HERBERT SMITH FREEHILLS

CARTEL INTEL:
UPDATES FROM OUR EMEA NETWORK

In this issue


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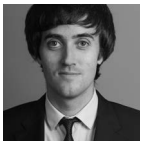

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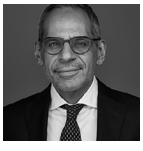

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European Union

Obtaining leniency in cartel cases: European Commission publishes new guidance on practice and policy

Seeking to clarify its policy and encourage leniency applicants to come forward, the European Commission ("**Commission**") has published new guidance on its approach to leniency and its Leniency Notice.[1] The new guidance comes in the form of Frequently Asked Questions ("**FAQs**").[2] The FAQs provide guidance on the fundamental principles underpinning the EU's leniency programme such as the definition of a cartel, the key conditions of the leniency programme, procedural aspects when contacting the Commission (including its recently upgraded eLeniency online platform). The FAQs also seek to highlight the protections and benefits available to leniency applicants beyond those described in the Commission's Leniency Notice.

Background

Under the Leniency Notice, companies that provide sufficient information to the Commission about a cartel in which they have participated may receive full immunity from fines or a reduction in fines. Full immunity is available to the first participant of a cartel to report the conduct to the Commission; other cartel participants which subsequently approach the Commission can receive reductions in fines if they provide "*significant added value*" to the investigation. Reportable infringements cover cartel conduct such as price fixing, market sharing, customer allocation and restricting imports or exports.

The Commission considers its leniency programme indispensable for the prosecution of illegal cartels, with the Commission noting that "*most cartels have been detected through the Commission's leniency programme*".[3]

Despite the effectiveness of the leniency programme, the Commission has noticed a significant decrease in leniency applications in recent years. In October 2021, Executive Vice-President and Competition Commissioner Margrethe Vestager revealed that the Commission was examining how well its leniency programme was working.[4]

1. Commission Notice on Immunity from fines and reduction of fines in cartel cases, available here.
2. Frequently Asked Questions (FAQs) on Leniency, version of October 2022, available here
3. Commission Report on Competition Policy available here
4. Speech by Executive Vice-President M. Vestager at the Italian Antitrust Association Annual Conference – "*A new era of cartel enforcement*," October 2021, available here

Snapshot: Other EU developments

- The General Court ("**GC**") upheld the Commission's fines on companies found to have participated in an Italian concrete reinforced bars cartel despite 30 years passing since the start of the cartel.
- The Commission imposed fines totalling €157 million on companies participating in a styrene monomer purchasing cartel.
- The Commission formally informed Deutsche Bank and Rabobank of its preliminary view that they breached EU competition rules by colluding when trading Euro-denominated bonds.
- The Court of Justice of the European Union ("**CJEU**") upheld the Commission's decision and the GC's judgment which found that HSBC participated in a cartel in the Euro Interest Rate Derivatives sector. However, the CJEU upheld the annulment of the € 33.6 million fine imposed on HSBC, considering the Commission's statement of reasons insufficient.

One of the factors considered to be leading to under-utilisation of the EU's leniency programme is uncertainty over its application to so-called "non-traditional" cartels. This may include conduct such as 'buyer cartels' (ie, fixing purchase prices), 'innovation cartels' (eg, agreeing to limit technical developments), and the exchange of commercially sensitive information between competitors. For such non-traditional conduct, businesses may be less able to clearly identify whether an infringement has occurred (and therefore whether leniency may be available).

The risk of exposure to follow-on damages claims may also reduce the attractiveness of the leniency programme. Cartelists that secure leniency through the Commission's leniency programme may obtain immunity from administrative fines from the Commission, but this immunity does not offer any protection from litigation from third parties. The risk of litigation may therefore deter would-be leniency applicants from coming forward, given the high value claims being pursued across the EU.

In response to a decline in leniency applications, the Commission is actively considering potential changes to the programme, including considering providing full immunity from follow-on damages claims and providing clearer guidance to companies involved in non-traditional cartels through its revised Horizontal Guidelines.[5] In this context, the FAQs are a welcome development.

Key takeaways from the FAQs

- **New anonymous guidance mechanism**. In a significant procedural innovation, the FAQs provide that the legal representatives of interested companies may discuss a potential leniency application on a 'no names' basis with the Commission to ascertain whether certain conduct is a cartel, without the need to disclose the sector, the parties involved or any other details identifying the potential cartel. The Commission's Leniency Officer is the first point of contact for these discussions. These informal exchanges will allow the legal representatives of a business to determine whether immunity may be available at an early stage. It is hoped that this increased transparency will further encourage potential applicants to come forward – in particular as it provides an early opportunity for prospective applicants to ascertain whether certain conduct qualifies under the leniency regime. This is likely to be especially relevant for novel types of conduct where the existence of an infringement may not be clear-cut.
- **Clarification of "significant added value"**. Under the Leniency Notice, businesses who provide "significant added value" in relation to a cartel can qualify for a reduction in fines. The FAQs set out that the meaning of "significant added value" is assessed on a case-by-case basis and, more specifically, by reference to the information already in the possession of the Commission at the time of the application. The FAQs note that the Commission generally considers the threshold for significant added value is satisfied where an applicant has provided all information in their possession at an early stage of the proceedings and where the applicant cooperates genuinely and fully. The evidential value is likely to be greater in respect of contemporaneous evidence and direct evidence (eg, notes of a cartel meeting) rather than indirect (eg, travel records relating to attendance at meetings). The FAQs note that to date only three applicants have failed to reach the threshold for significant added value: in two cases due to a lack of genuine cooperation, while the other case involved a failure to disclose participation in a cartel. Remaining cooperative throughout an investigation is therefore an important aspect to securing leniency, even if evidence has separately been provided to the Commission.
- **Leniency and damages actions**. The FAQs refer to the protection granted by the Damages Directive,[6] which prohibits the disclosure of leniency statements made to national competition authorities or the Commission in damages proceedings before the EU or Member State courts. In this context, the FAQs emphasise that the Commission is prepared to support leniency applicants against requests for disclosure in non-EU courts, pursuant to the principle of international comity.[7] The FAQs note that the Commission has successfully invoked this principle in US courts. It is also noted that under the Damages Directive, a beneficiary of immunity is only jointly and severally liable for its direct and indirect customers – by contrast, cartelists who do not benefit from immunity may be liable to other cartel victims if full compensation cannot be obtained from the other cartelists.
- **Updated eLeniency tool**: Lastly, the FAQs highlight recent changes to the Commission's eLeniency online platform, which was introduced in 2019 to allow applicants to submit leniency applications by typing statements and uploading documents directly into the Commission's secure server. The FAQs state that eLeniency provides for the same guarantees in terms of confidentiality and legal protection as the traditional procedure of oral statements. The new version of the eLeniency tool also allows the Commission to securely grant access to corporate statements and other leniency materials to parties involved in cartel and antitrust proceedings, documents which would otherwise only be accessible in-person at the Commission.

5. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, available here
6. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, available here
7. That is, the principle that courts of one jurisdiction should take the interests of other jurisdictions into consideration when making legal decisions.

Concluding remarks

The FAQs are a welcome development which serve to enhance the EU leniency framework by assisting to increase transparency and reduce certain legal uncertainty. In particular, the opportunity to engage in informal discussions with the Commission on a no-names basis to explore whether leniency may be available is a welcome development. Applicants, and the Commission itself, are likely to benefit from these informal exchanges, in particular insofar as novel conduct, outside of "traditional" cartel, is concerned. The ability to verify whether leniency is available removes legal uncertainty which may have previously deterred companies from applying.

Companies who suspect that they or their competitors may be involved in cartel conduct should make use of this new procedure in case of doubt on the application of the leniency regime. Obtaining early legal advice and seeking leniency at an early stage is likely to assist to maximise the chances of securing full immunity from fines. This informal guidance procedure is likely to prove particularly valuable in this context.

The Commission has also recognised that fear of exposure to damages actions and the significant increase in private damages litigation may deter companies from applying for leniency. The FAQs therefore aim to emphasise the protection offered to applicants in the context of EU and non-EU civil litigation. While it is laudable that the Commission will endeavour to support leniency beneficiaries in foreign jurisdictions, businesses should remember that there is no guarantee that the Commission will always be able to successfully intervene in non-EU court proceedings.

It is also noted that the publication of the FAQs follows the Commission's launch of the revision of the EU Competition enforcement framework[8] with a call for evidence and a public consultation involving various EU stakeholders in relation to Regulation 1/2003[9] and Regulation 773/2004[10]. The proposed revision aims to ensure that the EU's antitrust procedural rules are updated in line with evolving markets, new technologies and changing ways of doing business.

8. European Commission, Antitrust: "Commission seeks feedback on performance of EU antitrust enforcement Framework", available here
9. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, available here
10. Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, available here

Germany

When does the limitation period for the prosecution of bid-rigging cartels begin? The Higher Regional Court of Düsseldorf disagrees with Federal Supreme Court

Facts of the case

- In December 2019, the Federal Cartel Office ("**FCO**") fined eleven technical building service providers approximately €110m for participation in a bid rigging cartel.[11] The FCO's investigation was initiated in November 2014 following a leniency application. According to the FCO, several technical building service providers[12] colluded over many years in various tender processes. Often, the businesses submitted dummy bids (ie, fictitious bids) to protect other cartelists. In exchange for submitting fictitious quotes, the companies were "rewarded" with subcontracts, financial compensation from the winning bidder, or cover bids in other tenders (ie, to fix the winner). The bid rigging covered contracts awarded between 2005 and 2014.

Snapshot: Other German developments

- The FCO issued a statement of objections against associations of medical aid providers in relation to suspected coordination over price increases.
- The FCO imposed fines of almost €1 million on four construction companies found to have engaged in collusive tendering for road works.
- The Higher Regional Court of Düsseldorf increased the fine imposed on a coffee roaster for its participation in a cartel (press release available in German only).
- The Higher Regional Court of Düsseldorf has re-opened proceedings against a so-called "beer cartel" following the setting aside by the Federal Supreme Court of the Higher Regional Court's previous decision in the case (press release available in German only).
- Two of the companies appealed the FCO's decision to the Higher Regional Court of Düsseldorf. In its decision of 14 November 2022, the Court partially overturned the FCO's decision and discontinued the proceedings on the basis that the FCO was time barred from imposing fines on the two companies. The Court's judgment is not yet published, but it is apparent from the press release[13] that the Court's reasoning turns on an important legal question under German cartel law – namely the starting point for the calculation of the limitation period in bid rigging cases.

The main legal question: when does the limitation period begin?

In general, German law provides that the limitation period for a cartel prosecution begins at the point in time at which the competition law infringement[14] is "completed".

In bid rigging cases – ie, where two or more undertakings engage in collusive bidding in private or public tender procedures – there are essentially three points in time at which the infringement can be viewed as complete:

11. FCO Press Release of 27 March 2020.
12. The relevant services included "mechanics" (sanitation, heating and air-conditioning), "electricity" (electronics, measurement and control technology) and "fire protection" (eg, sprinkler systems).
13. See: Higher Regional Court of Düsseldorf Press Release of 14 November 2022 (in German).
14. Under either Article 101 TFEU or the German equivalent of s.1 of the Act against Restraints of Competition ("ARC").

- when the cartelist and the customer agree a contract based upon the rigged bid;
- when the works are completed (potentially several years after the contract is agreed); or
- when payment is made.

The German Federal Supreme Court ("**FSC**") has to date taken the view that the infringement is completed when the successful bidder issues its final invoice to the customer (which under German Civil Law is usually after all works have been finished).[15] The FSC's main reasoning is that until that point in time the cartelist could theoretically still avoid economic damage by lowering its price. This position has been widely criticised. The main criticism is that the mere implementation of the contract does not add to economic damage and hence the violation should be considered as complete once the contract has agreed.

The Higher Regional Court follows the CJEU's approach in *Kilpailu- ja kuluttajavirasto*

According to its press release, the Higher Regional Court has taken a different position from the FSC and held that the limitation period begins at the point the relevant contract is awarded. Accordingly, the Court held that at least some of the cases of bid rigging by the technical building services providers in this case were time barred and therefore could not be prosecuted by the FCO.

In support of its judgment, the Higher Regional Court cited the CJEU's preliminary ruling in *Kilpailu-ja kuluttajavirasto*,[16] which concerned a bid rigging cartel involving a construction contract related to the Finnish national power grid. In that case, the CJEU held that under Article 101 TFEU the infringement period ends at the date of the contract between the cartelist and the contracting authority. In its press release, the Higher Regional Court holds that in view of the *Kilpailu* decision the FSC's position is no longer good law.

The controversy will continue

In publications prior to the Higher Regional Court's judgment, representatives of the FCO (most notably its Vice President) have taken the view[17] that the CJEU's *Kilpailu* decision should not impact the FSC's position regarding the starting point for the statute of limitation in bid rigging cases.

FCO officials note firstly that the CJEU's decision technically only deals with the material question of the infringement period under Article 101 TFEU. It does not deal with the procedural question under German law as to when the statute of limitation begins to run. Secondly, they point out that stricter rules for the beginning of the limitation period under German law do not run contrary to the *effet utile* of Article 101 TFEU: the traditional position of the FSC – that limitation only begins after the issuance of the final invoice – facilitates the prosecution of violations of Article 101 TFEU because it provides for a longer limitation period. The FSC's position does not therefore frustrate the purpose of Article 101 TFEU by making prosecution more difficult.

It therefore seems highly likely that the FCO will appeal the Higher Regional Court's decision. Should the FSC disagree with the Higher Regional Court, it will likely need to refer the question to the CJEU to verify what exactly the implications of the *Kilpailu* decision are for German competition law. It is possible that the CJEU could use any referral judgment to seek to unify the prosecution of cartels in Europe by setting a common limitation period.

15. FSC, judgment of 5 August 2020 – KRB 25/20.
16. See case C-450/19 .*Kilpailu- ja kuluttajavirasto* [2021].
17. MüKoEuWettbR/Vollmer, 4th Edition 2022, GWB § 81g para. 9; Bien/Käseberg/Klumpe/Körber/Ost, Die 10. GWB-Novelle, 2021, chapter 3, para. 176.

Italy

The Consiglio di Stato confirms participation in a single cartel meeting is sufficient to infringe competition law

The Consiglio di Stato (the Italian Supreme Administrative Court) has upheld the decision of the Italian Competition Authority ("**ICA**"), and confirmed the existence of price fixing and market sharing cartels concerning the production and marketing of corrugated cardboard packaging.[18] The Consiglio di Stato published its first decision in November 2022[19] and has adopted 18 similar decisions since then. The decisions follow an appeal to the Lazio Regional Administrative Court ("**TAR**") by the companies found to have participated in the cartel and fined by the ICA.

Background

On 17 July 2019, the ICA found that several companies and a trade association participated in two cartels regarding the production and sale of corrugated cardboard sheets and packaging (one cartel involved collusion on price increase, and the other concerned market sharing). The ICA imposed fines totalling €287 million. One of the cartel participants, the DS Smith Group, received immunity from fines under the ICA's leniency programme.

All of the parties subject to fines challenged the ICA's decision before the TAR. Following the appeal, the TAR partially annulled the decision of the ICA. The TAR held that there were insufficient grounds to find that four of the fined companies (Alliabox, Ondulati del Salvio, Sandra and Topazzini) had engaged in cartel conduct. In particular, according to the TAR, the period over which Topazzini participated in the cartel – only 42 days – was too short to effectively implement the cartel. In relation to the three other companies, the TAR considered that the evidence of their attendance at (very few) cartel meetings was based solely on information provided by the leniency applicant. The TAR therefore partially annulled the decision of the ICA as it related to these companies.

Snapshot: Other Italian developments

- The ICA has implemented a whistleblowing platform to facilitate the anonymous reporting of cartel conduct and other competition infringements. (Press release available in Italian only.)
- The ICA has requested assistance from the Italian finance police (Guardia di Finanza) to collect documents in connection with the ICA's investigation into suspected anti-competitive conduct in the fuel sector.
- The ICA has published a consultation on proposed amendments to its settlement procedure. (Press release available in Italian only.)

Following the TAR decisions, the ICA made an appeal to the Consiglio di Stato in respect of its findings relating to Alliabox, Ondulati del Salvio, Sandra and Topazzini. Appeals were initiated by those companies who were unsuccessful in appealing the ICA decision to the TAR. The Consiglio di Stato upheld the ICA's decision in respect of each of the appellants, finding that they had participated in the cartel.

In relation to Alliabox, Ondulati del Salvio, Sandra and Topazzini, the Consiglio di Stato overturned the TAR's decision. While the Consiglio di Stato recognised that these companies had a much lesser role in the cartel, it concluded that there was nevertheless sufficient evidence that they had engaged in cartel conduct.

The Consiglio di Stato's decisions

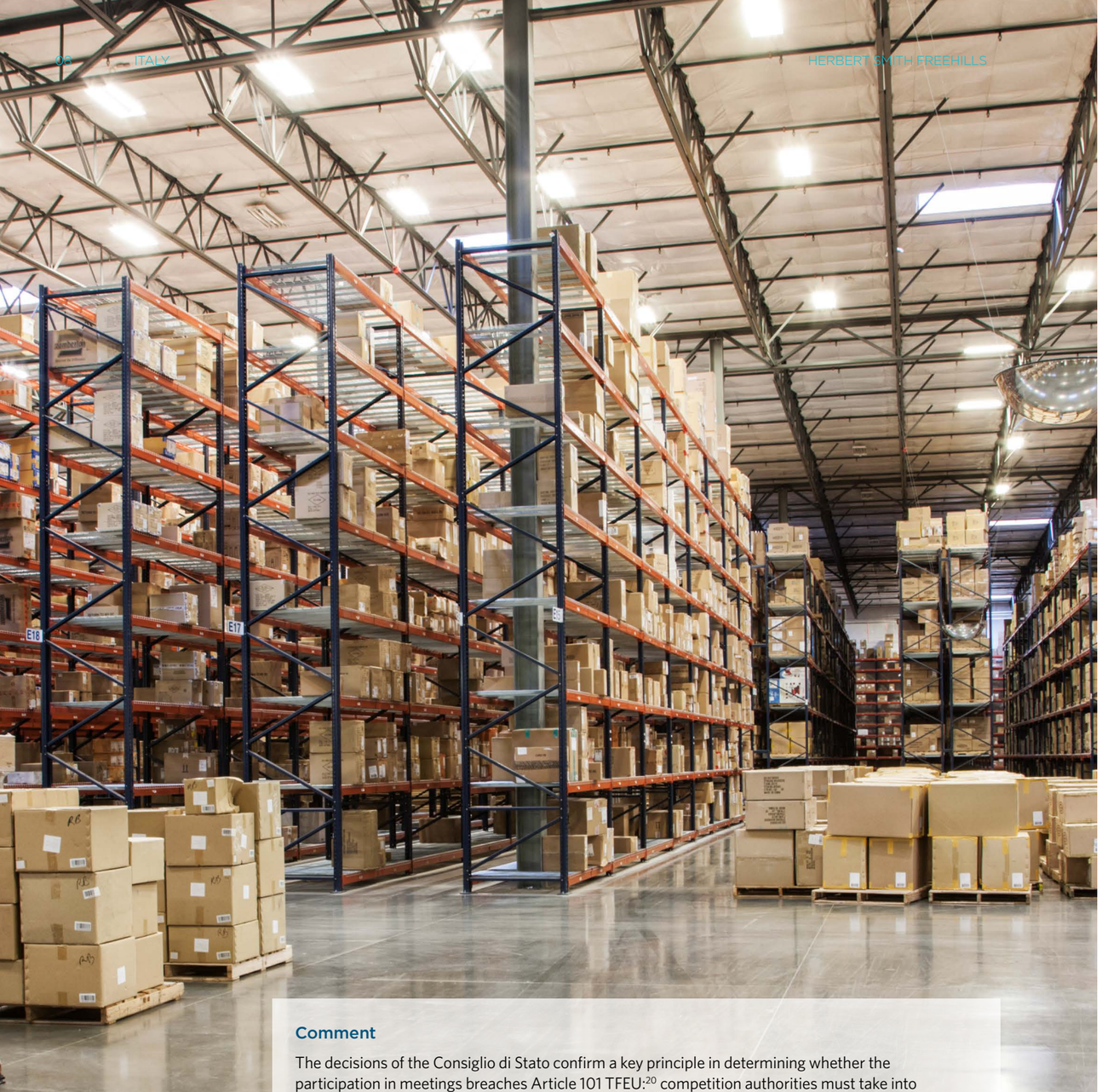
The decisions clarify that the participation in just a single meeting organised by others is sufficient to constitute an infringement of Italian competition law **unless** the participant expressly and unequivocally disassociates themselves from the meeting (eg, by reporting the meeting to the ICA). A company therefore cannot avoid liability for breaching competition law on the basis that its participation was limited to a small number of meetings or that it had only a minor role in the cartel. The decisions confirm that the role of a company in the creation and enforcement of a cartel, and the duration of their participation, are instead relevant only for determining the level of fine to be imposed.

In particular, the Consiglio di Stato upheld the view of the TAR that an infringement of Article 101 TFEU is to be established by reference to an undertaking's awareness of the type and purpose of the cartel meeting, and not just the number of the meetings attended, or the geographic areas considered by the meeting (ie, national, regional or local). One of the companies in this case, for example, participated in just two meetings but followed up with conference calls to discuss the market sharing arrangements and disclose details of negotiations with specific customers. The Consiglio di Stato found that this was the key differentiator between the behaviour of the claimant and of DS Smith Group, which had disassociated itself from the cartel by lodging a leniency application to the ICA (and ultimately benefitted from immunity).

The Consiglio di Stato found that while certain of the companies fined by the ICA had only attended a very small number of meetings, they were nevertheless aware of the illicit purpose of the meetings and did not disassociate themselves from the cartel. On this basis, the Consiglio di Stato concluded that they were participants to the cartel and therefore infringed competition law.

However, the Consiglio di Stato took the view that in determining the level of fine the ICA should have regard to the brevity and intensity of an undertaking's conduct. One of the cartelists in this case, for example, participated in the cartel for just over one year and did not pursue the collusive conduct agreed by the cartel (contrary to other companies in the cartel). On this basis, the Consiglio di Stato found that while the company was aware of the cartel, they did not implement it. The Consiglio di Stato therefore reduced the level of fine imposed by the ICA by 20%.

18. See I805 – Corrugated Cardboard Prices – case page available here (in Italian).
19. No. 10159/2022



Comment

The decisions of the Consiglio di Stato confirm a key principle in determining whether the participation in meetings breaches Article 101 TFEU:[20] competition authorities must take into account not just the number of meetings attended, but must assess whether the contacts between competitors allowed the company participating in the meeting to take the exchanged information into account when determining their own behaviour on the market and to replace the ordinary risks of competition with collusion.

In the present case, the view of the TAR was that the ICA's decision in respect of four companies who participated in the cartel for only a short space of time (in what was otherwise a long-lasting cartel) should be annulled. The Consiglio di Stato, however, re-instated the ICA's fines – albeit on a reduced basis – as it had found evidence that these companies were well aware of the nature of the meetings that they attended but did not take any action to distance themselves from the cartel. The case therefore underscores that limited participation in a cartel does not absolve a participant from liability – it is the act of disassociation from the conduct which provides a route through which participants can limit liability for infringing competition law (eg, through seeking and obtaining leniency from the competition authority).

20. See also case C-8/08 *T-Mobile Netherlands* [2009].

South Africa

Competition Appeal Court reaffirms importance of characterising the relationship between parties at the time of alleged cartel conduct

The concept of 'characterisation' was first introduced into South African law by the Supreme Court of Appeal ("**SCA**") in *ANSAC*.[21] In that case, the SCA recognised that there are instances where conduct may, on its face, seem to be collusion but upon closer scrutiny the conduct is found to be benign. The SCA formulated a process of 'characterisation': a two-stage enquiry to establish whether the character of the conduct complained of coincides with the character of cartel conduct proscribed by the Competition Act. The first stage involves delineating the scope of the prohibition as a matter of statutory interpretation. The second stage is a factual analysis of the nature of the conduct.

There has been fervent opposition to the recognition of the characterisation principle in South African antitrust law by the Competition Commission of South Africa (the "**Commission**"), which is of the view *inter alia* that the South African Competition Act does not require that conduct be characterised for purposes of a cartel prosecution.

Despite this opposition, characterisation has been reaffirmed as a principle of South African antitrust law in a series of cases since *ANSAC*, most recently in two judgments delivered by the Competition Court of Appeal ("**CAC**") in the latter half of 2022: *Tourvest* and *Irvin and Johnson*.[22]

The Commission has sought leave to appeal both decisions to the Constitutional Court of South Africa, however, leave to appeal was refused in *Tourvest* for lack of reasonable prospects of success. The Constitutional Court's decision in *Irvin and Johnson* is still pending.[23]

We have previously provided an update on the decision of the Competition Tribunal (the "**Tribunal**") in *Irvin and Johnson*,[24] which was confirmed by the CAC, and so this update focuses on *Tourvest*.

Background to the case

In June of 2022, the CAC upheld an appeal against a decision of the Tribunal in *Tourvest* in which the Tribunal found that Tourvest Holding (Pty) Ltd and the Siyazisiza Trust had engaged in cartel conduct in contravention of the Competition Act. The decision related to a complaint lodged by the Airports Company of South Africa (SOC) Ltd ("**ACSA**") directed at alleged collusion between the parties who bid for the same tender published by ACSA.

Tourvest bid together with a trust. This was because the trust, which was founded with the purpose of providing assistance to women in rural areas through upliftment and training projects, was not able to meet the onerous minimum tender requirements on its own. After having confirmed that it

21. *American Soda Ash Corporation v Competition Commission & Others* 2005 (6) SA 158 (SCA).

22. *Tourvest Holdings (Pty) Ltd v Competition Commission and Another* [2022] 2 CPLR 27 (CAC); and *Competition Commission v Irwin & Johnson and Another* [2022] 2 CPLR 26 (CAC).

23. At the time of writing.

24. Please see edition 2 of the Cartel Intel, available here.

was permissible for a bidder to be part of more than one consortium (provided that it was disclosed), Tourvest also bid individually. It did so because it was concerned that the trust might be disqualified, and it wanted to still be in the running for the tender. ACSA decided to disqualify both bids on the grounds that Tourvest allegedly colluded with the trust, notwithstanding that the parties' collaboration was fully disclosed to ACSA.

The Tribunal found that Tourvest and the trust had become actual or potential competitors by submitting bids for the same tender and had held themselves out to be competitors. This appears to rely on the principle adopted by the Tribunal that "*horizontality can be found in the creating of an 'illusion of competition'*".

The CAC overturned the Tribunal's decision. It held that the economic theory which underpins the prohibition against cartel conduct operates on the basis that the parties concerned must be potential or actual competitors at the time of conclusion of the impugned agreement. Therefore, when characterising conduct alleged to be in violation of the cartel prohibition, it is necessary to determine whether the parties are potential or actual competitors at the time that they commit the offence in issue ie, the horizontal relationship cannot be located within the alleged cartel conduct itself.

In its assessment of the "pre-tender environment", the CAC concluded that the trust could never have been found to be a competitor. Moreover, the fact that the agreement between Tourvest and the trust indicated that it would assist in the development of the trust, such that it may be able to occupy and operate a specialised retail space in the future, was not sufficient to hold that the parties were actual or potential competitors. Indeed, the evidence of the trust was that, absent the agreement, the trust would not have been able to develop the necessary skills and resources to engage in the relevant market.

To find that parties are in a horizontal relationship, because they hold themselves out to be competitors, is contrary to the express provisions of the Act which requires the parties to be in an actual (or potential) horizontal relationship. The CAC held that the prohibition against cartel conduct cannot be construed to import strict liability on parties which represent themselves as competitors when in fact they are not.

Analysis and key takeaways

Tourvest follows a series of cases dealing with similar circumstances ie, where parties participate in the same tender.[25] It is common (particularly in South Africa where firms are encouraged to promote greater participation in the economy by small and medium enterprises and/or firms owned or controlled by historically disadvantaged persons), for parties to submit joint bids and potentially separate bids in the same tender. *Tourvest* provides useful guidance that can be followed by bidding parties in their assessment of the competition risks in these circumstances. Parties need to consider whether they are actual or potential competitors prior to the submission of the bids – ie, are the parties actual or potential competitors, absent the parties' participation in the tender. This assists to determine whether there has been a removal of a competitor and therefore harm to competition. If not, the competition risks are reduced as a horizontal relationship cannot be found solely on the basis that the parties participated in the tender or an illusion of competing.

Conclusion

The CAC emphasised that the purpose of the prohibition against cartel conduct is to capture conduct which is so egregious that no pro-competitive defence is permitted. It stands to reason, therefore, that it does not seek to capture conduct which is not of the character that causes harm to competition.

The CAC mentioned in its decision in *Irvin and Johnson* that the application of a nuanced approach is appropriate in instances where the agreement falls somewhere along the continuum between hardcore cartelism and a legitimate commercial horizontal agreement. Such an approach requires the decision maker to simultaneously consider the text, context and purpose of the agreement whilst remaining cognisant of the economic relationship between the parties at the time of its conclusion.

The process of characterisation is a critical tool in preventing false positive findings of cartel conduct. This is necessary considering the severe consequences of an adverse finding, including the reputational harm and potential for criminal liability for directors or managers of firms that cause a firm to engage in, or knowingly acquiescing to a firm engaging in, cartel conduct.

The CAC's consistent application of characterisation in cartel cases and the Constitutional Court's refusal to hear the Commission's appeal of Tourvest suggests that the principle is now well established and entrenched in South African jurisprudence.

Snapshot: Other South African developments

- The Competition Commission published Guidelines on the Exchange of Competitively Sensitive Information between Competitors.
- The Competition Commission referred a complaint of alleged price fixing and market allocation against two personal protective equipment suppliers to the Competition Tribunal for prosecution.
- The Competition Tribunal granted interim relief to the Sekunjalo Group preventing three banks from closing their bank accounts and ordering five others to reopen bank accounts that had already been closed following *inter alia* adverse media allegations against the Group. The Tribunal found that there was *prima facie* evidence that the banks had engaged in a concerted refusal to supply banking services to the Group. This decision has been taken on appeal and review.
- The Competition Commission conducted the first dawn raid in several years against eight insurance companies on the basis that the Commission had reasonable grounds to suspect that the firms had engaged in price fixing.

25. See for example *Aranda Textiles (Pty) Ltd and Another v The Competition Commission of South Africa* (190/CAC/Dec20) [2021] ZACAC 1, and *A'Africa Pest Prevention CC and Another v Competition Commission of South Africa* (168/CAC/Oct18) [2019] ZACAC 2 (2 July 2019).

Spain

The CNMC will directly determine the scope and duration of procurement bans imposed for infringing competition rules

On 24 November 2022, Spain's National Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia*, "**CNMC**") announced its intention to start including directly in its decisions the scope and duration of procurement bans imposed on parties involved in cartel infringements. The CNMC launched a public consultation process for economic operators to submit feedback to its draft communication on the criteria that it will apply when imposing procurement bans (the "**Draft Communication**").

The CNMC's recent decisions have shown that procurement bans are an automatic consequence of infringing Spanish competition law by engaging in cartel conduct. Procurement bans prohibit cartelists from participating in future public tender procedures for a maximum period of up to three years.

Procurement bans imposed by the CNMC to date have not been applied effectively because the CNMC leaves it to the Spanish Ministry of Finance to set the scope and duration of the ban at a later stage after the CNMC has issued its decision. The CNMC wishes to address this issue and increase the effectiveness of procurement bans. It is proposed that CNMC decisions establishing the duration and scope of a procurement ban will be final from the moment that it adopts them, without prejudice to the possibility of them being challenged before the National Court.

Origin and current status of procurement bans

The CNMC first imposed a procurement ban in its *Electrificación y electromecánica ferroviarias* decision.[26] The measure was adopted as a result of the transposition into Spanish law of the provisions on the exclusion of economic operators from public procurement tenders under Directive 2014/24/EU. However, the transposition of those provisions into Spanish law has been unclear, since Spanish law (in particular, Article 72(2) of the Public Procurement Law 9/2017, of 8 November (*Ley 9/2017 de Contratos del Sector Público*, or "**LCSP**")) establishes two ways in which procurement bans can be implemented, either:

26. Case S/DC/0598/16.

- imposed directly by the procuring bodies when a judgment or administrative decision has expressly established its scope and duration; or
- if the judgment or administrative decision does not define the scope or duration of the procurement ban, this will instead be determined by the Ministry of Finance through a separate procedure. The Ministry of Finance will issue a decision based on the advice of the State Consultative Board on Public Procurement (*Junta Consultiva de Contratación Pública*) – however, no procedure has yet been implemented under Spanish law.

In its decisions to date, the CNMC has relied upon the second option and has not prescribed the scope and duration of procurement bans. Instead, the CNMC refers procurement ban cases to the State Consultative Board on Public Procurement – responsible for submitting a report to the Ministry of Finance – to decide the scope and duration of the ban via a separate administrative procedure. To date, no separate administrative procedure has been adopted by the State Consultative Board on Public Procurement.

In early 2022, the CNMC announced that it intended to change its approach and that it would instead define the scope and duration of procurement bans directly in its decisions. The Draft Communication relies on a number of recent court rulings that have recognised that the competition authority is best placed to make an overall assessment of the penalties and sanctions that can be adopted in the light of the facts established in its decisions and to weigh up the market impact of the infringing conduct. Consequently, the Draft Communication establishes that the CNMC will begin to publish in its decisions the scope and duration of procurement bans imposed on companies found to have infringed competition law.

Snapshot: Other Spanish developments

- The CNMC fined two taxi hiring platforms after it concluded that the companies colluded to penalise drivers who offered their services via other platforms.
- The Basque competition authority sanctioned two companies for engaging in collusive tendering for service, design, manufacture and distribution of clothing items in the region of Bilbao. (Decision available in Spanish only.)
- The CNMC announced that it is investigating several energy companies for suspected anti-competitive practices that may constitute an infringement of Articles 1 and 2 of the Spanish Competition Act and Articles 101 and 102 TFEU.

The Draft Communication: analysis and key takeaways

The main purpose of the Draft Communication is to set out the criteria the CNMC will use when setting the duration and scope of procurement bans, and in turn to provide legal certainty to businesses by ensuring transparency as to the CNMC's decision making process.

The Draft Communication states that procurement bans can be applied as a result of the participation in any anti-competitive practices and not only of those practices related to public procurement, such as bid rigging. The Draft Communication also states that both legal and natural persons, may be subject to procurement bans (this reflects that members of the management teams of infringing companies can be subject to personal sanctions by the CNMC). In addition, the Draft Communication establishes that procurement bans cannot be applied to conduct which concluded before the applicable regulations on procurement bans entered into force (22 October 2015).

In terms of the criteria for determining the scope and duration of procurement bans, the Draft Communication states that this requires the CNMC to consider all relevant elements to ensure compliance with the principles of proportionality, legal certainty and the protection of public bodies. In particular, the Draft Communication establishes that the following parameters should be taken into account:

- **Geographic scope**: The geographic market in which the infringement occurred should be taken as the main reference point when defining the geographic scope of the procurement ban, without prejudice to the specific circumstances of each case, which may make it advisable to define the scope more narrowly/widely than the geographic market.[27]
- **Product scope**: The product market (goods or services) affected by the infringement should be taken as the main reference when defining the scope of the procurement ban, without prejudice to the specific circumstances of each case.[28]
- **Duration of the infringement**: This is an objective factor that must act as guiding element in determining the duration of the procurement ban. It is possible to establish a rule of proportionality between the duration of the infringement and the duration of the procurement ban. In any case, the maximum duration of the procurement ban is three years.
- **Severity of the infringement**: The more serious the infringement, the longer the procurement ban. Likewise, infringements with a greater economic impact in terms of the volume of the market affected will be subject to longer ban.

The Draft Communication also points out that, in accordance with Article 72.5 LCSP, an economic operator under investigation may avoid a ban or have it lifted when, as well as undertaking to pay the fines established in the CNMC's decision, it adopts appropriate technical, organisational and personnel measures to avoid the commission of future

27. Indeed, it cannot be ruled out that the geographic scope could perhaps exceed a single market, taking into account the degree of active involvement of other entities of the same corporate group in the anti-competitive conduct including the parent companies responsible for the infringement.
28. Consider, for example, the case of a facilitator which operates in a market other than the market affected by the infringement. In this case, the procurement ban could apply to the market in which the facilitator operates and not the market affected by the infringement.

competition law infringements. These measures may include participating in a leniency programme, implementing an effective compliance programme, or making improvements to a programme in place prior to the investigation.

As such, the Draft Communication sets out two categories of exemption from procurement bans: (i) prior appraisal exemptions, which apply automatically to beneficiaries of immunity under the CNMC's leniency programme;[29] and (ii) exemptions which require subsequent assessment by the CNMC to determine whether the company found to have infringed competition law has adopted appropriate technical, organisational and personnel measures to prevent the commission of future infringements.[30]

Finally, the Draft Communication provides that the CNMC's decision imposing a procurement ban is final on the date the decision is issued (without prejudice to the possibility of it being challenged before the contentious-administrative courts). Procurement bans issued by the CNMC become effective once they are registered in the Official Register of Tenderers and Classified Companies in the Public Sector (or the equivalent register kept by the Autonomous Regions) as required by Spanish administrative law.

Conclusion

The Draft Communication represents a significant change in the application of procurement bans in response to infringements of competition law. Companies should be aware that once the Draft Communication is published in final form, the CNMC will begin determining the scope and duration of procurement bans directly in its decisions. This will mean bans take place sooner, as there will no longer be a separate decision by the Ministry of Finance.

29. The application of the exemption is discretionary for companies who obtain a reduction in fines (but not full immunity) under the leniency programme.
30. In this context, the Draft Communication refers to the CNMN's guidelines on competition compliance programmes.

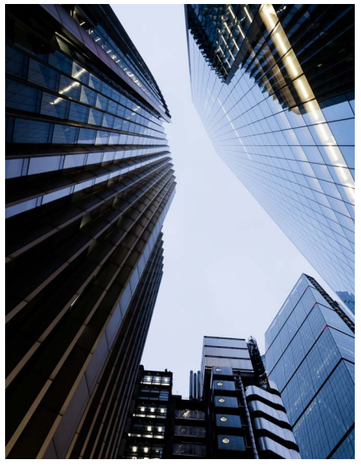
United Kingdom

Personal liability for cartels: Competition and Markets Authority targets directors

Through a pattern of recent enforcement action, the UK Competition and Markets Authority ("**CMA**") has sent a clear message to business: it will not hesitate to hold senior management personally liable for competition law infringements. As a matter of policy the CMA is increasingly determined to deter cartel participation by combining substantial corporate fines with the individual prosecution of culpable directors.

Emboldened by recent court victories, described below, in November 2022 the CMA issued proceedings in the UK High Court seeking the disqualification of seven directors in connection with illegal market sharing arrangements relating to the supply of Prochlorperazine tablets in the UK. In February 2022, the CMA had, in relation to the same infringement, imposed fines totalling more than £35 million (c. € 40 million).

As a result of disqualification, an individual may be barred from acting as a company director for a period of up to 15 years. In the past five years, there has been a 10-fold increase in the number of director disqualifications obtained by the CMA.



Background to the case

In February 2022 the CMA issued its infringement decision in respect of a market-sharing arrangement in relation to the supply of prochlorperazine tablets, a treatment for nausea, dizziness and migraines.[31]

The CMA concluded that an arrangement that restricted competition in the supply of prochlorperazine tablets to the NHS had been concluded by four firms (Alliance Pharmaceuticals, Focus, Lexon and Medreich) between June 2013 and July 2018 (with Medreich participating for only part of this period). Pursuant to this arrangement, Alliance Pharmaceuticals appointed Focus as its distributor, and Lexon and Medreich were paid a share of the profits that Focus earned by selling Alliance's product. In return, Lexon and Medreich agreed not to compete in the supply of prochlorperazine tablets in the UK.

The CMA determined that between December 2013 and December 2017, the prices paid by the NHS for prochlorperazine rose by 700%. The annual costs incurred by the NHS for prochlorperazine increased from around £2.7 million to around £7.5 million.

As noted above, the CMA imposed fines totalling more than £35 million on the companies involved. The fine imposed on Focus was apportioned between its current and former owners, respectively Advanz and Cinven. Lexon, Alliance Pharmaceuticals, Cinven, and Advanz have each filed appeals with Competition Appeal Tribunal ("**CAT**"), challenging the CMA's infringement decision and the penalties imposed.

Notwithstanding these appeals, the CMA issued court proceedings seeking the disqualification of seven company directors spread across the four firms (six former directors (one from Alliance, Lexon and Medreich, and three from Focus) and one current director of Alliance). The disqualification proceedings will be heard in the CAT and considered alongside the appeals of the CMA's infringement decision.[32]

The CMA's director disqualification powers

While the CMA has had the power to disqualify directors for almost 20 years, these powers remained unused until 2016, when the agency obtained its very first disqualification.

Since then, the CMA has resolved to use its director disqualification powers more frequently with its determined pursuit of this policy resulting in the CMA obtaining a total of 25 disqualifications in the last six years.

The CMA has also been emboldened by recent court victories: in 2020, for example, it secured its first director disqualification order before the UK courts. In that case, the Court ordered a 7-year disqualification in relation to a cartel agreement between estate agents. The 7-year period represented an increase compared with the disqualifications it had obtained via undertakings (see below) from other estate agency directors (which ranged from 3 to 5 years). Moreover, the CMA's application was successful notwithstanding the Court's finding that the relevant director was not involved in day-to-day sales nor a participant of cartel meetings, with the Court concluding that disqualification was merited on the basis that the director was aware of the cartel conduct but took no steps to prevent it or end his company's participation.[33] The success of this application demonstrates the seriousness with which the UK courts take infringements of competition law, and support the CMA's desire to hold directors accountable for the actions of their companies even if they are not personally direct cartel participants.

Not only are disqualifications more frequent, but they are also in place for longer periods. In 2021, for example, the CMA disqualified two directors for 11 and 12 years respectively. The CMA's decision to seek disqualifications in the pharmaceutical sector is also not surprising: outside of construction, the pharmaceutical sector has seen the most director disqualifications to date.

31. See: https://www.gov.uk/government/news/cma-fines-firms-over-35m-for-illegal-arrangement-for-nhs-drug. The CMA's infringement decision is available here.
32. See here
33. See *CMA v Michael Christopher Martin* [2020] EWHC 1751, and associated commentary here.

Under relevant legislation,[34] the CMA has two means of disqualifying directors: it can either apply to court for a competition disqualification order ("**CDO**") or it can accept a competition disqualification undertaking ("**CDU**") from a director in lieu of court proceedings. In either case, the maximum period of disqualification is 15 years.

To obtain a CDO, the CMA must show that the director of a company that infringed competition law engaged in conduct which makes them "unfit to be concerned with the management of a company" – ie, because the director:

- engaged in conduct contributing to the breach of competition law;
- did not contribute to the breach but had reasonable grounds to suspect that a conduct of the undertaking constituted the breach and took no steps to prevent it; or
- did not know but ought to have known that the conduct of the company infringed competition law.[35]

In addition to director disqualification powers, the CMA can also bring criminal proceedings against individuals under the UK's 'cartel offence', which makes it a criminal offence to engage in the most serious forms of competition infringement (ie, hard-core restrictions such as bid rigging or price fixing).[36] In practice, the CMA has rarely been successful in prosecuting individuals under the criminal cartel offence – and the CMA has never secured a criminal conviction in a contested case.[37] This is notwithstanding changes to the UK competition regime in 2014 which meant the CMA no longer needed to prove an individual acted dishonestly.

While the CMA remains, in principle, committed to prosecutions under the criminal cartel offence (and as recently as 2020 renewed a memorandum of understanding with the UK's Serious Fraud Office in relation to the investigation of criminal cartel offences[38]), no criminal proceedings have been brought by the CMA since 2017.

The CMA has instead favoured the use of its director disqualification powers to hold individuals to account for competition infringements – with 24 director disqualifications obtained between 2017 and 2022. The CMA's decision to pursue seven director disqualifications in a single case, however, remains noteworthy – in particular as its decision to apply to court for CDOs (rather than obtaining CDUs from the directors) suggests that the directors in this case dispute their liability. If the CMA's case is successful, it is only likely to further encourage the CMA to pursue disqualifications before the courts.

The CMA has commented publicly on its reliance on its director disqualification powers and has confirmed that it now considers "*in all cases*" whether to pursue director disqualification. It says this caused a "*spate of disqualifications in 2018/2019*".[39]

Analysis and key takeaways

As noted above, the CMA seeking seven CDOs from the Court in a single course is remarkable – it is the first time that the CMA has applied to court for so many disqualifications in respect of a single case. If successful, the CDOs would also be the first obtained in the pharmaceutical sector (with previous pharmaceutical disqualifications being obtained via CDUs).[40]

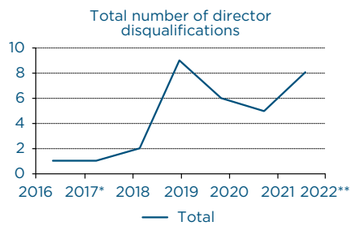
Snapshot: Other UK developments

- The CMA imposed fines of over £2 million in relation to price fixing of Rangers Football Club merchandise See our earlier commentary here.
- The CMA announced that it is continuing to investigate suspected anti-competitive behaviour re sale of Leicester City-branded products, which includes parties fined for fixing prices of Rangers-branded products (above).
- The CMA closed its investigation into suspected anti-competitive conduct relating to the services provided at certain UK immigration removal centres.
- The CMA continues to investigate suspected breaches of competition law in relation to the production and broadcasting of sports content.
- The CMA continues its investigation into suspected anti-competitive practices in the financial services sector. Morgan Stanley confirmed in a regulatory filing that it is engaging with the CMA in relation to "*activities concerning certain liquid fixed income products between 2009 and 2012*".

In part, this is reflective of the benefits of CDUs for both the director in question and the CMA: the CMA benefits as it does not have to expend the time and cost related to court proceedings but can still achieve the same result, and the director may benefit from a shorter disqualification period.

As shown in the graph below, the number of disqualifications obtained by the CMA has markedly increased since 2016.

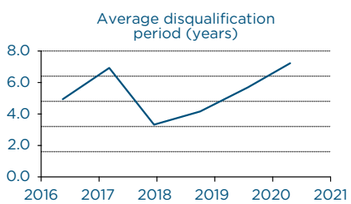
34. The Company Directors Disqualification Act 1986 (as amended by the Enterprise Act 2002) ("**CDDA**").
35. Sections 9A(1) to (3) of the CDDA.
36. See section 188 of the Enterprise Act 2002.
37. The CMA has only secured criminal convictions where the individuals involved pleaded guilty. See for example, the Marine Hose cartel investigation (2012), the Galvanised Steel Tanks cartel investigation (2015) and the Precast Concrete Drainage products cartel investigation (2017).
38. See here.
39. See the CMA's blogpost 'Director disqualification: an increasing risk', available here.
40. See, for example, *Nortriptyline* (case page available here).



**Obtained via criminal proceedings.*
***Includes seven CDOs before the courts in this case.*

The CMA's decision to pursue a CDO against a director of a company that benefitted from leniency (Medreich) is also exceptional. In its guidance the CMA states that it will only seek to disqualify directors of a company that has benefitted from leniency in limited circumstances (ie, where a director does not co-operate with the CMA's investigation, was removed from their post for participation in the infringement, or for opposing the leniency application).[41] Clearly, the CMA considers these circumstances are relevant in this case.

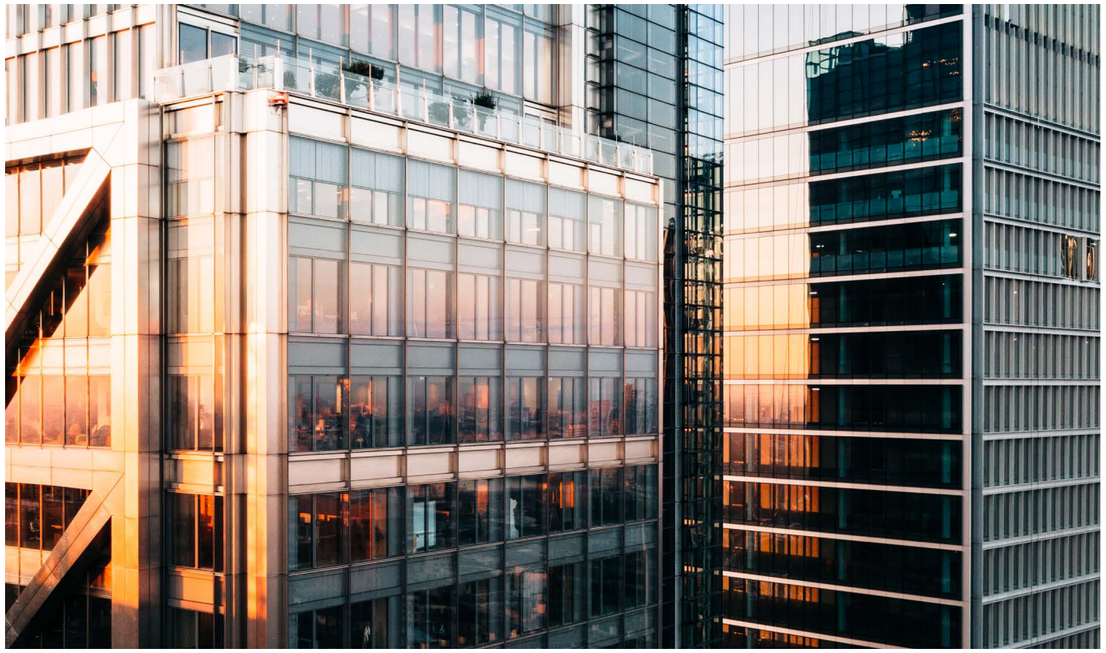
In addition to becoming more frequent, director disqualifications are also being applied for longer periods – as shown in the graph below.



Rigorous enforcement set to continue

It appears that director disqualifications are becoming both more likely and more severe in nature – with increasingly long disqualification periods. Indeed, the CMA recently obtained CDUs for lengthy periods of 11 and 12 years – the longest disqualifications to date, nearing the 15 year upper limit.[42] These periods may be exceeded in the current prochlorperazine proceedings – the outcome of this case is expected around mid-2023, with the timetable for the CAT hearings to be agreed by May 2023.[43] There is every indication that the CMA is intent on making good on its professed ambition to "continue to crack down on law-breaking companies and directors"[44]

The prospect of individual, personal liability for cartel conduct provides a further compelling incentive for companies to adopt appropriate compliance training and procedures. In particular, directors who "contributed" to a breach or "ought to have known" a breach had occurred are equally susceptible to disqualification as those who are direct participants in a cartel. To mitigate disqualification risk, businesses and directors should therefore ensure that internal reporting processes are robust and that allegations of anti-competitive conduct are rigorously investigated.



41. Guidance on Competition Disqualification Orders (CMA102) (available here), para 4.13.
42. See the CMA's criminal investigation into the supply of construction products (case page available here) – this civil investigation ran in parallel to the criminal Precast Concrete Investigation.
43. See here.
44. Michael Grenfell, Executive Director of Enforcement at the CMA, following disqualification of a director in relation to anti-competitive conduct concerning the drug nortriptyline, see the CMA's press release here.