivals (eg, at trade association); frequent movement of personnel between competing firms; employee knowledge of competitors' business plans or prices);
- risks from contractual, structural, or other links with competitors (eg, sharing the same suppliers as competitors; having customers who are also competitors; having partnerships or joint selling or purchasing arrangements with competitors);
- risks from specific types of agreements or conduct (eg, entering into exclusive contracts for long periods; agreements that require confidential information to be shared with competitors; imposing resale price restrictions on retailers that sell a company's product); and
- risks that a company may be treated as subject to 'abuse of dominance' rules (eg, having a large share of any markets in which the company operates).

7 What are the key features of a compliance programme regarding risk assessment?

Risks can be categorised according to their seriousness, considering both the likelihood of the risk materialising and the consequences of a breach.

The likelihood of the risk materialising depends on the circumstances at issue. For example, the likelihood of an inappropriate exchange of confidential information may depend on the frequency of contact with competitors, and the number (and role) of employees that have contact with competitors.

Potential consequences of a breach may include a fine, private damages actions, loss of reputation, and sanctions on individuals (eg, criminal sanctions or director disqualification).

Taking these factors into account, the CMA's guidance states that the level of risk can be expressed in quantitative terms (eg, assigning the risk a monetary value) or qualitative terms (eg, low, medium or high).

8 What are the key features of a compliance programme regarding risk mitigation?

Appropriate steps to manage competition law depend on the specific risks identified – and their seriousness – possibly including:
- competition law training for management and employees;
- codes of conduct, checklists, or competition law manuals;
- carrying out due diligence on the objectives and operation of industry associations before joining them;
- logging records of conversations with competitors;
- attendance of competition counsel and presentation of reminders at trade association meetings;
- making advice available to employees before entering new contracts;
- establishing a system for employees to report confidentially any concerns they have;
- making anticompetitive conduct a disciplinary issue; and
- implementing information firewalls as regards joint ventures with competitors.

9 What are the key features of a compliance programme regarding review?

Monitoring and reviewing can involve key performance indicators (eg, percentages of staff trained) and carrying out internal audits. Reviews may also be prompted by the CMA sending advisory or warning letters to companies. These letters explain any concerns that the CMA may have about the company's compliance with competition law. Advisory letters recommend that the business carry out a self-assessment of its compliance with competition law and warning letters request further information about what the company has done or will do to ensure that it complies with competition law. The CMA may decide to launch a formal investigation at a later date, and may impose a higher financial penalty if the company fails to act on the requests in the warning or advisory letter. The CMA issued 19 warning letters and 42 advisory letters in 2017. The Financial Conduct Authority (FCA), which has concurrent competition law powers in relation to financial services, also issues advisory and 'on notice' letters.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

The Competition Act 1998 prohibits agreements that have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, unless they are exempt – either under a block exemption or individual exemption (see question 13) (the Chapter I Prohibition). Article 101 of the Treaty of the Functioning of European Union (TFEU) also applies directly in the UK. Its provisions are substantially identical to the Chapter I Prohibition, but apply only to agreements that may affect trade between EU member states.

The Chapter I Prohibition and article 101 specifically refer to agreements relating to price-fixing, limiting production, market-sharing, price discrimination, and imposing unrelated supplementary obligations in agreements with third parties that place them at a competitive disadvantage. The scope of the prohibition is broad, however, and has also been applied to vertical agreements (eg, resale price maintenance), information exchanges, and 'reverse payment settlements' in patent litigation. It also extends to certain categories of horizontal cooperation agreements and joint ventures. The UK competition authorities (the CMA, as well as nine sectoral regulators that can apply UK and EU competition law in their regulated sectors) defer to the European Commission's Guidelines on Horizontal Cooperation Agreements (2011/C 11/01).

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

This risk typically arises when a company enters into joint ventures or joint purchasing or selling arrangements with competitors, or where they participate in data sharing arrangements (even via third parties).

Measures to mitigate risks can include information firewalls, quarantining employees that have had access to rivals' confidential information, and ensuring sufficient aggregation of data to avoid having access to rivals' commercially sensitive information.

Where a company intends to rely on a block exemption or individual exemption, it is prudent to record formally the basis on which the company considers the agreement to be exempt.

Trade association meetings can also give rise to competition-law compliance risks. Companies participating in trade association activities can mitigate these risks by checking the proposed agenda in advance, asking competition counsel to attend, ensuring that discussions do not stray onto prohibited topics (and leaving the meeting if they do), and keeping detailed minutes.

Individuals can also reduce their exposure to the risk of prosecution under the criminal cartel offence by notifying customers of the agreement in advance or publishing information about the agreement in any of the London Gazette, the Edinburgh Gazette or the Belfast Gazette.

12 What form must behaviour take to constitute a cartel?

The Chapter I Prohibition applies to a broader set of agreements than 'cartel activity' as defined for the purposes of leniency (see question 15) or the criminal 'cartel offence' under the Enterprise Act 2002. A wide range of behaviour can fall within the scope of the Chapter I prohibition.

'Agreements' include oral and written agreements, whether formal or informal, and whether legally binding or not. Following the Court of Justice, it is sufficient that the parties 'have expressed their joint intention to conduct themselves on the market in a specific way' (*Hercules Chemicals*, 1991) or that there is a 'concurrence of wills' that 'constitutes the faithful expression of the parties' intention' (*Dresdner Bank*, 2006).

The Chapter I Prohibition also applies to 'concerted practices'. The CMA adopts the approach of the Court of Justice in *T-Mobile Netherlands* that a single meeting between competitors may, in principle, constitute a sufficient basis to find a concerted practice. In the context of information exchange, a concerted practice can be deemed to arise from even unilateral (one-way) disclosure of information unless the recipient manifestly opposes receiving it (*RBS/Barclays*, 2011).

In a case concerning online sales of poster frames, the CMA confirmed that using automated repricing software to give effect to an agreement between sellers not to undercut each other fell within the scope of the Chapter I Prohibition (August 2016).

13 Under what circumstances can cartels be exempted from sanctions?

Outside the scope of the block exemptions, agreements may be individually exempt from article 101 and the Chapter I Prohibition if they contribute to improving production or distribution or promoting technical or economic progress, provided they allow consumers a fair share of the resulting benefit, the restrictions are indispensable for achieving these objectives, and they do not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

Although it is possible, in principle, for a cartel agreement to satisfy these criteria, it is very rare in practice. For example, the European Commission notes the possibility for 'crisis cartels' to be exempt from article 101 TFEU, although the parties would need to show 'that the industry concerned indeed suffers from a structural overcapacity problem, namely, market forces alone cannot remove that excess overcapacity' as well as demonstrating the benefit to consumers (2011 submission to the OECD Global Forum for Competition).

Firms must assess for themselves whether their agreements are exempt from the Chapter I Prohibition and article 101. There is no mechanism to apply for exemption. The CMA may offer 'short form' opinions on whether specific proposed agreements are individually exempt (eg, *P&H/Makro* – joint purchasing agreement (2010) and *NFU/CLA* – rate recommendations (2012)).

The UK competition authorities cannot impose fines for breaches of the Chapter I Prohibition where the aggregate turnover of the parties to the agreement does not exceed £20 million, unless the agreement involves price fixing or the CMA has withdrawn the benefit of this statutory exclusion in advance ('small agreements').

14 Can the company exchange information with its competitors?

Companies risk infringing competition law if they exchange strategic information, either directly or via third parties. Strategic information generally includes information that reduces uncertainty between the companies (eg, current or future prices, cost structures, output levels, marketing plans, customer lists, investments, and business risks), and information is more likely to be viewed as strategic if it is recent, non-aggregated, non-public, and exchanged frequently (European Commission, Horizontal Cooperation Guidelines). Sharing information about future pricing intentions or future strategy is generally considered an infringement of article 101 and Chapter I 'by object' (without any need to show anticompetitive effects).

In 2011, a CMA investigation into the exchange of insurance quotations between motor insurance suppliers was resolved through commitments only to exchange such information if it was anonymised, aggregated across at least five insurers, and was at least six months old. The CMA's recent infringement decision in *Galvanised Steel Tanks* (2016) – which was upheld on appeal – concerned the alleged exchange of current and future pricing intentions at a single meeting. The OFT's decision against Barclays and RBS in 2011 concerned the disclosure of sensitive price information by RBS to Barclays.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

Leniency is available for firms that confess to participating in 'cartel activity', comprising price fixing (including resale price maintenance), bid rigging, output restrictions, and market sharing (OFT 1495).

To qualify for leniency, a firm has to confess the infringement, refrain from further participating in the cartel, and provide all relevant, non-privileged information, documents and evidence available to it. It must also cooperate throughout the investigation until conclusion (including criminal proceedings and defending civil or criminal appeals).

Three types of 'immunity' are available under the CMA's leniency regime:

Type A immunity

The first applicant for leniency obtains full corporate immunity from financial penalties and blanket immunity for individual employees and officers of the company from criminal prosecution and director disqualification. The applicant must provide information that gives the CMA a sufficient basis for taking forward a credible investigation. There must be no pre-existing investigation into the cartel activity.

Type B leniency

Where there is a pre-existing CMA investigation, the first applicant can obtain a discretionary discount on any financial penalty of up to 100 per cent and discretionary immunity from criminal prosecution for some or all employees and officers of the company, and immunity from director disqualification orders. The applicant must supply information that adds significant value to the CMA's investigation.

Type C leniency

Second or subsequent applicants who apply for leniency prior to the statement of objections can obtain a discretionary discount on any financial penalty of up to 50 per cent and discretionary immunity from criminal prosecution for specific employees and officers of the company, and immunity from director disqualification orders. The applicant must supply information that adds significant value to the CMA's investigation.

Applicants for types A and B leniency must not have taken steps to coerce another firm to have participated in the cartel activity.

The fact that an undertaking has applied for leniency will not normally be revealed to other undertakings until a statement of objections has been issued, although the identity of the applicant may sometimes be inferred when information it has supplied is put by the CMA to third-party witnesses.

16 Can the company apply for leniency for itself and its individual officers and employees?

Yes (see question 15). Individuals can also apply for criminal immunity themselves.

17 Can the company reserve a place in line before a formal leniency application is ready?

The CMA encourages businesses considering a leniency application to contact it on a no-names basis (usually through its external legal adviser) in the first instance before applying for a marker. If type A immunity is available, the applicant is expected to reveal its identity and proceed with the application. If type A immunity is unavailable but type B or C is potentially available, the party is not required to disclose its identity unless it decides to proceed with an application.

Obtaining a marker enables a company to hold its place in the queue for leniency while it goes about providing evidence required by the CMA to perfect the application. To obtain a marker, the applicant needs to 'establish a concrete basis for a suspicion of cartel activity' and a 'demonstration of a genuine intention to confess' (OFT1495).

18 If the company blows the whistle on other cartels, can it get any benefit?

Leniency applicants are not obliged to supply materials that are outside the scope of the leniency application. Thus, where companies have also taken part in another distinct cartel, the CMA's guidance encourages them to apply for leniency – and disclose relevant information and evidence – in respect of that cartel too.

As an incentive, where companies successfully apply for type A immunity or type B leniency in respect of the second cartel, the CMA will also apply a further discount in the fine that it imposes in respect of the first cartel, called 'leniency plus.' The CMA has stated that the additional discount available will likely be small (OFT 1495).

The CMA offers a financial reward of up £100,000 (and anonymity) to individual whistle-blowers who were not involved in the cartel in question. It also receives 'tip-offs' via a cartels hotline, which recently led the CMA to discover a bid-rigging arrangement in respect of household coal supplies (2018).

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

Vertical agreements are considered less likely to produce anticompetitive effects than horizontal agreements. CMA guidance notes that 'vertical agreements do not generally give rise to competition concerns unless one or more of the parties to the agreement possesses market power on the relevant market or the agreement forms part of a network of similar agreements' (OFT 419, paragraph 1,4).

The European Vertical Agreements Block Exemption Regulation applies directly in the UK. Agreements that fulfil the criteria for block exemption but which do not affect trade between EU member states also benefit from the block exemption by virtue of 'parallel exemption' under the Competition Act 1998. The same principles apply to the EU Block Exemption Regulations relating to specialisation agreements, research and development, technology transfer and motor vehicles. There is also a UK Block Exemption Order (guaranteeing exemption from the Chapter 1 Prohibition) that covers certain categories to public transport ticketing schemes.

The Vertical Agreements Block Exemption applies where both the supplier and purchaser have market shares below 30 per cent and the agreement does not contain a 'hardcore restraint' or an excluded restriction (eg, certain non-compete provisions).

Hardcore restraints are restrictions of article 101 or Chapter 1 'by object'. They do not benefit from block exemption and are presumed not to satisfy the criteria for exemption on an individual basis. These include vertical price-fixing (resale price maintenance), restrictions on sales to end users in a selective distribution system, and restrictions on the territories or customer groups to which purchasers can resell a product.

Recently, the CMA has focused on resale price maintenance as a 'hardcore' and 'by object' restriction of competition in several cases. In 2016, for example, the CMA imposed fines in the *Bathroom Fittings* and *Fridge Supplies* cases, where companies imposed resale price maintenance with respect to online sales.

Other types of vertical agreements that fall outside the block exemption (eg, non-compete agreements, or single branding arrangements where the supplier or purchaser has a share above 30 per cent) are assessed by reference to their actual effects on competition. If a party to the agreement is dominant, it may also be assessed under the Chapter II Prohibition or article 102 TFEU.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

In principle, no agreements are per se illegal. Even 'by object' restraints (eg, resale price maintenance) – where a competition authority or claimant does not have to prove the anticompetitive effects of the agreement – can be individually exempt where the conditions outlined in question 13 are met. However, the burden of proving that an agreement is exempt falls on the party under investigation, and demonstrating that the restraint is indispensable to the pro-competitive objective is a high threshold to meet.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

See questions 13 and 19.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

'Dominance' is defined as the power of an undertaking to behave to an appreciable extent independently of competitors, customers, and ultimately consumers. The assessment of dominance under UK law (the Chapter II Prohibition) is consistent with EU law (article 102 TFEU), which also applies directly in the UK.

As a first step, the CMA (or other UK competition authority) defines the relevant product and geographic market. It then considers whether the undertaking has substantial market power on that market, taking into account 'market shares, entry conditions, and the degree of buyer power from the undertaking's customers'. If the undertaking 'does not face sufficiently strong competitive pressure' in the relevant market, it may be treated as dominant. In other words, according to CMA guidance, 'market power can be thought of as the ability profitably to sustain prices above competitive levels or restrict output or quality below competitive levels' (OFT 415). At its narrowest, the CMA has identified a market comprising just one product: it identified a market for the 'manufacture of Pfizer-manufactured phenytoin sodium capsules' in its 2016 decision that Pfizer and Flynn had imposed excessive prices in breach of the Chapter II Prohibition.

Within the relevant market, the CMA applies a (rebuttable) presumption that an undertaking is dominant if it 'has a market share persistently above 50 per cent'. High market shares are not determinative, though. The UK Competition Appeal Tribunal (the CAT) declined to presume dominance where the defendant had a market share of 89 per cent, following the loss of the defendant's statutory monopoly (*National Grid*).

CMA guidance also states that it is unlikely that an undertaking could be dominant if it has a market share below 40 per cent (OFT 402). Ofcom's abuse of dominance investigation into BT in 2008 (NCNN 500) in exceptional circumstances found that BT was dominant with a market share of below 31 per cent.

There is no minimum market size threshold: a 'dominant position' refers to a dominant position in the United Kingdom or any part of the UK. This means that dominant positions can be found even for small suppliers active in small product or geographic markets. For example, in *Cardiff Bus* (2008), the OFT found that Cardiff Bus (which had a turnover of less than £50 million) had abused its dominant position on the markets for certain types of bus service in Cardiff.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

The Competition Act 1998 lists examples of potentially abusive conduct, including: unfair prices or trading conditions; limiting production, markets, or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and making the conclusion of contracts subject to acceptance of supplementary obligations that have no connection with the subject of the contracts.

This list is not exhaustive. Any conduct by a dominant undertaking that excludes competitors or exploits customers is potentially abusive, unless that conduct is objectively justified. Other well-established forms of abuse include a refusal to supply an essential facility, margin squeeze, exclusive dealing, loyalty-inducing rebates, and predatory pricing.

UK cases in recent years have dealt with novel forms of abuse (often following developments in EU competition law), including the tactical withdrawal from the market of a pharmaceutical products once the patent expired (*Gaviscon*, 2010), and so-called 'reverse payment' settlements of patent litigation with generic drug suppliers (*GlaxoSmithKline*, 2016).

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

There is no equivalent of the leniency regime or block exemptions for abuses of dominance. However, the CMA cannot impose a financial penalty in relation to 'conduct of minor significance', defined as conduct by a company whose turnover in the year preceding the infringement was £50 million or less. This was applied in *Cardiff Bus* (2008), where the company was found to have abused its dominant position through predatory pricing but no fine was imposed.

In addition, exemptions from the Chapter II Prohibition exist for undertakings that have been entrusted with carrying out 'services of general economic interest' (to the extent that the Chapter II Prohibition would prevent them from carrying out those services), conduct that is carried out to comply with a legal requirement, and conduct that the Secretary of State specifies as being excluded from the Chapter II Prohibition in order to avoid a conflict with the UK's international obligations or for reasons of public policy.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

The CMA has jurisdiction to investigate 'relevant merger situations' – where two or more enterprises cease to be distinct, including the acquisition of control or the ability to exercise a material influence over another business, mergers, and certain joint ventures – if the acquired enterprise has a UK turnover in excess of £70 million (the 'turnover test') or if it creates or increases a share of supply or purchases of particular goods or services of at least 25 per cent in the UK or a substantial part of it (the 'share of supply' test). It covers both anticipated and completed transactions. Lower thresholds apply to mergers where the target develops or produces items for military or 'dual' use, computer hardware, or quantum technology.

There is no obligation to obtain advance approval for mergers, but the CMA can undertake ex officio investigations into mergers that have not been notified voluntarily. Where the CMA has reasonable grounds for suspecting that there is a relevant merger situation, it can order the purchaser to refrain from – or reverse – any 'pre-emptive' actions that could prejudice a reference of the merger for a Phase II investigation or any remedial actions that the CMA may require following its investigation.

In the case of completed mergers, the CMA is generally precluded from referring the merger for a Phase II investigation after four months from completion.

26 How long does it normally take to obtain approval?

The CMA has 40 working days to undertake its Phase I investigation, subject to possible extensions if the merger parties offer 'undertakings in lieu' to avoid a Phase II reference. This period begins on the date of formal notification or (in the case of ex officio investigations) when the CMA has sufficient information to begin its investigation. Before Phase I, parties are expected to engage in pre-notification discussions and evidence gathering, which may take at least two weeks in non-problematic mergers and can take several months in more complex cases. Once the statutory timetable has begun, the CMA has the power to 'stop the clock' if the parties do not respond to a formal information request by the stated deadline.

If a merger is referred to a Phase II investigation, an Inquiry Group of independent CMA members has 24 weeks to investigate and publish its report, subject to an extension of up to eight weeks in special circumstances. If the CMA finds that the merger has resulted in (or may be expected to result in) a 'substantial lessening of competition' it has 12 weeks to take a decision that remedies, mitigates, or prevents the substantial lessening of competition or the adverse effects that may result from it (subject to an extension by a further six weeks).

According to the CMA's 2018/19 Annual Plan, it aims to clear at least 70 per cent of Phase I mergers within 35 working days, and to complete 70 per cent of Phase II merger investigations without extending the statutory deadline.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

The CMA's duty is to consider whether a relevant merger situation has occurred and whether it has resulted or may be expected to result in a substantial lessening of competition. Mergers are exempt from the Chapter I Prohibition and this exemption extends to agreements that are ancillary (directly related and necessary) to the merger. In considering whether an agreement is ancillary, the CMA applies the European Commission's Notice on restrictions directly related and necessary to concentrations (2005/C 56/03).

A decision that the merger situation is not expected to create an anti-competitive outcome cannot be read, however, as approval of all the terms of agreements between the parties. The CMA's guidance explains that, given the constraints of the Phase I review process, the CMA will not normally express a view in its merger decisions of whether a particular restraint as between the parties is 'ancillary' to the merger or 'restrictive'. Parties must carry out their own assessments. The CMA may exceptionally agree to provide guidance if the 'restraint' raises novel or unresolved questions (CMA2).

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

As noted above, there is no obligation to notify the CMA of a merger. The CMA may, within certain time limits, investigate and impose remedies on mergers that have been completed.

If the CMA has opened an investigation, failing to provide information that the CMA requests may result in a delay to the CMA opening the Phase I investigation or suspensions of the statutory timetables. In *Arriva Passenger Services/Centrebus* (2014) the timetable was suspended for almost three months and in *Ballyclare/LHD* (2014) it was suspended for approximately four months following a failure to provide information requested by the OFT.

The CMA can also impose fines on parties that, without reasonable excuse, do not respond to a formal information request within the stated deadline.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

The company and its officers or employees typically require separate legal representation where there is a risk of a conflict of interest. For example, this could arise in cartel investigations that may lead to criminal prosecutions of individuals, separate from the civil investigation of the company. Particular considerations arise where the company is applying for type B or C leniency and is, therefore, obliged to cooperate with the CMA's investigation but individual employees or officers may not have been granted immunity from criminal prosecution (see question 15).

CMA guidance refers to the need to consider conflicts of interest where the CMA exercises its powers to summon individuals who have a connection with the company to a compulsory interview. The CMA considers it inappropriate that the interviewee should be accompanied by a legal adviser who is acting only for the company, and reminds advisers acting for both the company and the interviewee to consider any risk of a conflict of interest arising.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

The CMA can conduct dawn raids as part of an investigation into suspected anticompetitive agreements, abusive conduct, the criminal cartel offence and possible applications for director disqualification orders. It may also carry out inspections on behalf of the European Commission or other EU national competition authorities. Inspections fall into the following three categories:

Inspections of business premises without a warrant. The CMA's officers are entitled:

- to require anyone on the premises to produce documents that the officers consider relevant to the investigation;

- to provide an explanation of such documents;
- to state where such documents may be found;
- to take copies of documents;
- to require electronic information that they consider relevant to be produced in a legible form that can be taken away; and
- to take steps that appear necessary to preserve documents that they consider relevant to the investigation.

Inspections of business premises with a warrant: in addition to the above powers, a warrant allows officers to use such force as is reasonably necessary to enter the premises (including unoccupied premises). Officers also obtain the right to carry out searches – not merely to require documents to be produced to them.

Inspections of domestic premises: the High Court or CAT may issue a warrant to search domestic premises that are used in connection with a company's affairs.

Inspections of business or domestic premises relating to the criminal cartel offence always require a warrant.

In 2017 the CMA faced its first challenge to a warrant granted under section 28 of the Competition Act. The case concerned a warrant to search Concordia's premises in respect of documents relating to two pharmaceutical drugs that were already the subject of an ongoing investigation. Concordia applied to vary or discharge the warrant, arguing that there was no risk of such documents being concealed or destroyed. The warrant was originally granted ex parte and defended partly on the basis of evidence that was subject to public interest immunity (and that therefore would not be disclosed to Concordia). The court ruled that a decision of whether to vary or discharge the warrant would proceed only on the basis of evidence that could be disclosed to Concordia, and not on the basis of information that was withheld under public interest immunity. The case is currently before the Court of Appeal.

31 What are the company's rights and obligations during a dawn raid?

It is a criminal offence to obstruct the CMA's unannounced inspections, which, in the case of inspections carried out under a warrant, can result in imprisonment. It is also a criminal offence to destroy, falsify, or conceal documents that the CMA has required to be produced, or to provide false or misleading information to CMA officials.

The company has the following rights in relation to 'dawn raids':

- Right of information. A right to be provided with evidence of the CMA authorisation, a document setting out the subject matter and purpose of the inspection, and the warrant (as applicable).
- Right to legal privilege. The CMA is not entitled to take copies of privileged documents. To establish that the document is privileged, CMA inspectors may want to see at least the letterhead (or sender e-mail address), as well as the subject line. In cases of disagreement, the inspectors may agree to 'seal' the documents to resolve the question of privilege at a later stage.
- Right of privilege against self-incrimination. The CMA's right to require factual explanations of documents cannot compel a company to provide answers that would involve the admission of an infringement of competition law.
- Right to legal advice. The occupier of the premises is entitled to have their legal adviser present. The CMA will typically wait a 'reasonable time' for legal advice to be sought (although it does not have to), possibly subject to requiring filing cabinets to be sealed, refraining from moving business records, and suspending external e-mail (OFT 440).

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

The CMA can accept commitments from, or enter into a settlement agreement with, companies under investigation.

Commitments procedure

The CMA can accept binding commitments from the company in cases where 'the competition concerns are readily identifiable, will be fully addressed by the commitments offered, and the proposed commitments can be implemented effectively and, if necessary, within a short period of time' (CMA 8, paragraph 10.16). CMA guidance also explains that commitments are very unlikely to be accepted in cases concerning 'secret cartels' or a 'serious' abuse of dominance.

If the CMA accepts commitments, there is no finding – or admission – of an infringement. Commitments can, in principle, be accepted at any stage of the investigation (although the CMA is unlikely to consider it appropriate after it has issued a Statement of Objections) and the CMA will give third parties an opportunity to comment on the commitments (CMA8). Recent cases resolved through commitments include the CMA's investigations in *Epyx* (2014) and *Road fuels* (2014), as well as the Office of Rail and Road's *Freightliner* (2015) investigation.

Settlements procedure

Settlement generally arises at a later stage of the investigation once the CMA is satisfied that it has met the evidential standard for issuing an infringement decision. Under the settlement procedure, the company admits that it has infringed competition law and agrees to pay a financial penalty of a maximum amount that takes into account a discount of up to 20 per cent for cases settled before a statement of objections is issued, or 10 per cent afterwards.

The company also accepts a streamlined administrative process, involving reduced access to file (eg, limited to key documents only), no written representations in response to the statement of objections (except in relation to 'manifest factual inaccuracies'), and no oral hearing. The settling company agrees to be bound by the ultimate infringement decision, even if other addressees of the decision successfully appeal against it.

The settlement procedure has to respect the principle of equal treatment. In the OFT's *Tobacco* decision (2010), the OFT gave assurances to one – but not all – settling companies that it would repay the fine in the event of a successful appeal by non-settling defendants. The Court of Appeal held that this breached the principle of equal treatment. This judgment has been appealed to the Supreme Court, which heard the case in March 2018. At the time of writing, the Supreme Court has not yet handed down its judgment.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

The CMA may be willing to grant a discount on the financial penalty of 5 to 10 per cent (see question 4). This discount is also available to companies that participate in the settlement procedure (see question 32). For example, in *Gaviscon* (2010), Reckitt Benckiser received a discount of 5 per cent on the basis that it had 'demonstrated that it has taken adequate steps to ensure compliance, in particular, by investing significant resources into developing a comprehensive and effective competition law compliance policy'.

34 Are corporate monitorships used in your jurisdiction?

'Monitoring trustees' are typically used to ensure that merger parties comply with 'hold separate' orders (see question 25). Under the CMA's merger guidance, it will normally consider the need for a monitoring trustee at Phase I of the investigation where, among other factors, there is substantial integration of the businesses already. At Phase II, the CMA will usually require a monitoring trustee to be appointed in completed mergers unless the parties provide compelling evidence that there is little risk of pre-emptive action (CMA2). The CMA has also required monitoring trustees to be appointed to oversee the implementation of remedies in mergers and market investigations.

The role of the monitoring trustee is generally to oversee compliance and the parties have a duty to cooperate. Any breach of an initial enforcement order (including provisions requiring cooperation with a monitoring trustee) can expose the parties to fines of up to 5 per cent of worldwide turnover.

Monitoring trustees may also be used to oversee compliance with remedies or commitments in antitrust (anticompetitive agreements and dominance) cases, although this is relatively rare in practice.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

Under the settlement procedure, the CMA issues an infringement decision that the settling company agrees not to challenge except for manifest factual inaccuracies. This agreed infringement decision – like any other infringement decision – is binding on the High Court or CAT for

Update and trends

After criticism in a 2016 National Audit Office report for not bringing enough Competition Act cases, the CMA has substantially increased its enforcement activity. In 2016 the CMA imposed a record-breaking fine on Pfizer in an excessive pricing case and issued an infringement decision to GlaxoSmithKline and several generic drug suppliers in respect of alleged pay-for-delay agreements. In 2017, the CMA issued five infringement decisions under the Chapter I Prohibition, secured a guilty plea (and director disqualification) under the criminal cartel offence in respect of the supply of products to the construction industry, and issued seven statements of objections. Moreover, the CMA has been increasingly willing to call in completed mergers for review. In 2017, 25 completed mergers were called in for review (comprising around 40 per cent of all transactions investigated), resulting in delayed implementation.

The UK's impending exit from the European Union is likely to have a significant impact on enforcement. Dr Andrea Coscelli, the Chief Executive of the CMA, stated that the CMA aims 'to be one of the top competition authorities worldwide', which may refocus the CMA's work on larger, more high-profile cases, and could also see it review in parallel cases that are before the European Commission (subject to any transitional arrangements). The CMA expects to have to manage a significantly increased workload – in particular, the CMA predicts having to review an additional 30-50 Phase 1 mergers each year, leading to an additional six or so Phase 2 investigations.

In terms of its sectoral focus, the CMA continues to scrutinise the pharmaceutical industry more closely than other sectors. Eight out of its 15 ongoing Competition Act investigations concern the pharmaceutical sector, covering both suspected Chapter I and Chapter II infringements. However, the CMA has been keen also to emphasise its thinking about how to address competitive issues in online markets, noting its recent enforcement in the Amazon Poster Frames case, challenging resale price maintenance for online sales in the supply of bathroom fittings and catering services, as well as its current case into the use of most-favoured-nation clauses by a digital comparison tool. In a speech in November 2016, Michael Grenfell, Executive Director of Enforcement at the CMA, noted that 'a consequence of digital markets being fast-moving is that anticompetitive practices can create damaging barriers to innovation that would otherwise flourish – repressing and retarding the dynamism that can hugely benefit consumers'.

The CMA's 2018/19 annual plan states that the CMA's priorities will be (i) vulnerable consumers; (ii) ensuring markets can be trusted; (iii) online and digital markets; and (iv) supporting economic growth and productivity.

the purposes of private damages actions, as are any 'findings of fact' in the decision (sections 58 and 58A of the Competition Act 1998).

Under the EU Damages Directive (implemented in the UK by the Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017), the UK courts and CAT cannot order the disclosure of a defendant's settlement submission in a private damages action.

A commitments decision expresses only the CMA's preliminary conclusions and does not give rise to a finding of infringement that enables private 'follow-on' actions, although claimants are free to cite it as part of a standalone action.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

Companies facing antitrust or merger investigations cannot be made to disclose privileged documents or information in response to requests for information and CMA officials are not allowed to copy privileged information when carrying out inspections of business or domestic premises (see questions 30 and 31). Individuals cannot be compelled to disclose privileged information when summoned to compulsory CMA interviews. The following types of privilege most frequently raise questions.

Legal advice privilege applies to confidential communications between a client and legal adviser for the purposes of giving or obtaining legal advice. Unlike EU rules on privilege, legal advisers include in-house counsel. However, English law has developed a narrow definition of the 'client', which may only include a small group of people who are tasked with obtaining legal advice (following the *Three Rivers* case). Thus, the recent *RBS Rights Issue* litigation made clear that lawyers' records of discussions with company employees (who did not form part of the client) would not be privileged. To address this risk, a company's board may wish to designate particular employees with authority to seek legal advice on behalf of the organisation.

Litigation privilege applies to communications between a legal adviser and client or a third party that were for the dominant purpose of litigation that is reasonably in prospect. In an appeal against the OFT's *Dairy products* (2011) decision, the CAT held that communications between Tesco's lawyers and potential third-party witnesses were covered by litigation privilege since, by that point, the OFT had issued a statement of objections (and supplementary statement of objections), so that 'by this point the character of the administrative procedure was no less confrontational than ordinary civil proceedings' (*Tesco v OFT* (2012)).

Privilege against self-incrimination means that a person cannot be compelled to give answers that would require an admission that they have infringed the law. The CMA can, however, ask factual questions about documents that are already in existence and ask for them to be produced.

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

The CMA is allowed to name any companies that it is investigating, although the CMA's policy is generally not to name the parties under investigation until a later stage of the investigation, typically once a statement of objections has been issued (CMA8).

The UK competition authorities are prohibited from disclosing 'specified information' as defined under part 9 of the Enterprise Act 2002. This includes confidential information about a firm or an individual that the authority acquires in the exercise of any function it has under legislation, including the Competition Act 1998. 'Specified information' can only be disclosed in accordance within certain 'information gateways'. These include disclosure with the company's consent, where disclosure is required under EU law, to facilitate the exercise of a statutory function, in connection with criminal proceedings or disclosure to overseas public authorities for the purposes of certain types of investigation.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

Failing to produce requested information within the deadline, providing false or misleading information, failing to attend a compulsory interview, or obstructing an inspection can result in financial penalties. The first fine for failure to supply requested information was imposed on Pfizer in April 2016. The CMA fined Pfizer £10,000 for failing to provide underlying data for a claim that Pfizer made at an oral hearing. The CMA also fined Hungryhouse in 2017, for failing to provide information in the context of a merger investigation.

Serious refusals to cooperate with the CMA (including knowingly or recklessly providing false information) may also be a criminal offence.

39 Is there a duty to notify the regulator of competition infringements?

There is no general duty to notify authorities of breaches of competition law, and the privilege against self-incrimination protects companies from being compelled to confess infringements (see question 36).

Firms that are regulated by the FCA – a concurrent competition enforcer – are required to notify it if they have or may have committed a 'significant infringement of any applicable competition law' (FCA Handbook).

40 What are the limitation periods for competition infringements?

Competition enforcers are free to investigate historic conduct without any particular time limit. There are limitation periods, though, for bringing private 'follow-on' actions of six years in England, Wales and Northern Ireland, and five years in Scotland. The European Damages

Directive and UK Implementing Regulations provide for suspensions of the limitation periods during investigations by competition enforcers.

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

In addition to compliance with EU and UK competition law, certain companies are required to comply with sectoral regulations (eg, in post, energy, transport, and water).

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

In July 2017, the CMA published its response to a consultation on changes to market investigations (CMA61 resp). As a result of the consultation, the CMA has implemented several changes to its approach to carrying our market investigations, including identifying potential remedies in its initial issues statement (in the first two months of the investigation), fewer publication and consultation stages, and the option for the CMA Board to give a directional steer for the investigation.

In September 2017, the CMA introduced new guidance on the use of initial enforcement orders in merger investigations, as well as templates for initial enforcement orders and derogation requests.

In March 2018, the government introduced new (lower) merger thresholds that allow it to intervene on national security grounds in mergers where the target develops or produces items for military or 'dual' use, computer hardware, or quantum technology. It is also consulting on longer-term reforms to review foreign investment in 'essential functions' in key parts of the economy, including based on national security concerns.

There is scope for substantial reforms as a result of the UK's withdrawal from the European Union. Possible changes will include (i) the European Commission's loss of jurisdiction to investigate UK-specific conduct or agreements, (ii) decisions of the European Commission and Court of Justice no longer being binding on the CMA, CAT, and other UK courts, and (iii) European state aid rules no longer applying to the UK.

CLEARY GOTTLIEB

Paul Gilbert **pgilbert@cgsh.com**
Alexander Waksman **awaksman@cgsh.com**

City Place House
2 London Wall Place
London EC2Y 5AU
United Kingdom

Tel: +44 20 7614 2200
Fax: +44 20 7600 1698
clearygottlieb.com

United States

Olivier N Antoine, Britton D Davis and Robert B McNary

Crowell & Moring LLP

General

1 What is the general attitude of business and the authorities to competition compliance?

The business community and antitrust authorities recognise that having an effective antitrust compliance programme is critical to detect and prevent antitrust violations. Further, not having an antitrust compliance programme may raise red flags with US antitrust authorities and courts overseeing price fixing cases, which will likely consider the absence of a compliance programme as an indication that the company is not taking antitrust compliance seriously.

Having an effective antitrust compliance programme is particularly important in the US in light of the risks that individuals and companies face when they violate US antitrust laws. These can include significant jail time for executives, high fines, substantial treble civil damages, significant legal fees and associated bad publicity and reputational damages.

2 Is there a government-approved standard for compliance programmes in your jurisdiction?

While there is no government-approved standard for antitrust compliance programmes, Chapter 8 of the United States Sentencing Guidelines provides guidance for minimal requirements of an effective antitrust compliance programme (www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8). The Antitrust Division of the Department of Justice (DOJ) has also referred to standards and protocols identified in the International Chamber of Commerce Antitrust Compliance Toolkit (iccwbo.org/publication/icc-antitrust-compliance-toolkit/).

Further, in several speeches, senior DOJ officials have identified the key tenets of what constitutes an effective antitrust compliance programme. See, for example, Brent Snyder, 'Compliance is a Culture, Not Just a Policy' (www.justice.gov/atr/speech/compliance-culture-not-just-policy); William Kolasky, Antitrust Compliance Programs: The Government Perspective (www.justice.gov/atr/speech/antitrust-compliance-programs-government-perspective).

3 Is the compliance guidance generally applicable or do best practice and obligations depend on a company's size and the sector of the economy it operates in?

The most effective antitrust compliance programmes are those that are tailored to the specific issues facing each business unit.

4 If the company has a competition compliance programme in place, does it have any effect on sanctions?

The existence of a compliance programme does not allow the company to avoid criminal antitrust charges. The DOJ almost never recommends that companies receive credit under the Sentencing Guidelines for a pre-existing compliance programme. The DOJ takes the position that a pre-existing compliance programme was at best ineffective, or wilfully disregarded, if the company then participated in a price fixing cartel.

In 2015, for the first time ever, the DOJ awarded sentencing credit for implementing an effective compliance programme after the start of an investigation. The DOJ granted Barclays a fine reduction in the Foreign Currency Exchange case noting the 'substantial improvements to the defendant's compliance and remediation programme to prevent recurrence of the charged offenses.' (See Barclays PLC Plea Agreement 13, available at www.justice.gov/file/440481/download.) Similarly, the DOJ granted Kayaba a fine reduction in the auto parts investigation, noting that Kayaba had 'clearly accepted responsibility for its criminal conduct' and 'implemented a new compliance policy to educate its employees to ensure that the company does not violate the antitrust laws in the future.' (See US Sentencing Memorandum and Motion, *US v Kayaba Industry Co, Ltd d/b/a KYB Corporation,* 6, 5 October 2015, 1:15-cr-00098-MRB).

On 9 April 2018, the DOJ hosted a public forum of antitrust practitioners on the topic of criminal antitrust compliance, and many of the public comments focused on this issue. Several commentators noted that other jurisdictions do credit compliance programmes in their formal sentencing policies. Along with the recent *Barclays* and *Kabaya* cases, the hosting of the forum may indicate a potential change of formal DOJ policy regarding credit for corporate compliance programmes.

Implementing a competition compliance programme

5 How does the company demonstrate its commitment to competition compliance?

The first step is to ensure that the compliance programme meets its objectives of preventing and detecting antitrust violations. One way to demonstrate such a commitment is to regularly update internal compliance policies and protocols to reflect current DOJ guidance.

For example, a senior DOJ official recently highlighted five key components of an effective compliance programme:

- antitrust compliance has to start at the top, with full support from the company's senior executives and board of directors;
- the company should ensure that the entire organisation participates in compliance efforts, and in particular, functions that may raise more antitrust risk, such as sales and marketing;
- the company should ensure that it has a proactive compliance programme and that risk activities are regularly monitored and audited;
- the company should encourage individuals who participate in the compliance programme and discipline those who violate antitrust laws or fail to take the reasonable steps necessary to stop antitrust violations; and
- a company that discovers criminal antitrust conduct should modify the compliance programme that failed to prevent the criminal conduct initially.

See Brent Snyder, 'Compliance is a Culture, Not Just a Policy' (www.justice.gov/atr/speech/compliance-culture-not-just-policy).

6 What are the key features of a compliance programme regarding risk identification?

To identify risk, the compliance programme needs to appropriately target the relevant substantive areas of risk, as well as the business units likely to be more at risk than others. First, the focus should be on horizontal agreements among competitors. While vertical relationships with customers and suppliers are often very important to the business, the risks created by these relationships are much more manageable than the risks created by price-fixing cartels. Second, the focus should be on the business units that could logically be tempted to engage in

collusion. This requires an antitrust assessment of the business units and functions more at risk of engaging in collusive behaviour (eg, a market in which there are few sellers, homogeneous products or a history of collusion).

Then, it is critical for the compliance programme to:

- be actively and publicly championed by the most senior executives of the company, including the CEO and direct reports;
- articulate and publicise clear standards and policies, including through targeted antitrust training provided by antitrust specialists.
- provide clear reporting protocols that entice employees to report antitrust violations without fear of retaliation; and
- identify compliance and legal teams to quickly delve into potential risks.

7 What are the key features of a compliance programme regarding risk assessment?

First, the antitrust compliance programme and the compliance manual should try to provide clear standards, policies and hypotheticals tailored to the business units. These standards should be clear enough to help the business team – with or without legal counsel or compliance support – to assess whether particular business conduct creates antitrust risk. They should help employees issue spot and deter risky conduct.

Second, the compliance protocols should identify the key legal personnel to contact. These should include not only a compliance hotline but the contact information of antitrust legal specialists to field and assess risk.

Third, the antitrust compliance programme should provide quick protocols to assess the severity of antitrust risk, including those protocols providing for the availability of senior executives or the board of directors to seek leniency, if needed.

8 What are the key features of a compliance programme regarding risk mitigation?

Risk mitigation often includes training employees and executives on how to extricate themselves from situations in which competitors start an illegal conversation. These include guidance to:

- stop the conversation;
- tell the competitor to change the subject;
- ensure that there is 'noisy withdrawal' that others will remember. This is a memorable act that removes the individual from the situation in a way in which others will recall the objection and departure;
- record the incident and the refusal to engage; and
- report the incident to a supervisor and the legal department.

9 What are the key features of a compliance programme regarding review?

Antitrust audits are useful to evaluate potential antitrust risk areas, and provide recommendations to improve business conduct and minimise antitrust risk. Antitrust audits can vary in form and burden. Some include a review of documents from key individuals, followed by interviews and training. Other antitrust audits are part of general compliance audits. One of the most effective form of antitrust audit is a 'surprise' audit not disclosed to the business team until the day of the audit.

Dealings with competitors

10 What types of arrangements should the company avoid entering into with its competitors?

The Sherman Act prohibits agreements that unreasonably restrain trade among competitors. US antitrust enforcement distinguishes between per se violations, which should be avoided at all cost, and arrangements to be assessed under the rule of reason. Per se violations are so likely to harm competition that they do not warrant the time and expense necessary for particularised inquiry into their effects on competition. In contrast, the rule of reason is an inquiry into the competitive harms and benefits of an arrangement.

Per se violations include price fixing, market allocation agreements, and some types of boycotts or concerted refusal to deal. 'A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilising the price of a commodity in interstate or foreign commerce is illegal per se.' *US v Socony-Vacuum Oil*, 310 US 150 (1940). The US Supreme Court has identified per se violations as a 'threat to the central nervous system of the economy'. Id.

Most criminal antitrust prosecutions involve price fixing, bid rigging, or market division or allocation schemes. These schemes may take several forms, such as the following:

- establishing or adhering to pricing discounts;
- holding price firm;
- eliminating or reducing discounts;
- adopting a standard formula for computing prices;
- maintaining certain price differentials between different types, sizes or quantities of products;
- adhering to a minimum fee or price schedule;
- bid suppression (one competitor agrees to refrain from bidding);
- complementary bidding (one competitor agrees to submit a bid that will not be accepted);
- bid rotation (competitors take turns being the low bidders);
- anticompetitive subcontracting (competitors agree to not bid as principal against each other); and
- market division.

In October 2016, DOJ issued Antitrust Guidance for Human Resource Professionals to alert professionals and others involved in hiring and compensation decisions to potential violations of the antitrust laws (available here: https://www.justice.gov/atr/file/903511/download?). The HR Guidance and DOJ's 'Antitrust Red Flags for Employment Practices' caution that DOJ could bring a criminal prosecution against individuals and companies who engaged in 'naked' wage price fixing, reciprocal no poaching practices or other conduct violating the antitrust laws in the human resource context. On 3 April 2018, DOJ entered into a settlement with Knorr and Wabtec to terminate unlawful agreements not to compete for employees (https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete).

Arrangements assessed under the rule of reason include most other types of arrangement between competitors, including joint ventures, R&D cooperation agreement, buying or sourcing groups. US antitrust agencies recognise that competitors often need to collaborate in order to compete in modern markets, and that such collaborations are often pro-competitive. Thus, the the Federal Trade Commission (FTC) and DOJ have provided joint guidance in their Antitrust Guidelines for Collaborations Among Competitors (www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf).

11 What precautions can be taken to manage competition law risk when the company enters into an arrangement with a competitor?

The first step is understanding whether the proposed arrangement is per se illegal. Any consideration of a per se illegal agreement should be promptly dismissed, and further antitrust training for the individual or business unit considering such an arrangement should ensue.

Agreements analysed under the rule of reason may also present antitrust risk in situations where the anticompetitive harm outweighs the pro-competitive benefits. The first step in assessing such an arrangement is to estimate the harm and test the benefits. How is competition restricted? How will customers and consumers benefit from the agreement? How would they be harmed by such an agreement? The DOJ/FTC Collaboration Guidelines provide a helpful framework of analysis to guide companies on these questions.

12 What form must behaviour take to constitute a cartel?

Agreements do not need to be formal or in writing, but there must be a 'conscious commitment to a common scheme designed to achieve an unlawful objective.' *Monsanto Co v Spray-Rite Serv Corp*, 465 US 752, 768 (1984). A violation can be proven without an express agreement, provided there is direct or circumstantial evidence of concerted action.

The standard jury instruction notes that the evidence need not show that the members of the cartel entered into any express, formal or written agreement; that they met together; or that they directly stated their purpose, the details of the plan, or the means by which they would accomplish their purpose. The agreement itself may have been entirely unspoken.

13 Under what circumstances can cartels be exempted from sanctions?

Antitrust exemptions exist by federal statute and case law. Statutory limitations include geographic scope of US law, excluding purely foreign commerce, 15 USC section 6a, labour unions (15 USC section 17), professional sport leagues (15 USC section 1291) insurance (15 USC section 7601), shipping (46 USC section 40307), agriculture (7 USC section 291), and fishing (15 USC section 521).

Case law exemptions include the state action, *Noerr-Pennington*, implied immunity, and file rate doctrines.

The state action doctrine exempts anticompetitive policies that are the result of state or government policy (*Parker v Brown*, 317 US 341 (1943)). There are two conditions required for the state action doctrine to apply. First, the challenged restraint must be clearly articulated and affirmatively expressed as state policy. Second, it must be supervised by the state.

Under the *Noerr-Pennington* doctrine, entities are immune from liability under the antitrust laws for attempts to influence the passage or enforcement of laws or administrative rulemaking, even if the laws they advocate for would have anticompetitive effects (*Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc*, 365 US 127 (1961); *United Mine Workers v Pennington,* 381 US 657 (1965)). The Supreme Court extended this immunity to efforts to influence the adjudicatory process (*California Motor Transport Co v Trucking Unlimited*, 404 US 508 (1972)).

The implied immunity doctrine exempts from antitrust enforcement conduct that would disrupt or be repugnant to a pervasive regulatory scheme. For example, in *Credit Suisse Securities v Billing*, 551 US 264 (2017), the Supreme Court held that the securities laws implicitly precluded the application of antitrust laws to certain allegedly anticompetitive conduct.

The filed rate doctrine bars private antitrust damage claims based on conduct undertaken pursuant to a tariff filed by a federal or state regulatory agency.

Finally, the Antitrust Guidelines for Collaborations Among Competitors (www.ftc.gov/sites/default/files/attachments/dealings-competitors/ftcdojguidelines.pdf) provide antitrust 'safety zones' for pro-competitive collaboration among competitors.

14 Can the company exchange information with its competitors?

Yes, a company can exchange information with its competitors, as long as there is a pro-competitive justification for such an exchange, and there are appropriate protocols in place to avoid the sharing of competitively sensitive information that could raise antitrust risk.

Before exchanging any confidential information, companies should consider whether the purpose or likely effect of the exchange is to promote competition. In assessing the antitrust risk, the companies should consider what is shared, to whom it is shared, and how it is shared.

The first question is the nature of the information to be shared. Is it competitively sensitive? Competitively sensitive information should not be shared with competitors. Information relating to customer specific prices, margins, cost, output, or strategic planning is more likely to be competitively sensitive. Disaggregated, customer specific, and current or future information is more likely to be competitively sensitive. Aggregated, redacted or historic information is less likely to be competitively sensitive.

The second question is who is likely to have access to such data, and how the data would be shared. There are various processes to mitigate antitrust risk when exchanging such information, such as the retention and operation of a clean team that masks the competitive nature of the information to be exchanged.

Leniency

15 Is a leniency programme available to companies or individuals who participate in a cartel in your jurisdiction?

The DOJ enforces the leniency policy. It published both a Corporate Leniency Policy and a Leniency Policy for Individuals.

Leniency is available to companies and individuals who participate in a cartel, or participate in any criminal antitrust violation. For self-reporting antitrust crimes, a company or individual can avoid criminal convictions, as well as the resulting fines and incarceration. The first corporate or individual conspirator to confess participation in an antitrust crime and fully cooperate with the DOJ receives leniency.

The DOJ will automatically grant leniency if the following six conditions are met:

- the company must be 'first in the door' to report the violation;
- the company must have taken prompt and effective action to terminate its part in the cartel upon its discovery;
- the company must cooperate fully with DOJ;
- the company must not have coerced another party to participate in the cartel nor have been its ringleader;
- where possible, the company must make restitutions to injured parties; and
- the confession of wrongdoing must be a corporate act, as opposed to isolated confessions of individual executives.

The Antitrust Division's policy is to keep confidential both the identity of the leniency applicant and any information obtained from the applicant.

16 Can the company apply for leniency for itself and its individual officers and employees?

When a company qualifies for automatic amnesty, all directors, officers and employees of the corporation who admit their involvement in the illegal antitrust activity, as part of the corporate confession, will receive leniency in the form of not being charged criminally for the illegal activity. Employees who refuse to cooperate in the investigation will lose protection given to cooperating employees under the corporate conditional leniency letter, and the DOJ is free to prosecute them. They face the potential for indictment, jail terms and fines.

The leniency policy for individuals applies to individual employees who approach the DOJ on their own behalf, not as part of a corporate proffer. For leniency to be granted, the individual needs to be 'first in the door' in reporting the cartel. Further, the individual needs to cooperate fully with the DOJ, and must not have coerced another party to participate in the cartel or have been its ringleader.

17 Can the company reserve a place in line before a formal leniency application is ready?

The DOJ offers a 'marker' for a finite period of time to hold a place while counsel gathers additional information through an internal investigation. The date of this marker is the official date on which the cartel members have contacted the DOJ.

The marker applicant must disclose the general nature of the discovered conduct, and the industry, product, or service involved. For applications by counsel, the client must typically be identified. However, in limited circumstances the DOJ will grant two or three extra days to gather additional information before reporting the client's identity.

The marker applicant must perfect the client's leniency within a finite period of time. The time is based on factors such as the location and number of interviews and documents, and whether the DOJ already has an ongoing investigation. A 30-day period for an initial marker is common.

18 If the company blows the whistle on other cartels, can it get any benefit?

A company can bring evidence of illegal activity in a second market in exchange for leniency in the second market and a reduction in fine in the first investigation.

Indeed, companies are strongly advised to bring such information to the DOJ's attention, as it will punish corporations and individuals that are under investigation, but who fail to report additional illegal activity in which they are engaged or of which they were aware. Under the 'penalty plus' policy, if a firm participated in a second antitrust offence and does not report it and that conduct is later prosecuted, the DOJ may recommend this as an aggravating factor to the sentencing court.

Dealing with commercial partners (suppliers and customers)

19 What types of vertical arrangements between the company and its suppliers or customers are subject to competition enforcement?

Vertical restraints have been the subject of agency or judicial review under sections 1 and 2 of the Sherman Act, section 3 of the Clayton Act,

and recently section 5 of the FTC Act. Exclusive dealing, resale price maintenance, tying arrangements, reciprocal dealing, territorial and customer restrictions, and distribution channel restraints have been the subject of some antitrust scrutiny, over the years, with varying degrees.

US antitrust law, however, tends to be more permissive than other competition regimes in the assessment of vertical restraints. Vertical restraints tend to create more antitrust risk when used to foreclose a competitor and monopolise a market under section 2 of the Sherman Act. For example, a network of exclusivity clauses or share of purchases clauses with large customers may effectively foreclose competitors from a significant portion of the relevant market.

Further, the Robinson–Patman Act of 1936 prohibits direct discrimination in price – the sale of a product to two different buyers at different prices (section 2(a) of the Act), and also prohibits indirect discrimination, in the form of providing, or paying for, services such as advertising and promotion to facilitate the resale of the product on other than proportionally equal terms (sections 2(d) and (e) of the Act). These simple-sounding prohibitions, however, apply only if a fairly specific set of factual conditions are satisfied, and even then only if (in the case of direct price discrimination) they have the potential to harm competition. US antitrust agencies do not enforce the Robinson–Patman Act, but Robinson–Patman litigation occurs with some frequency, especially in the context of counterclaims filed by non-paying distributors.

20 Would the regulatory authority consider the above vertical arrangements per se illegal? If not, how do they analyse and decide on these arrangements?

Nearly all vertical arrangements are now analysed under rule of reason. Historically, some of these arrangements were per se illegal. For example, minimum resale price maintenance was treated as per se illegal until *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 87 (2007), when the Supreme Court overturned precedent on this question.

Over last 30 years, however, US antitrust agencies and courts became more permissive on vertical restraints. At this stage, only some form of tying remains, at least theoretically, per se illegal. While tying is most often treated under a rule of reason analysis, the US Supreme Court in *Jefferson Parish Hospital District No. 2 v Hyde*, 466 US 2, 9 (1992) found tying arrangements to be per se illegal where the seller had sufficient market power in the tying product to enable it to restrain trade in the tied product market. So this is a per se offence only in name. In any other context, what makes a per se offence is that market power need not be proven.

21 Under what circumstances can vertical arrangements be exempted from sanctions?

Vertical agreements that reasonably expect to yield pro-competitive benefits are unlikely to raise antitrust risk.

How to behave as a market-dominant player

22 Which factors does your jurisdiction apply to determine if the company holds a dominant market position?

Monopoly power has been defined as the power to control prices or exclude competition. Establishing monopoly power requires a thorough factual and economic analysis of the competitive landscape. The market share of the defendant is a key fact in this analysis. But it is just one indicator of monopoly power.

That said, a market share in excess of 70 per cent typically establishes a prima facie case of monopoly power, especially with evidence of barriers to entry or expansion by competitors. Courts have rarely if ever found monopoly power where the market share is less than 50 per cent. There is less clarity whether a party has monopoly power where it controls 50 to 70 per cent of a relevant market. Courts then turn to the barriers to entry and the relative strength of the competitors in the relevant market to ascertain whether a party has monopoly power.

23 If the company holds a dominant market position, what forms of behaviour constitute abuse of market dominance? Describe any recent cases.

Several forms of anticompetitive conduct can constitute the required 'exclusionary conduct' element under a monopolisation or attempted monopolisation claim. These include predatory pricing, refusal to deal, exclusive dealing, loyalty discounts, bundled pricing, most favoured nation or most favoured customer clauses, denial of access, refusal to license IP and misuse of governmental or standard setting processes.

A recent example of an exclusive dealing case is *ZF Meritor, LLC v Eaton Corp*, 696 F3d 254 (3d Cir 2012). ZF Meritor alleged that it had been harmed by Eaton through exclusive dealing arrangements between Eaton and heavy-duty truck manufacturers. Eaton controlled 85 to 95 per cent of the market for heavy-duty transmissions in North America and sold its transmissions to four OEMs, which in turn designed and sold heavy-duty trucks to end users. Eaton created an incentive programme with the four OEMs that provided rebates if the OEMs purchased 85 to 95 per cent of their supply of HD transmissions from Eaton and if OEMs provided exclusive or preferential advertising in data books it used to sell parts to end users. The court, noting that no external supplier had entered the market for the past 20 years, there were extremely high barriers to entry, and Eaton effectively controlled more than 90 per cent of the relevant market, found that Eaton's long-term agreements with its OEM customers foreclosed ZF Meritor from the market.

24 Under what circumstances can abusing market dominance be exempted from sanctions or excluded from enforcement?

Other than the exemptions described in more detail in question 13, there is no circumstance where monopolisation offences are exempted from antitrust enforcement.

Competition compliance in mergers and acquisitions

25 Does the company need to obtain approval from the competition authority for mergers and acquisitions? Is it mandatory or voluntary to obtain approval before completion?

The Hart-Scott–Rodino Antitrust Improvements Act of 1976 (the HSR Act) requires the notification and clearance of certain mergers and acquisitions and joint ventures. The HSR Act applies to the acquisition of voting securities, non-corporate interests, or assets that meet certain thresholds. In addition, the HSR Act may require notification and approval of an acquisition of non-corporate interests or voting securities in the formation of a joint venture. The thresholds are:

- whether either party is engaged in US commerce or in any activity affecting US commerce, otherwise known as 'the commerce test';
- the amount of voting securities, non-corporate interests, or assets that will be held as a result of the acquisition exceeds $50 million (adjusted annually to reflect changes in the GDP, currently $84.4 million), otherwise known as 'the size-of-transaction test'; and
- for transactions valued under $337.6 million, a 'size-of-person test' must also be satisfied. This test looks at the size of both the acquiring and acquired person and if one party (including all entities within that person) has global sales or assets in excess of $10 million (as adjusted, currently $16.9 million), and the other party has global sales or assets in excess of $100 million (as adjusted, currently $168.8 million), the test is satisfied and notification is required under the HSR Act.

Under the HSR Act, both the acquiring and acquired person are required to file separate notifications, and the applicable waiting period commences after both parties have filed a complete notification. Only one filing fee is required, however, and the parties can agree how they will allocate and pay the filing fee.

If the thresholds described above are met, a notification under the HSR Act is mandatory and parties face severe civil penalties for consummating a transaction without notifying the government and waiting the required period under the HSR Act.

26 How long does it normally take to obtain approval?

Once both parties have filed their respective HSR notifications, a waiting period of 30 calendar days commences (or, in the case of a cash

tender offer or a transfer in bankruptcy, a 15-day waiting period). The parties can request early termination of the waiting period, which if granted and the transaction cleared, the parties can proceed to closing. If early termination is granted, such grant is published in the Federal Register. If early termination is not granted, the parties must wait the entire 30-day period before proceeding to close the transaction. For transactions that raise no competitive concerns, the agencies frequently clear transactions before the end of the 30-day waiting period if parties have requested early termination.

For transactions raising competitive concerns, the antitrust authorities can issue a second request for additional information (a second request), seeking additional documents or information in the form of data or narrative responses. The regulatory review period is stopped until the parties certify substantial compliance with the second request. Once the parties have certified substantial compliance, the agencies have an additional 30 days to review the transaction.

This statutory timetable can be modified by a timing agreement between the parties and the DOJ or FTC. Timing agreements are now common in most merger investigations. Protracted merger investigations can often take as long as one year to 18 months from the date of signing the merger agreement.

27 If the company obtains approval, does it mean the authority has confirmed the terms in the documents will be considered compliant with competition law?

The agencies can review the restrictive provisions of a merger agreement even after they have cleared the underlying transaction, especially to enforce gun-jumping rules.

28 What are the consequences for failure to file, delay in filing and incomplete filing? Have there been any recent cases?

If a notification is required under the HSR Act, the parties may not consummate a transaction until a notification is made and the applicable waiting period has expired. During the waiting period, it is a violation of the HSR Act for an acquirer to exert beneficial ownership of the acquired party.

Incomplete or inaccurate filings are rejected by the Premerger Notification Office of the FTC.

Failure to comply with the requirements of the HSR Act can result in civil monetary penalties of up to $40,000 per day (adjusted annually, currently $41,484 per day). In addition, the agencies can unwind a transaction consummated in violation of the HSR Act.

In January 2017, the DOJ filed a civil antitrust suit alleging that Duke Energy Corporation (Duke Energy) violated the HSR Act, while simultaneously settling for $600,000 in civil penalties to resolve the dispute. In 2014, Duke Energy entered into both an acquisition agreement and tolling agreement for a power plant owned by Calpine Corporation, the value of which exceeded the requisite filing threshold under the HSR Act. Despite filing the requisite notification for the asset acquisition, the DOJ alleged that through the terms of the tolling agreement, which went into effect immediately upon execution, Duke Energy had acquired beneficial ownership of the power plant.

In June 2016, the DOJ settled a civil antitrust suit for $11 million against ValueAct. The DOJ alleged that ValueAct had violated the HSR Act through acquisition of voting securities in both Halliburton and Baker Hughes following the Halliburton/Baker Hughes merger announcement. ValueAct had relied on the investor-only exemption that permits acquisition of up to 10 per cent of voting securities of a company that are made 'solely for the purpose of investment'. The DOJ took the position that this exception was not applicable here because ValueAct wanted to use this investment:

> *to obtain access to management, to learn information about the merger and the companies' strategies … to influence those executives to improve the chances that the merger would be completed, and to influence other business decisions whether or not the merger went forward.*

This case follows recent settlements with activist investors ThirdPoint and Bilgari Holdings in which the DOJ took the position that certain communications with management disqualified investors from claiming the exemption.

Investigation and settlement

29 Under which circumstances would the company and its officers or employees need separate legal representation? Do the authorities require separate legal representation during certain types of investigations?

Separate representation is appropriate when a potential conflict arises between the company and the employees, such as when the officer or employee may have violated the law or company policy. Prior to conducting preliminary interviews of employees, counsel for the corporation is required to inform each employee that he or she represents the corporation and not the employee as an individual. Counsel further informs each employee that if he or she has any concerns about his or her involvement in the alleged activity he or she should consider separate representation.

Authorities do not require separate legal representation but expect that key individuals who have violated the law are represented by separate counsel.

30 For what types of infringement would the regulatory authority launch a dawn raid? Are there any specific procedural rules for dawn raids?

Dawn raids are becoming rare in the US and occur in cases where the DOJ anticipates the spoliation of evidence.

In cartel investigations, the DOJ will issue broad requests seeking electronic documents, paper files, and phone and text records, including from central files and share drives and individual computers and phones. The search warrant will be limited to certain entities and certain locations.

It is critical that employees never hide or destroy evidence, as the penalties for obstruction of justice are severe. Federal obstruction charges can result in jail terms of up to 20 years and fines in excess of $500 million. See, for example, 18 US Code section 1510 (obstruction of criminal investigations); 18 USC section 1512(c)(2) (obstruction of official proceeding); 18 USC section 1519 (destruction of records); see generally, 18 USC Chapter 73; US Sentencing Guidelines, Guideline Fine Range – Organizations, www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8#NaN.

31 What are the company's rights and obligations during a dawn raid?

Targets of a search warrant have legal rights against overbroad and unlawful searches.

32 Is there any mechanism to settle, or to make commitments to regulators, during an investigation?

Settlements are very common. The overwhelming majority of the DOJ's major cartel investigations are initiated following a leniency application, followed by negotiated plea agreements where lesser sentences are imposed in exchange for timely cooperation. These plea agreements for 'second-in' companies must charge the company with the 'most serious, readily provable' offence, and may only reduce the sentence from the probable sentence faced if convicted to an extent reflecting the 'totality and seriousness' of the company's conduct.

As to agreements or commitments without a determination of violation, the closest procedure in the US would be a deferred prosecution or non-prosecution agreement. These agreements can require ongoing cooperation and compliance, and have been used by the DOJ. Most recently the agreements have been used in various major financial services industry investigations where there are overlapping government investigations by non-antitrust agencies. In these circumstances, the DOJ may accept remediation and compliance requirements, and ongoing interim reporting for the period of the agreement, in return for non-prosecution. Companies should be aware that a subsequent violation of a deferred prosecution agreement can result in severe penalties.

33 What weight will the authorities place on companies implementing or amending a compliance programme in settlement negotiations?

See question 4.

34 Are corporate monitorships used in your jurisdiction?

The DOJ has recently requested outside third party monitors in two high-profile cases, following successful antitrust trials that were particularly unusual and highlighted severe antitrust compliance concerns.

In *AUO*, a Taiwanese company and its American subsidiary were placed on probation for three years. The Court required the appointment of an independent monitor to administer an antitrust compliance programme. Similarly, in *Apple e-books*, the compliance monitor was appointed for two years to review and evaluate Apple's antitrust compliance programmes.

Subsequently, in both the *AUO* and *e-books* cases, the parties disagreed on the terms and responsibilities of the appointed monitors, leading the parties back before the court on multiple issues. Nevertheless, the DOJ has stated it will continue to consider corporate monitors in situations with a significant risk of recidivism.

35 Are agreed statements of facts in a settlement with the authorities automatically admissible as evidence in actions for private damages, including class actions or representative claims?

A final judgment in a US government action is prima facie evidence against the defendant as all civil matters regarding the same conduct, pursuant to section 5(a) of the federal Clayton Antitrust Act. A criminal conviction following a guilty plea qualifies as a final judgment for these purposes.

36 Can the company or an individual invoke legal privilege or privilege against self-incrimination in an investigation?

The US constitutional right against self-incrimination applies to US criminal antitrust proceedings. This protection includes testimonial communications. In addition there is an 'act of production' privilege, based on the same principles, involving testimonial communications made through documents.

The attorney–client privilege protects confidential communications between an attorney and client for the purpose of seeking or rendering legal advice. The protection applies equally to external or in-house attorneys communicating with company employees for the purpose of receiving legal advice, so long as that legal advice was pursuant to the attorney's professional capacity. The US attorney–client privilege is held by the client, and can only be waived by the client.

While sharing privileged information with a third party waives any privilege, parties to a joint-defence agreement can preserve the privilege by agreement in furtherance of the joint-defence privilege. Joint defence agreements are commonplace in cartel and merger investigations, given the common interests in sharing confidential information regarding the investigation.

The attorney work-product privilege covers materials prepared in anticipation of litigation or trial and reflecting the mental impressions or opinions of an attorney. The US Supreme Court recognised the work-product doctrine so that counsel would have sufficient privacy in their litigation preparation from opposing parties and their counsel (*Hickman v Taylor*, 329 US 495 (1947)).

37 What confidentiality protection is afforded to the company or individual involved in competition investigations?

Criminal investigations typically proceed pursuant to grand jury subpoenas governed by the Federal Rules of Criminal Procedure. A grand jury determines whether there is sufficient probable cause to indict the target of a criminal investigation, and may subpoena testimony and evidence. In this process, the matters before the grand jury may not be disclosed by the prosecutors, jurors, and court employees. This secrecy is strictly enforced with violators subject to contempt of court proceedings.

Civil investigations are also confidential, including both the existence of the investigation as well as confidential company information and witness testimony disclosed (15 USC section 1313(c); 15 USC section 57b-2(b)).

Plea negotiations are generally confidential. However, a defendant in breach of a plea agreement – such as by failing to cooperate in the investigation – may forfeit this confidentiality. In the US, courts do not participate in these discussions, but the resulting agreements are generally disclosed in open court (unless doing so would jeopardise a secret investigation) for acceptance of the court.

38 What are the penalties for refusing to cooperate with the authorities in an investigation?

Refusing to cooperate with the DOJ will forfeit any leniency or sentencing enhancement associated with cooperation. Furthermore, refusal to appropriately produce witnesses and documents could subject the company to criminal contempt and obstruction of justice charges. The penalties for obstruction of justice are often much more severe than those for the underlying cartel offence. Obstruction of a government antitrust investigation can be punished by a jail term of up to 20 years. See, for example, 18 USC section 1512(c)(2), and fines in excess of $500 million. See 18 USC section 1512(c)(2).

The DOJ has regularly prosecuted companies it deems to have corrupted its investigative processes, especially with false statements or alteration of documents.

39 Is there a duty to notify the regulator of competition infringements?

Leniency applicants are required to fully cooperate with the DOJ. While there is no duty to notify the regulator of competition infringements, not doing so may lead to drastic criminal penalties and civil litigation.

40 What are the limitation periods for competition infringements?

The statute of limitations for criminal conspiracies, including antitrust conspiracies, is five years. For civil actions, a suit must commence within four years after the cause of action has accrued.

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Olivier N Antoine **oantoine@crowell.com**
Britton D Davis **bdavis@crowell.com**
Robert B McNary **rmcnary@crowell.com**

590 Madison Avenue, 20th Floor
New York
New York 10022-2544
United States

Tel: +1 212 803 4022
Fax: +1 212 223 4134
www.crowell.com

Miscellaneous

41 Are there any other regulated anticompetitive practices not mentioned above? Provide details.

Yes, there are distinct state law regimes that cover both anticompetitive practices and unfair competition laws. Many of these laws are more restrictive than federal law.

42 Are there any proposals for competition law reform in your jurisdiction? If yes, what effects will it have on the company's compliance?

Federal lawmakers have been considering legislation that would eliminate differences in the preliminary injunction standards used by the FTC and the Antitrust Division of the Department of Justice in the context of litigation of mergers and acquisitions under the HSR Act. The proposed Standard Merger and Acquisition Reviews Through Equal Rules Act of 2017 is intended to address concerns that parties to a proposed merger agreement or acquisition currently face different preliminary injunction standards in court challenges, as well as different processes, depending upon which federal antitrust agency reviews the transaction.

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